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A Cypress is Gone

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In my metaphorical forest of torts scholars, there are many tall and strong trees, reaching with their scholarship and teaching to the sky. Some are oaks—strong and traditional; some are maples—with wide leaves. Others—the Californians—are sequoias. But some—a remarkable number, really—are a bit different: they reach to the sky but spring from water. They are the Louisianans. They are cypress trees, and one of the most beautiful and resilient of those cypress trees is gone—Dave Robertson. Professor David W. Robertson of the University of Texas School of Law passed away late in 2018 after courageously and quietly battling cancer.

Dave was certainly a Texan, having spent the vast majority of his many years of teaching at UT, but he also was a Louisianan. As he humbly and humorously described himself, he was "one of the best lawyers to ever come out of Pollock, Louisiana." He was a graduate of the Louisiana State University Law School, Class of 1961; he taught here both as a full-time faculty member and as a visitor, and he was a frequent speaker at LSU and other Louisiana continuing legal education programs. Notably, Dave really was a cypress tree in the forest of torts scholars because, not only did he have an international reputation as a torts teacher and scholar, but he was also the nation's foremost expert on maritime tort law.

Dave was smart; he was honest; he was incredibly prepared; he was funny; he was kind. He was a wonderful friend and a role model for me throughout my career. I miss him very much. Dave had a profound influence on the development of my career. He taught me much about torts, admiralty, and teaching.

On the torts front, I first met Dave vicariously through an article he wrote called *Reason Versus Rule in Louisiana Tort Law: Dialogues on Hill v. Lundin & Associates, Inc*.[1] It was 1987 when I first read the article, although Dave published it in 1973. When I read it, I was a brand new torts teacher at LSU Law. I knew Louisiana used something called the duty/risk method to decide negligence cases. In that inaugural fall of teaching torts,

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1. David W. Robertson, *Reason Versus Rule in Louisiana Tort Law: Dialogues on* Hill v. Lundin & Associates, Inc., 34 LA. L. REV. 1 (1973).

I was struggling to understand exactly what this so-called duty/risk method was, how it was like what I had learned in law school and practiced in Washington, and how it was different. Dave's article helped explain it to me—at least to the extent anyone can understand it.

Later that same academic year of teaching torts for the first time, the Louisiana Supreme Court decided *Murray v. Ramada Inns, Inc*.[2] The case was a certified question from the United States Court of Appeals for the Fifth Circuit, asking the Louisiana Supreme Court whether the defense of assumption of the risk survived Louisiana's 1980 implementation of a pure comparative fault regime in tort cases.[3] On the brief for the plaintiff was Dave Robertson, and on the brief for the defendant was H. Alston Johnson, Dave's friend and a contributor to this tribute section. The buzz in the coffee room at the LSU Law Center was that Dave had argued for one side and Alston had argued for the other in what remains one of Louisiana's most significant torts decisions.

In particular, Dave and Alston advocated concerning the role of the duty/risk analysis in a plaintiff fault case, even if assumption of the risk was no longer a defense in a Louisiana tort case. Dave argued that to find that a defendant owed no duty to a plaintiff who was aware of the particular risk he or she encountered would eviscerate comparative fault and allow plaintiff fault to function as a bar to recovery. He asserted that this approach would be inconsistent with the legislative decision to move to a comparative fault system. That is, he argued for a simpler approach, a theme I will return to in a moment, but for now, I will stick with the Dave and Alston combo.

A few years after *Murray,* as I became a regular contributor to continuing education programs for the Louisiana Judicial College, the highlight of every December torts program was a dialogue on torts. But it really was a debate about duty/risk: should the judge or the jury (as fact-finder) decide whether a defendant owed the plaintiff a duty to protect against a specific risk that arose in a specific manner? Alston typically took the Wex Malone/Leon Green position that it was up to the judge, or at least that it was not wrong for the judge to decide that issue. Dave took what he would later call a "Keetonian"[4] approach and argued that it was for the jury to decide scope of responsibility at the case-specific level. Their conversations were fun, informed, provocative, and civil. Their

2. Murray v. Ramada Inns, Inc., 521 So. 2d 1123 (1988).

3. Act No. 431, 1979 La. Acts 431 (amending, among others, LA. CIV. CODE art. 2323 (1996)).

4. David W. Robertson, *Allocating Authority Among Institutional Decision Makers in Louisiana State-Court Negligence and Strict Liability Cases*, 57 LA. L. REV. 1080, 1092 (1997).

mutual admiration for one another was apparent. As a young, aspiring torts teacher and scholar, I was rapt. Alston was generally careful and always most careful when discussing a decision whose author was in the room. Dave was generally faster in his tempo, especially in response, and never afraid to let a judge know he or she "got it wrong."

