

Louisiana Law Review

Volume 44 | Number 5

Ruminations on Tort Law: A Symposium in Honor of

Wex Malone

May 1984

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John W. Wade

Repository Citation

John W. Wade, *Ruminations on a Premier Torts Professor*, 44 La. L. Rev. (1984)

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RUMINATIONS ON A PREMIER TORTS PROFESSOR

*John W. Wade**

We first met fifty-three years ago last September. It was at the height of the Great Depression, and the first-year law class at the University of Mississippi School of Law was a comparatively small one—somewhere around thirty. As we filed into the first class room, there was a slight young teacher seated at the desk who looked as if he might be one of us. His opening lecture was given somewhat diffidently, but it was interesting, and we looked forward to the next class with him. At the next session, as he called on us to give cases, he quickly had the whole class engaged in vigorous discussion. It was fun! It offered intellectual stimulation that was completely exciting, and we continued to look forward to his classes with eager anticipation.

Wex Malone had come to us directly from graduation at the University of North Carolina School of Law, and he was entering the practice of law by practicing teaching with us.¹ He was a busy man that year, teaching several courses and voluntarily assuming the additional undertaking of courting Helen Jeffress, the young law librarian. We watched the courtship with interest and with secret jealousy.

Wex left us at the end of the school year to engage in graduate work at Harvard University Law School. We students at Ole Miss continued a somewhat more prosaic course and most of us finished law school, including a number of transfers.

After a period of law practice in New York City, Wex returned to the Ole Miss faculty in 1935; and in 1936, having also taken graduate work at Harvard, I returned to Mississippi as a fledgling member of the law faculty. Wex and I served together as colleagues for three years, from 1936 to 1939, and our friendship became fast and binding. I know he has had a significant effect on my development, becoming essentially a role model;² I hope I have reciprocated in at least a minor degree.

Wex Malone's teaching career has been an unusual one. Since he went to Louisiana State University Law Center in 1939, he has maintained intact his relationship with the institution, being named to the Boyd Professorship in 1966 and receiving emeritus recognition in 1974. But he has visited extensively all over the country. Visits for either an academic year or for a semester have taken place at the University of Southern Califor-

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* Dean and Distinguished Professor of Law, Emeritus, Vanderbilt University School of Law.

1. Why is it that a lawyer (or doctor) "practices" law all his life, while a teacher practices it only at the very beginning?

2. I took over his courses in Torts and Restitution.

nia Law Center (1951 and 1962), the Rutgers University School of Law (1952-53), the Stanford Law School (1955-56), and the University of Washington School of Law (1977-78). Summer visits include Northwestern University School of Law (1937, 1945 and 1947), the University of Texas School of Law (1941, 1948, 1956), University of Chicago Law School (1958), Hastings College of Law (1960) and University of North Carolina School of Law (1962).

Wex Malone has attained the highest position in the law school world, serving as President of the Association of American Law Schools in 1967 and as National President of the Order of the Coif in 1961-1964, originating the Coif Triennial Award for Outstanding Literature. Numerous awards serve as a tribute to his influence as a teacher and scholar. They include the American Trial Lawyers Association Award for Merit (1964), the University of North Carolina Citation of Distinction (1969), and the William L. Prosser Award of the Association of American Law Schools (1977).

The Malone publications are extensive. They include two major treatises on Louisiana Worker's Compensation Law,³ plus two general casebooks in the field of worker's compensation.⁴ He participated in the publication of two casebooks on tort law, following the factual arrangement of cases originated by Leon Green.⁵ He published a collection of studies in Louisiana torts law in 1970,⁶ and a torts nutshell in 1979.⁷

Wex Malone's articles are legion and cover a wide range of topics, and some of them have become classics. For example, his article on cause in fact⁸ is widely cited by courts and in law reviews and has had a substantial effect on the development of the law. The article on landowner's liability has had a similar effect.⁹ Several historical treatments provide a very valuable background for understanding and interpreting the law of today,¹⁰

3. W. MALONE, *LOUISIANA WORKMEN'S COMPENSATION LAW AND PRACTICE* (1951); W. MALONE & A. JOHNSON, *WORKERS' COMPENSATION LAW AND PRACTICE* in 13-14 *LOUISIANA CIVIL LAW TREATISE* (2d ed. 1980).

4. W. MALONE & M. PLANT, *CASES AND MATERIALS ON WORKMEN'S COMPENSATION* (1963); W. MALONE, M. PLANT & J. LITTLE, *CASES AND MATERIALS ON WORKERS' COMPENSATION AND EMPLOYMENT RIGHTS* (2d ed. 1980).

5. L. GREEN, W. MALONE, W. PEDRICK & J. RAHL, *CASES ON THE LAW OF TORTS* (1957); L. GREEN, W. MALONE, W. PEDRICK & J. RAHL, *CASES ON INJURIES TO RELATIONS* (1959).

