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ESSAYS ON TORTS. By Wex S. Malone. Baton Rouge: Louisiana State University, 1986. Pp. 1-400. \$45.

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## BOOK REVIEW

ESSAYS ON TORTS. By Wex S. Malone. Baton Rouge: Louisiana State University, 1986. Pp. 1-400. \$45.

*John W. Wade\**

During recent years, there have been many important additions to the literature of the law of torts. The subject of torts has seen extensive development and is presently the object of much ferment. Tort law has been particularly appropriate for judicial development. It requires a careful and judicious balancing of the conflicting interests of the various parties, rather than the "trade-offs" so frequently resorted to in legislative action. Trade-offs can produce varying results that may combine to establish a reasonably fair average, but the average often comes from many specific instances in which one or the other party is treated unfairly.

Courts have therefore not been reluctant to play an active part in molding the development of this field of the law. And they have been strongly influenced by the writings of law professors and other legal scholars. The Restatement of Torts has been utilized by the courts in deciding cases many more times than any of the other Restatements. Dean Prosser's treatise on torts has become legendary, and the treatise of Professors Harper and James is not far behind. Revised editions of both have just been published. There is a growing tendency to publish texts on particular torts. Tort professors and other scholars are also writing numerous law review articles that often prove to be extremely influential.

Sometimes, the articles of a particular torts professor have become recognized as so important that a collection of the more significant ones has been compiled and published in a bound volume, where they can be more easily available for the use of the members of the legal profession. There have been several of these collections, but three of them have stood out as preeminent. They are Dean Francis Bohlen's *Studies in the Law of Torts* (1926), Dean Leon Green's *Judge and Jury* (1930), supplemented by his later *The Litigation Process in Tort Law* (2d ed. 1977), and Dean William Prosser's *Selected Topics in the Law of Torts* (1953). These three recognized masters of the torts article might well be called the Three Musketeers. Now, with the publication of Wex

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Malone's *Essays on Torts*, a D'Artagnan has joined the crew of Athos, Porthos and Aramis and increased the number of master essayists to four.

Malone's law review articles have been limited to fourteen for publication in his *Essays*. They cover a 40-year period from the early forties to the early eighties, and they fall naturally into three groups—five involving “matters of history,” five concerned with “tort theory and doctrine” and four treating specific problems of Louisiana law.

The first historical article is entitled “The Role of Fault in the History of Negligence.” Originally prepared under a commission of the Federal Department of Transportation and published as a monograph, it was later revised somewhat and published in the *Louisiana Law Review*.<sup>1</sup> It is commonly regarded as the best single treatment of the common law development of the action of negligence, even though it does not purport to be based on a complete study of all of the original materials. Instead, it is a careful evaluative study of the pertinent English and American treatments of the general subject, providing a single, readable article based on conclusions reached in the evaluative study. This article thus gives a total picture that would otherwise be difficult to acquire.

The next pair of articles deal with wrongful death actions—the development of the common law rule, and its amelioration by legislative action in England and the United States.<sup>2</sup> Here the treatment is quite detailed, dealing comprehensively with the original legislative and judicial materials. No consistent, unified approach to the problem was to be discovered in the legislative acts and state judicial decisions, and the second article concluded that the “need to evolve a single adequate and realistic approach for the handling of wrongful death has proffered a baffling challenge to legislatures and courts for more than a century and in many instances the complete answer is yet to be found.”<sup>3</sup>

The fourth article in Part I deals with the origin and development of the common law rule that plaintiff's contributory negligence bars his recovery.<sup>4</sup> Malone makes brief reference to the English beginning in

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1. Malone, *Ruminations on the Role of Fault in the History of the Common Law of Torts*, 31 *La. L. Rev.* 1 (1970).

2. Malone, *The Genesis of Wrongful Death*, 17 *Stan. L. Rev.* 1043 (1965); and Malone, *American Fatal Accident Statutes—Part I: The Legislative Birth Pains*, 1965 *Duke L.J.* 673.