Dave strove to make tort law clear and sensible but never dodged difficult, esoteric questions. It was his way to try and cut through esoterica like Alexander through the Gordian knot. He did it with comparative fault.[5] He did it with cause-in-fact.[6] As noted, he did it with duty and scope of duty.[7] In his approach to torts, he was a populist with a healthy respect for juries and their ability to correctly decide cases. But in making his case, he would not be out-briefed, out-researched, out-prepared, out-written, or out-argued by anyone.

To a landlubber, Dave was one of the nation's leading torts scholars. But the reader should also recall that he was a genuine cypress tree. His feet were in the water, and he was, in addition to being distinguished as a torts guru, one of the world's experts in admiralty law. His book, *Admiralty and Federalism*,[8] remains the best work on the subject almost 50 years after its publication. His yearly summaries of recent developments in maritime law, co-written with Professor Michael F. Sturley in the Tulane Maritime Law Journal,[9] were a must-read for anyone who even waded into the field. He became an expert on the Oil Pollution Act[10] and its interplay with maritime law.[11] He was a presenter at virtually every one of LSU's Judge Alvin B. Rubin Maritime Personal Injury Law Conferences.

Dave Robertson also advised lawyers handling major admiralty cases and argued several, including *Batterton v. Dutra Group*.[12] In *Batterton*, Dave successfully argued for the plaintiff that punitive damages should be

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5. DAVID W. ROBERTSON, THE LOUISIANA LAW OF COMPARATIVE FAULT: A DECADE OF PROGRESS (1991).

6. David W. Robertson, *The Common Sense of Cause in Fact*, 75 TEX. L. REV. 1765 (1997).

7. *See, e.g.*, 46 U.S.C. § 30104 (2012); Kahn Lucas Lancaster v. Lark Int'l, 186 F.3d 210 (2d Cir. 1999).

8. DAVID W. ROBERTSON, ADMIRALTY AND FEDERALISM (1970).

9. *See, e.g.*, David W. Robertson & Michael F. Sturley, *Recent Developments in Admiralty and Maritime Law at the National Level and in the Fifth and Eleventh Circuits*, 41 TUL. MAR. L.J. 437 (2017).

10. The Oil Pollution Act of 1990, 33 U.S.C. §§ 2701–2762 (2012).

11. David W. Robertson, *The Oil Pollution Act's Provisions on Damages for Economic Loss*, 30 MISS. C. L. 157 (2011).

12. Batterton v. Dutra Grp., 880 F.3d 1089 (9th Cir. 2018), *cert. granted*, 139 S. Ct. 627 (2018).

available in a seaman's general maritime law unseaworthiness action. In so holding, the Ninth Circuit agreed with the Washington Supreme Court's decision in *Tabingo v. American Triumph LLC*[13] and disagreed with the Fifth Circuit's divided decision in *McBride v. Estis Well Service, LLC.*[14] In *McBride,* Dave was one of the lawyers representing the plaintiff—there, unsuccessfully. Thanks, no doubt, in part to the split in the circuits, the U.S. Supreme Court granted certiorari in *Batterton*. Sadly, Dave was not there to argue the case before the Supreme Court, and he would have been sad to see the result: the Court decided that a seaman cannot recover punitive damages against his or her employer arising from the unseaworthiness of the vessel on which he or she served.[15]

I do want to comment on Dave's presentation style at continuing legal education programs—both as a presenter and as an audience member/participant.[16] First, his outline was always a "paper." And the paper was always suitable for publication and often was later published. In addition, like a great advocate, he would begin his presentation with an organizational roadmap of what was to follow. Moreover, he always got to the end of the road.