6. W. MALONE & L. GUERRY, *STUDIES IN LOUISIANA TORTS LAW* (1970).

7. W. MALONE, *TORTS IN A NUTSHELL: INJURIES TO FAMILY, SOCIAL AND TRADE RELATIONS* (1979).

8. Malone, *Ruminations on Cause in Fact*, 9 *STAN. L. REV.* 60 (1956), reprinted in R. RABIN, *PERSPECTIVES ON TORT LAW* 91 (2d ed. 1983).

9. Malone, *Contributory Negligence and the Landowner Cases*, 29 *MINN. L. REV.* 61 (1945).

10. See, e.g., Malone, *Ruminations on the Role of Fault in the History of the Common Law of Torts*, 31 *LA. L. REV.* 1 (1970); Malone, *American Fatal Accident Statutes—*

and a trio of recent articles offers stimulating "ruminations."¹¹ Some articles written on individual cases have treatments that are meaningful beyond the state where the decisions were rendered.¹² Early writings treated jurisprudence¹³ and reformation.¹⁴ There are comments or forewords for symposia on assumption of risk¹⁵ and comparative negligence,¹⁶ a number of tributes to other persons, and book reviews. Comments on the work of the Louisiana and other state courts run close to thirty. The worker's compensation articles I leave to others to describe.

One of the most distinctive features of Professor Malone's writings is that they are evenly spread throughout his career. Taking emeritus status has not decreased the amount of his output or affected its meritorious character. In fact, the later writings are the product of the mature wisdom and discretion which he developed throughout his career.

Dean Leon Green has generally been characterized as a realist. He espoused a fact-classification of cases and contended that the stated rules of the law are applied to reach differing results in different types of cases so that an accurate understanding of the state of law requires that the rules be studied and analyzed in factual contexts. He has developed many adherents, especially in tort law, and Wex Malone is one of them. And yet Malone does a remarkably effective job of reconciling that approach with the more traditional way of analyzing and stating rules of law. He is able to perceive and describe factors that affect the action taken by

Part I: The Legislative Birth Pains, 1965 DUKE L.J. 673; Malone, *The Genesis of Wrongful Death*, 17 STAN. L. REV. 1043 (1965); Malone, *The Formative Era of Contributory Negligence*, 41 ILL. L. REV. 151 (1946), reprinted in R. RABIN, *supra* note 8, at 63; ESSAYS IN NINETEENTH-CENTURY AMERICAN LEGAL HISTORY 267 (W. Holt ed. 1976); 268 INS. L.J. 839 (1946).

11. Malone, *Ruminations on Liability for the Acts of Things*, 42 LA. L. REV. 979 (1982); Malone, *Some Ruminations on Contributory Negligence*, 1981 UTAH L. REV. 91; Malone, *Roy Ray Lecture: The Decisional Environment in Torts Controversies*, 46 J. AIR. L. & COM. 101 (1980).

12. Malone, *Ruminations on Dixie Drive It Yourself Versus American Beverage Co.*, 30 LA. L. REV. 363 (1970); Malone, *Ruminations on a New Tort: Angelloz v. Humble Oil & Refining Co.*, 4 LA. L. REV. 309 (1942); Malone, *Insult in Retaliation—The Huckabee Case*, 11 MISS. L.J. 333 (1939).

13. Malone, *A Re-examination of Our Legal Rights*, 7 MISS. L.J. 149, 260, 351 (1935), reprinted in 1 CURRENT LEGAL THOUGHT 339 (1935); see also Malone, *Roy Ray Lecture: The Decisional Environment in Torts Controversies*, 46 J. AIR. L. & COM. 101 (1980); Malone, *Ruminations on Group Interests and the Law of Torts*, 13 RUTGERS L. REV. 565 (1959).

14. Malone, *The Reformation of Writings Under the Law of North Carolina*, 15 N.C.L. REV. 155 (1937); Malone, *The Reformation of Writings Under the Law of Mississippi*, 8 MISS. L.J. 329 (1936); Malone, *The Reformation of Writings for Mutual Mistake of Fact*, 24 GEO. L.J. 613 (1936), reprinted in 2 CURRENT LEGAL THOUGHT 660 (1936).

15. Malone, *Symposium: Assumption of Risk—Foreword—The Kid Who Got Left Out*, 22 LA. L. REV. 1 (1961).

16. Malone, *Symposium: Comparative Negligence in Louisiana—Prologue*, 40 LA. L. REV. 293 (1980); Malone, *Comments on Maki v. Frelk—Comparative v. Contributory Negligence: Should the Court or Legislature Decide?*, 21 VAND. L. REV. 930 (1968).

courts when the courts themselves do not clearly perceive those factors. This has added considerably to the value of his writings and to his legal discussions with others.

