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Wex Malone

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REMINISCING ABOUT THE GREAT RUMINATOR

Alston Johnson*

It is common in written collections of this type to begin with laudatory comments about the extraordinary talents of the honoree, and this will be no exception. In this instance, however, there is more to be done. The effort here will be to describe briefly the inestimable impact of the honoree—using those talents—upon the course of his chosen field of law. The depiction is of a Colossus bestriding the harbor of tort law as almost no other scholar ever has—Boyd Professor Wex Smathers Malone.

One could of course begin by mentioning other accomplishments in his chosen profession. We could draw attention to his election as president of the Association of American Law Schools and as president of the Order of the Coif, double recognition by his peers of his pre-eminence and a double honor shared by few if any of his professional colleagues. We could recall his service as an advisor on the *Restatement (Second) of Torts*, bringing him into the select company of such luminaries as Dean William Prosser, Page Keeton, John Wade, Warren Seavey and others. No restatement of the law by the American Law Institute remotely approaches the success of the restatement of tort law.

But it is as a teacher that he made his greatest mark. He taught many of us, including some of the writers in this collection. His writings influenced almost all of us, including members of the judiciary. As a consequence, American tort law generally and Louisiana tort law specifically have been shaped by his provocative thinking and incisive commentary.

One need mention his contributions to the fabric of tort law only briefly to refresh the recollections of all reasonably prudent readers. We owe him a great deal for his historical writings on negligence and on wrongful death.¹ We in Louisiana are in his debt for his seminal article on *res ipsa loquitur*, long a troublesome issue in our cases.² We acknowledge the unparalleled accomplishment of replacing the concept of proximate cause in Louisiana as a risk-exclusion or risk-inclusion device with the more candid device of the duty-risk analysis,³ perhaps his greatest single achievement.

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1. Malone, *American Fatal Accident Statutes—Part I: The Legislative Birth Pains*, 1965 DUKE L.J. 673; Malone, *The Formative Era of Contributory Negligence*, 41 ILL. L. REV. 151 (1946); Malone, *Ruminations on the Role of Fault in the History of the Common Law of Torts*, 31 LA. L. REV. 1 (1970); Malone, *The Genesis of Wrongful Death*, 17 STAN. L. REV. 1043 (1965).

2. Malone, *Res Ipsa Loquitur and Proof by Inference—A Discussion of the Louisiana Cases*, 4 LA. L. REV. 70 (1941).

3. Malone, *Ruminations on Dixie Drive It Yourself Versus American Beverage Company*, 30 LA. L. REV. 363 (1970).

Even in the blazing sunset of his life, his contributions have not ceased. Only a few years ago, his lead article considering the ramifications of the doctrine of strict liability for the custody of things under Civil Code article 2317⁴ produced a ferment in the cases interpreting the article which is still under way.⁵ His thoughtful doubts about the wisdom of the developments in that portion of Louisiana law produced prompt judicial movement,⁶ as only he could. No other writer could have influenced the judiciary's thinking as he did in that article.

Great as these written contributions have been, they are not his most significant accomplishment. The most important thing which Wex Malone has done is to inspire his students—to imbue them with the zest for questioning, weighing, analyzing and studying the principles of the law that he always brought to the task himself.

His strong commitment to his students survives his retirement. He remains something of a west-wing guru, happily at work in his secluded bailiwick in the old law building and always available for consultation with puzzled students and even stymied young law professors.

It was precisely this kind of consultation that led to this collection. I sent a bright young torts student, Jim Viator, to see Wex for elaboration on a topic we had under discussion in first-year torts. He returned enthused and invigorated. Thereafter, I gather that Wex and Jim spent a number of hours in pleasant colloquy about torts in the fading sunlight of fall afternoons. Jim was dismayed to find that the *Louisiana Law Review* had never honored this great scholar with a written collection such as this one. He set about to convince the editorial board to produce such a symposium, and his persistence and the efforts of the board ultimately resulted in success.

Thus we have a written feast of scholarship befitting our esteemed colleague. His long-time colleague John Wade ruminates about a "premier torts professor." His former student, erstwhile practitioner and now teaching colleague Dave Robertson has the temerity to question the thesis of one of this writer's earlier works, and does so in his customary excellent and exhaustive manner in a piece on the duty-risk analysis, comparative negligence and other affirmative defenses in negligence and strict liability. Present and former members of the judiciary—Charles A. Marvin, Albert Tate, Jr. and Mack Barham—consider vicarious liability of parents for the acts of children, *res ipsa loquitur* and comparative negligence in strict-liability cases. Teaching colleagues raise intriguing thoughts about judicial interpretation of statutes (Jerry J. Phillips); periodic damage payments (Marcus L. Plant); lack of informed consent in legal

4. Malone, *Ruminations on Liability for the Acts of Things*, 42 LA. L. REV. 979 (1982).

5. See *Ross v. Lewis*, 446 So. 2d 1322 (La. App. 2d Cir. 1984) (Sexton, J., concurring).

6. *Entrevia v. Hood*, 427 So. 2d 1146 (La. 1983).

matters (Cornelius J. Peck); and the future of tort law itself (John Fleming). A practitioner and former student analyzes the experience of the duty-risk analysis from his perspective (Timothy J. McNamara). And a member of Congress joins with another teaching colleague to put forward some provocative ideas about medicare and medical malpractice (Henson Moore and Jeffrey O'Connell). The breadth of their experience and their interests speaks more loudly than can this introductory piece of the impact of Wex Malone.

It is a fine collection, one that we will enjoy and consult for years to come. What greater tribute can we offer to the Great Ruminator than a continuation of the academic dialogue that he has so often stimulated with his own observations? A true academic giant has been among us, and remains with us. It may be true that *de minimis non curat lex*, but *de majoribus semper curat lex*.