3. *Essays* at 116; 1965 *Duke L.J.* at 719. Compare the Uniform Law Commissioners' Model Survival and Wrongful Death Act (1977), 8 *U.L.A.* 591 (1983); Smedley, *Some Order Out of Chaos in Wrongful Death Law*, 37 *Vand. L. Rev.* 273 (1984). They were published about twenty years after the Malone articles.

4. Malone, *The Formative Era of Contributory Negligence*, 41 *Ill. L. Rev.* 151 (1946).

*Butterfield v. Forrester*<sup>5</sup> and then treats the American developments in detail. His thesis, convincingly presented, is that the courts found the element of plaintiff's fault as the one most suitable for giving them control of jury conduct. Thus, in the "formative era" many of the cases involved railroad crossings. In rural areas, if there was a clear view of the track on the approach to the crossing, courts adopted a "rule-of-thumb action" of nonsuiting the plaintiff on a more-or-less automatic basis. The technique "did leave sufficient latitude . . . to permit of compromise whenever compromise seemed desirable" and thus created a device of "wondrous plasticity."<sup>6</sup> This article has been widely cited by both courts and law reviews and has had considerable influence on the law of contributory negligence. The conclusion drawn at the end of the study is that "[c]ourts wanted to control juries during the last century, they want to continue to control them today [1946], and they will probably want to control them in the future. If we take away contributory negligence from the judges, they will find some other way. It's hard to beat judicial ingenuity."<sup>7</sup>

The last article in Part I speculates on how the law can undertake to protect the interests of groups as distinguished from individuals, even against each other—e.g., highway travelers against adjoining landowners—and how far tort litigation can do this.<sup>8</sup>

Part II of the book (entitled "Tort Theory and Doctrine") contains its most valuable pieces. The first article is a true classic. Malone called it "Ruminations on Cause-In-Fact."<sup>9</sup> Of course it recognizes the distinction between proximate cause (legal cause) and factual cause. But it dissipates the idea that cause-in-fact is "simple," involving only a question of fact. The "tangled skeins of fact and policy" cannot be fully "unraveled."<sup>10</sup>

A cause is not a fact in the sense that its existence can be established merely through the production of testimony. Although evidentiary data must supply the raw material upon which a finding of cause or no-cause will be based, yet . . . the trier . . . must refer the facts presented by the testimony to some judging capacity within himself before he can venture the conclusion that a cause exists. . . . The most that can be said is

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5. 11 East 59, 103 Eng. Rep. 926 (K.B. 1809).

6. Essays at 135; 41 Ill. L. Rev. at 171-72.

7. Id. at 144; 41 Ill. L. Rev. at 171-72.

8. Malone, Ruminations on Group Interests and the Law of Torts, 13 Rutgers L. Rev. 565 (1959).

9. Malone, Ruminations on Cause-In-Fact, 9 Stan. L. Rev. 60 (1956).

10. Essays at 161; 9 Stan. L. Rev. at 60.

that the trier is making a deduction from evidentiary facts. This operation is not self-performing.<sup>11</sup>

This is enough to make clear that factual cause is not "simple" fact. But there are more complications. For anyone dealing with issues of causation, this article is a must-read. It has been cited in well over sixty cases throughout the country and over seventy law reviews.

The second article in Part II, entitled "Some Ruminations on Contributory Negligence,"<sup>12</sup> is perhaps the most thought-provoking article in the collection. Wex Malone was an early convert to Leon Green's concept of the duty-risk technique. It can be used effectively and well in the case of violation of a criminal statute, where the "rule" is clearly set forth and the "risk," or hazard, can be accurately deduced from the statute. It becomes more difficult when there is only the general common law standard of negligence and the judge

is obliged to ferret out the hazard or hazards presented in each dispute and to verbalize them as precisely as he can. Then comes the task of isolating the appropriate rule or rules whose violation is at stake. Only at this stage can the judge undertake to determine the match or mismatch between the rule invoked and the hazard presented. This process is a severe challenge to the court's creative ingenuity and its sensitivity to values.<sup>13</sup>

Even the most capable and experienced judge needs to be scrupulously careful not to let his personal subjective inclinations affect his divining the nature of the hazard and the precise language of the rule. The process has a tendency to become subconsciously question-begging. Nevertheless, it is usually quite helpful if taken by the judge himself with a grain of salt, and without implicit confidence in the accuracy of his "creativity."

