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THE LAW OF TORTS, by Fowler V. Harper and Fleming James, Jr. (3 volumes). Little, Brown & Co., Boston, 1956. Pp. xlv, 2,060. \$60.00.

Wex S. Malone

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BOOK REVIEWS

THE LAW OF TORTS, by Fowler V. Harper and Fleming James, Jr. (3 volumes). Little, Brown & Co., Boston, 1956. Pp. xlv, 2,060. \$60.00.

The crying need for adequate textual treatment of the subject of torts has gradually been fulfilled over the past twenty-five years. The latest contribution is the three-volume work of Professors Harper and James of the Yale University Law School. A set of books as important as this one will doubtless be reviewed competently, critically, and at length in numerous periodicals throughout America. For this reason I believe that I should confine my remarks to an attempt to answer a question that will arise in the minds of many Louisiana lawyers who handle a substantial amount of torts litigation: Should I add this somewhat expensive set of books to my office library? The answer, I feel, is definitely, Yes. I would like to explain why I enthusiastically recommend this purchase to you.

Most Louisiana torts lawyers already own a copy of Prosser's excellent textbook. Here they can either find an adequate statement of the fundamental rules and principles of torts law that they need, or they are referred to some other source where the need is supplied. But a textbook with the limited proportions of *Prosser on Torts* does not afford the necessary elbow room for a leisurely discussion of the factors that underlie rules and doctrines or of the social, moral, and economic impulses that make the law of torts into a ticking machine. The restrictions imposed upon Prosser are those of available space. There is no such limitation on the authors of the new work, and most of the time they have made fine capital of this asset.

The reader will sense immediately a difference in the approach of Harper and James from that adopted by Dean Prosser. In reading the treatment of negligence and accidents in the second volume he will constantly be made aware that he is dealing with only a single moment in the constant and inevitable flow of an ever-changing stream of legal liability. The authors' statements as to what are the legal rules and doctrines of accident law correspond approximately to those of Prosser and the *Restatement of Torts*. But their estimates as to why the law of torts is as it is, what it was formerly, and what it is coming to

be make up the interesting part of the book. These are its real contributions.

The key to the Harper-James approach will be found in Chapters 12 and 13. They list as four the possible objectives which a rational system of accident liability must necessarily serve: (1) the moral objective; (2) compensation of accident victims; (3) prevention of accidents and promotion of safety; (4) avoidance of undue collateral disadvantages, such as the overburdening of a desirable activity. These objectives are frequently inconsistent with each other and are discovered in varying degrees of competition in litigation. For this reason the courts are faced with the constant task of reconsidering ideals. Furthermore, the proper point at which a balance is to be achieved is shifting almost from day to day. Significantly Harper and James point out that in accident law the standard of conduct is largely external and does not take into account the personal equation, with the result that legal fault does not entirely coincide with moral fault. (p. 753) The second urge — to compensate accident victims — is, of course, one that may conflict with the desire to relieve morally blameless persons of legal responsibility for harms inflicted without fault. The point of balance to be established between these two conflicting urges will be affected by considering the deterrent effect upon future dangerous conduct that will be achieved by imposing liability in any given instance. It will also be affected by the giving of weight to the effect of liability in overburdening desirable enterprising activity.

It is with reference to this latter consideration — the avoidance of undue hardships upon useful conduct — that the increasing prevalence of risk-distributing machinery (particularly, liability insurance) is coming to play a dominant role in the formulation of modern torts law. Most of the unevenness and inconsistencies that are becoming characteristic of accident rules are thus to be accounted for.

It is upon the fabric of conflict between these motivating factors, the shifting panorama of social values and the devising of new and efficient risk-distribution machinery that the authors bring into sharp focus a version of a constantly changing and improving scheme for administering accident controversies. Interest is centered, not so much upon what the law is, as upon what it is coming to be.