I am sure that Wex would agree that the most stimulating experience we encountered in our teaching careers was the set of annual meetings we participated in as Advisors to the Reporter for the *Restatement (Second) of Torts*—Bill Prosser. In another context I described those meetings in this way:

Each of us had studied drafts carefully and had suggestions and criticisms. Comments from one person struck fire from another. We were all immensely stimulated by the association, and there was always much said, sometimes quite vigorously. Those meetings, I am sure, were the highlight of the year for each of us. There's an ecstasy in the intellectual give-and-take of friends who are vividly discussing something they are fully expert in and who have true respect for each other. Halcyon days . . . that phrase seems just right.¹⁷

This is a prelude to saying that Wex Malone was ideal in playing the discussion role in a one-to-one situation. I vaguely recall reading somewhere a comment that a writer regarded another person as his whetstone—the person to come to and use for the purpose of sharpening up an idea or proposal that had incipient usefulness but was still somewhat amorphous. Wex Malone is a whetstone of first-rank. He is ideal for sharpening up ideas and organizing one's thoughts.

I can think of no one who would make a better colleague in a law faculty. He is considerate, patient with deficiencies and faults of others, and quick to give encouragement. He gets pleasure out of promoting his friends but is willing to provide honest, critical advice. Unfortunately, we have not developed a way of cloning teachers like Malone, so that they could teach at several law schools at once.

Professor Malone's influence on his students is lasting. The first-year class that I spoke of in the beginning will celebrate this spring the fiftieth anniversary of its graduation. Those of us who are still around to make it to the meeting can be expected to ruminate and reminisce about him at length.

My remarks about Professor Malone's teaching in his first year are

17. Wade, *William L. Prosser: Some Impressions and Recollections*, 60 CALIF. L. REV. 1255, 1257 (1972). The Advisory Committee to the Reporter for the Restatement (Second) of Torts was composed of about a dozen members, most of whom were teachers; it had four members who became president of the Association of American Law Schools and two who became president of the Order of the Coif. Wex Malone was the only person to come within both of those subgroups.

confirmed by Dean Paul M. Hebert of Louisiana State University after many years of Professor Malone's teaching there:

Students flocked to his class and many a successful professional career can be traced to the thrill of a classroom experience under Wex Malone. His wit and ingenuity enlivened the classroom dialogues. For LSU he has typified the type of legal education that causes alumni of the School to look back fondly on the years spent in working for the law degree.

Over and above his legal scholarship, Professor Malone always brought to the classroom a warm concern for his students, an evident genius for tight organization and clear presentation of his lectures and an engaging and stimulating combination of insight and imagination causing his students, with both admiration and affection, to reach out with him into developing frontiers of the law.¹⁸

The title to this piece speaks of a premier torts professor. In taking this occasion to nominate Wex Malone for the honor, I decided that the most suitable method to adopt would be to begin by trying to identify the attributes of a premier law professor. My ruminations led me to conclude that there are three sides to the law professor's career.

First, he is a distinguished teacher who has enthusiasm for teaching—he likes what he is doing and looks forward with eager anticipation to the coming class. He delights in the give-and-take of the classroom and creates that same enjoyment in his students. He has true empathy for the students and their concerns and desires, but he is aware of what the course should do and he sees that it is done. He has a good sense of humor and does not hesitate to poke fun at himself as well. His repartee is quick and spontaneous, but not biting; it gives an impression of laughing with the target rather than at him. He prepares carefully in advance for the class, but does not utilize a detailed outline that straight-jackets the discussion and restricts its spontaneity. He experiments with teaching methods and varies techniques to keep the class from becoming too routine. He is careful to maintain a fair and balanced approach—for example, in torts, not favoring unduly the side of either plaintiffs or defendants. And he makes apparent to the students the practical implications and applications of the rules and principles they are deducing from the cases.

Second, a premier law professor is conscious of his relationship to others in the legal profession. This includes his relationship with students and colleagues, judges and lawyers, and to a large extent, the public in

18. Hebert, *Dedication to Boyd Professor Wex S. Malone*, 34 LA. L. REV. (Issue 4) iv (1974). Wex Malone has taught law at Louisiana State University for around three and a half decades. One can easily speculate on the influence this has produced on the bench and bar of the state of Louisiana. There are others who can speak factually on this matter.

general. He recognizes an appropriate sense of responsibility toward each of these groups and willingly meets it.

Third, a premier law professor seeks to improve the state of the law. Every law professor should feel this significant responsibility. It is met in many ways, including teaching and relating to the groups listed above. But it is met primarily by writings and lectures, and it is the primary reason why the good law teacher engages in writing. He is looking for legal areas where he can offer helpful ideas. He has the ability to think clearly, logically, and creatively. He also has the ability to write clearly and smoothly, with a constant feeling for the "reader looking over his shoulder."

If these can be regarded as the proper attributes of a premier law professor, then I think I have described Wex Smathers Malone. He is the epitome of a premier law professor.