This article, however, goes beyond the problem of "proximate cause" and seeks to apply the duty-risk technique to the problem of contributory negligence and the question of when it should bar recovery. It cites with approval the holding of the Louisiana Supreme Court in *Rue v. Department of Highways*,<sup>14</sup> where the plaintiff negligently veered off the highway itself on to the highway shoulder, lost control of her vehicle, struck a dangerous rut on the shoulder and sustained serious injuries. The supreme court reversed the holdings of the trial and appeals courts for the defendant on the basis of contributory negligence, and instead allowed recovery of the full amount of the injuries on the ground that

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11. *Id.* at 162; 9 *Stan. L. Rev.* at 61.

12. Malone, *Some Ruminations on Contributory Negligence*, 1981 *Utah L. Rev.* 91.

13. *Essays* at 200; 1981 *Utah L. Rev.* at 94.

14. 372 *So. 2d* 1197 (La. 1979).

the "Highway Department's duty to maintain a safe shoulder encompasses the foreseeable risk that for any number of reasons, including simple inadvertence, a motorist might find himself travelling on, or partially on, the shoulder."<sup>15</sup> Why not say that a motorist's duty to drive carefully and stay on the paved highway is particularly obligatory when she can see a patently dangerous condition on the shoulder? What makes one duty prevail over the other except perhaps a subconscious desire to afford compensation to a seriously injured person? Perhaps it is pertinent too that plaintiff's negligence in driving the car was active and defendant's negligence in failing to discover and repair the rut was passive, and that the "last clear chance" was with the plaintiff.

Shortly after the decision in the *Rue* case, Louisiana adopted comparative negligence. The article concludes that the duty-risk technique should also control the utilization of that doctrine, too.

Should the negligent state agency [in *Rue*] now be relieved of a portion of the damages otherwise assessable against it? If the carelessness of the motorist is properly numbered among the hazards that call upon the defendant to guard the shoulder of the roadway, is it not incongruous to conclude that the same carelessness should serve to mitigate the damages? . . . Courts should carefully restrict resort to comparative negligence to those situations where an analysis of duty and risk does not dictate either a complete denial of recovery, or recovery without a diminution in damages.<sup>16</sup>

Mr. Malone fears that *unless* this is done, past confusion will be enhanced. I fear that *if* it is done the confusion will be enhanced. I am skeptical of the free-wheeling "creativity" of judges to determine when the duty-risk technique "dictates" full recovery or no recovery.<sup>17</sup>

Contributory negligence is also the subject of a much earlier article,<sup>18</sup> now published as Chapter 4 in Part II. It treats Contributory Negligence of Business Guests and provides a fine example of the "Greenian factual

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15. *Id.* at 1199.

16. *Essays* at 217; 1981 *Utah L. Rev.* at 113. See also, Malone, Prologue to Symposium on Comparative Negligence in Louisiana, 40 *La. L. Rev.* 293 (1980); Johnson, Comparative Negligence and the Duty/Risk Analysis, *id.* at 319.

17. The common law was long beset by the all-or-nothing approach that differentiated it from equity. It would be a step backward, I think, to return to it. See Wade, Comment on *Maki v. Frelk*, 21 *Vand. L. Rev.* 938, 940-42 (1968). Mr. Malone also commented on the *Maki* case, *id.* at 930. And see Green, Illinois Negligence Law, 39 *Ill. L. Rev.* 36, 42-53 (1944), describing the untoward consequences resulting from an early attempt in Illinois to combine contributory negligence and comparative negligence at the same time.