It seems to me that the practical lawyer is no longer interested merely in concrete rules for concrete cases. Most attorneys have learned from bitter practical experience that yesterday's cases and yesterday's rules are being transformed at a dizzy pace as they are applied in today's controversies. Courts are well versed in the art of distinguishing cases, of shifting the points of emphasis in established rules, of gradually transforming the law through ingenious administration and the skillful manipulation of language. What is behind this? Where are we going? The modern lawyer cannot possibly avoid speculating as to what the old rule will sound like when it is applied to the new case. He must be prepared to press to his client's advantage every trend that he senses may be developing in the complex picture of torts administration. It is for this kind of endeavor that the new treatment of accident law will prove its full value.

Volume 2 on accident law gives full evidence that it is made up largely of a series of law review articles which Professor James has published over a period of more than five years. The microscopic examination of his treatment is typical of good legal periodical literature. Yet there is no absence of continuity. It is evident that from the beginning the author had eventual book publication in mind.

Volume 1 is less exciting, less critical, less speculative. This is due in large part to the nature of intentional torts. Assaults, batteries, imprisonments, trespasses — all these are borrowed largely from the criminal law. The rules have frozen; the competing values have crystallized. Perhaps some creative genius could impart a spark of life to the subject, but Harper and James are hardly to be criticized because they have failed to do so. This is bascially dreary stuff. However, it is not so easy to understand why the authors failed to stimulate a more lively interest in such torts as defamation, privacy, infliction of emotional disturbance, unfair competition, and interference with domestic relations. Here are subtle, complex, and fast-changing areas of torts law. About all that I can say of Volume 1 is that it seems to be fairly comprehensive, that it rests upon the footing of the original *Restatement of Torts*, and that it is a basically sound but conservative treatment of the subject. I miss in this volume the eager critical prodding found elsewhere in the treatise.

This set of books is expensive. Many readers will resent being charged \$20.00 for an index and a table of cases — which

is what Volume 3 amounts to. Many others will wish that they could buy Volume 2 alone. But such is life, and such are the ways of bookmakers. If I had to decide whether to part with my \$60.00 or to do without Harper and James' treatment of accident liability, I am sure that I would pass my money over to the publishers.

*Wex S. Malone**

THE RIGHT TO LIFE, by A. Delafield Smith. University of North Carolina Press, Chapel Hill, 1955. Pp. ix, 204. \$3.50.

Some sixty years ago a leading American sociologist could justly remark that "In each commonwealth the fabric of the public charitable institutions rests upon the quicksands of the poor law, which few study and probably none understands."¹ Today, while the fabric of American welfare programs is infinitely more complex, the legal framework for these programs is still too little studied and too little understood. This book, subtitled "A Legal Approach to Society's Responsibility to the Individual," is therefore especially welcome.² Written by an Assistant Attorney General in the Federal Department of Health, Education and Welfare, it seeks to establish a proper philosophical perspective for man's undertakings to relieve the dependency needs of his fellow man.

While the book purports to be an analysis of the "Right to Life," this reviewer experienced some difficulty in determining just what is to be included within this term. At one point, Smith characterizes it as comprehending public protection against the adverse effects of wage loss, together with public provision of a full opportunity for personal fulfillment and development.³ However, and although a few chapters are also devoted to the legal problems of guardianships, the book seems concerned primarily with the legal and philosophical basis of the American social security programs.

Both the substantive and administrative aspects of social

*Professor of Law, Louisiana State University.

1. WARNER, AMERICAN CHARITIES: A STUDY IN PHILANTHROPY AND ECONOMICS 311 (1894), quoted in BRECKENRIDGE, PUBLIC WELFARE ADMINISTRATION IN THE UNITED STATES 13 (1927).

2. The attention the book has received in the law journals is also welcome. See, e.g., Manning, Book Review, 66 YALE L.J. 315 (1956). There have been at least two book reviews in social welfare journals. Virtue, *Book Review*, 38 SOCIAL CASEWORK 36 (1957); Wright, *Book Review*, 30 SOCIAL SERV. REV. 373 (1956).

3. Pp. 98, 99.