18. Malone, Contributory Negligence and the Landowner Cases, 29 *Minn. L. Rev.* 61 (1945).

approach" of collecting a number of cases concerned with a particular type of activity and discussing them by grouping the types of hazards involved. Many readers will have had occasion to learn from the article in the past, and they will enjoy, as I did, the occasion for perusing it again.

Sandwiched between the two chapters on contributory negligence is a short one entitled, "Ruminations on a New Tort: *Angeloz v. Humble Oil & Refining Company*."<sup>19</sup> The case involves an oil company that trespassed on plaintiff's land to conduct geophysical explorations to ascertain feasibility of drilling for oil in the vicinity. The tests showed negative results and the speculative value of plaintiff's land was lost, to his detriment. The situation creates an interesting combination of remedies under the law of torts (with a number of possibilities), restitution, real property and oil and gas law, no one of which is fully satisfactory. The discussion is of true Malone vintage.

The last chapter in Part II presents an exposition and evaluation of the "Judicial Personality of Justice Traynor"<sup>20</sup> of the Supreme Court of California. Mr. Malone admired Roger Traynor, as did all of us who served with him on the Advisory Committee to the Reporter for the Second Restatement of Torts, and ascribes to him most of the attributes and characteristics of the ideal appellate judge, just as I ascribe to Mr. Malone most of the attributes and characteristics of the ideal torts teacher and law-review writer. You will find pleasure in reading this chapter and will learn from it much about the law of torts and the relative function of judge and jury.

Part III is entitled "Application to the Louisiana Scene." It contains four articles based primarily on Louisiana case law. All of them, I gather from the numerous cases citing them, are generally recognized in the State as authoritative. Three of the four contain legal analysis and valuable insights that would be helpful throughout the other states.

The first is on *res ipsa loquitur* and proof by inference.<sup>21</sup> The second is entitled "Ruminations on *Dixie Drive it Yourself versus American Beverage Company*,"<sup>22</sup> and expertly treats the utilization of the duty-risk concept for determining "proximate cause." The third is entitled

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19. Malone, *Ruminations on a New Tort: Angeloz v. Humble Oil & Refining Company*, 4 La. L. Rev. 309 (1942). The *Angeloz* case is reported in 196 La. 604, 199 So. 656 (1944).

20. Malone, *Contrasting Images of Torts—The Judicial Personality of Justice Traynor*, 13 Stan. L. Rev. 779 (1961).

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

22. Malone, *Rumination on Dixie Drive it Yourself versus American Beverage Company*, 30 La. L. Rev. 363 (1970). The case is reported in 242 La. 471, 137 So. 2d 298 (1962).

“Comparative Negligence—Louisiana’s Forgotten Heritage.”<sup>23</sup> And the last—entitled “Ruminations on Liability for the Acts of Things”<sup>24</sup>—discusses the strict-liability doctrine of *Loescher v. Parr*,<sup>25</sup> and compares it with strict liability for products.<sup>26</sup>

Professor Malone’s writing style is smooth, clear and lucid, not abstruse or cryptic. It is, of course, analytic and tightly reasoned, and it adopts an unusual amalgamation of a philosophical approach and a highly practical approach. He makes use, apparently instinctively, of what might be called a psycho-analytical interpretation of the motives of the judges in taking the positions they adopt. His explanation of why a judge adopts a particular rule and how he uses it, may sometimes come as a surprise to the judge himself, but if he is honest in his self-appraisal he may well acknowledge its accuracy. This oracular interpretation of the basis for some tort rules can be extremely helpful to people who are concerned with how the rules are stated and their use.<sup>27</sup>

In his articles, he constantly engages in “ruminating.” A majority of the essays in the book use the word, ruminations, in the title either of the original article or of the chapter in the book. This means he thinks at length about the legal problems he is discussing, speculates on how they should be solved, and sets forth his thoughts and speculations for the benefit of the reader.

This suggests one of the reasons why a good law review article on a particular topic can prove much more useful than the discussion in

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23. Malone, *Comparative Negligence—Louisiana’s Forgotten Heritage*, 6 La. L. Rev. 125 (1945). This article is primarily concerned with provisions of the Louisiana Civil Code.

24. Malone, *Rumination on Liability for the Acts of Things*, 42 La. L. Rev. 979 (1982).

25. 324 So. 2d 441 (La. 1975).

26. Malone concludes that it is not desirable to establish under the Louisiana Civil Code a separate system of strict liability to handle the problem of liability for injury produced by a defective “thing” in the custody of the defendant. The discussion is most interesting and readers from outside the State will find that it has comments applicable to the development of the doctrine of strict liability for products. His concluding sentence asserts that “the plasticity of the negligence concept and its capacity to adjust itself to an everchanging world strongly recommends it as a vehicle that should not lightly be cast aside.” *Essays* at 400; 42 La. L. Rev. at 1009.

I gather that this is an indirect way of saying the same thing about the development of strict products liability. There is merit in the thought. I believe and have said that if the concept of strict liability for products had never been originated, the law of negligence would have accomplished by this time most of the desirable developments that have come about under strict products liability. It is primarily the excesses to which strict liability has been taken by some courts that would have been eliminated. Wade, *Strict Tort Liability for Products: Past, Present and Future*, 13 Cap. U.L. Rev. 335, 349-50 (1984).

27. In the work on the Second Restatement of Torts, he frequently made comments that caused the members of the committee to rethink and rewrite a section—either blackletter or comments.

a legal treatise. Concentrating on the topic, the article writer can discuss it more completely than the author of the treatise, going more thoroughly into the background, providing a more complete analysis and speculating more thoroughly into the probable effect of potential solutions—instead of briefly stating the solution that the treatise author thinks is appropriate. An attorney, preparing for trial or argument in a case will likely obtain far more usable ideas from an article like those in these *Essays* than from a treatise, and a law teacher gets more from the article to help him develop stimulating classroom discussion.

And this suggests one more idea about law review articles that seems pertinent here. One can often infer the motivation of an author in writing an article. It may be routine work to obtain a grant of tenure or a promotion or a salary raise; or it may be to publish for the benefit of the legal profession and the improvement of the general state of the law an idea for handling a legal problem that he has been mulling over in his mind for a long time and which simply must come out now for public inspection and use.

The law professor who has a true view of the ethical responsibility that he owes to his profession, feels that it impels him to do his best toward improving the state of the law that he teaches. And, whether he finds real pleasure in research and writing or finds it a tedious, even painful, process, he has no difficulty in locating areas of the law in which he can make a valuable contribution.

Wex Malone is undoubtedly a law professor who feels that moral responsibility. A reader of his "essays" recognizes that he writes in a sincere effort to improve the law of torts—and, indeed, that he has accomplished his purpose in many ways. This makes his articles more interesting and stimulating. But it doesn't always make the reading easier and quicker. You see, his insights and ideas strike reactions and new ideas in the reader, who will want to stop and think about them for a while. And that slows down the reading process.

But that's all to the good, don't you think?<sup>28</sup>

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28. There are two other relevant thoughts that I did not find a better place to put in:

1. Professor Robert A. Leflar, another veteran teacher who has had a big impact on the development of the law of torts (and conflicts) through his teaching and articles, and, even more emphatically, his development of the N.Y.U. Summer Conference for Appellate Judges, has recently published a book that is similar to Malone's *Essays*, but different. It is *One Life in the Law: A Sixty-Year Review* (1985). This book is partially autobiographical and partially a presentation of his thoughts and ideas about various aspects of the law. It makes enjoyable and profitable reading.

2. I do wish that the editors of the Malone *Essays* had included somewhere in the book a bibliography of his other writings. People who have been stimulated by these essays would like to know what else he has written, and where it can be found.