Sometimes, he would bring his guitar to a presentation. Dave had "rewritten" the lyrics of some popular songs with torts themes. For instance, he rewrote the lyrics to The Box Tops' greatest hit, *The Letter*,[17] to convey a commentary about Justice Cardozo's majority opinion in *Palsgraf v. Long Island Railroad Co*.[18] As the lawyer and law student will recall, Justice Cardozo decided that the railroad owed no duty to Mrs. Palsgraf to protect against the risk that its employee's pushing an unrelated passenger from behind would cause the pushed man to drop a package of fireworks, which exploded and knocked a part of a scale onto Mrs. Palsgraf. Justice Cardozo decided that the railroad owed no duty to protect against the particular risk because it was not foreseeable. The approach was, of course, inconsistent with Robertson's populist commitment to juries. Dave agreed with the author of the dissent, Justice Andrews, not Justice Cardozo. In *The Letter*, the singer tells of how he must get a ticket for an airplane in order to get home because, as he says at the end of the

13. Tabingo v. Am. Triumph L.L.C., 391 P.3d 434 (2017).

14. McBride v. Estis Well Serv., L.L.C., 768 F.3d 382 (5th Cir. 2014), *cert. denied*, 135 S. Ct. 2310 (2015).

15. The Dutra Group v. Batterton, 139 S. Ct. 2275 (2019).

16. Sadly, I never got to see him in the classroom.

17. The Joe Cocker version, while arguably more well-known, is indeed a cover.

18. Palsgraf v. Long Island R. Co., 162 N.E. 99 (N.Y. 1928).

chorus and virtually every verse: "My baby, just-a wrote me a letter."[19] But Dave changed that to: "Cardozo could-a done better." The audience loved it.

Looking back, I might have changed it a bit and added: "Robertson couldn't-a done better!"

As a participant, Dave would usually sit in the front row and listen intensely. But he did more than listen; he would almost always interject with a question or a comment. In doing so, he might occasionally intimidate the speaker; however, he also managed to turn the presentation into a conversation, which was more informative, more critical, and more entertaining than a simple speech. The last time I saw Dave was at the 2018 Judge Alvin B. Rubin Conference on Maritime Personal Injury Law at LSU. It was a special day because at lunch, Judge John W. deGravelles honored Dave by announcing the creation of a scholarship in Dave's name and funded by a wonderful gift from the Judge and his wife, Jan. The scholarship will exist forever.

That day, after the luncheon honoring Dave, I was one of the last speakers—the absolute last in fact—and I was talking about a vessel owner's liability under § 905(b) of the Longshore and Harbor Workers' Compensation Act.[20] It is a damnifyingly complex piece of legislation, which requires rereading every time one sets out to meaningfully discuss it. It is a very tricky thing to teach to law students, let alone judges. As I was getting into my presentation on the subject and said "905(b)," Dave nodded and interjected: "Five little sentences." I agreed and awaited further questioning, but that was it. While I missed the repartee, I took his silence (and nodding) as a compliment.

A compliment from Dave meant a lot, and I was always grateful. Once, as I was walking with him after a seminar, he said: "Nice job on the punitive damages article." I was on a cloud. I felt validated and even a bit accomplished. Dave Robertson had liked my work.

Of course, we did not always agree.

We disagreed on one of the finer—but pretty important—points of the scope of maritime jurisdiction. It is my view that in a multi-tortfeasor case where some of the defendants are maritime and some are land-based, maritime jurisdiction over one of the maritime tortfeasors means jurisdiction over all of the tortfeasors—both land-based and maritime.[21]

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19. THE BOX TOPS, *The Letter on* THE LETTER/NEON RAINBOW (Mala Records 1967).

20. 33 U.S.C.A. § 905(b) (West 2016).

21. Thomas C. Galligan, Jr., *The Admiralty Extension Act at Fifty*, 29 J. MAR. L. & COM. 495 (1998); Thomas C. Galligan, Jr., *Of Incidents, Activities, and Maritime Jurisdiction: A Jurisprudential Exegesis*, 56 LA. L. REV. 519 (1996).

Dave definitely did not agree![22] I am sorry I will not have the opportunity to convince him. If there is something after this life, I will try.

We also wrote a series of articles on negligence where Dave urged his Keetonian model of deciding negligence cases—giving the jury the power to decide the scope of the risk or the scope of liability.[23] While not explicitly disagreeing with him, I walked a sort of middle ground between describing what actually occurred and endorsing the preservation of a more flexible approach with a potentially greater role for the judge.[24] The second set of our articles appeared in my last fall semester teaching at LSU—1997—before leaving to become Dean of the University of Tennessee College of Law.[25]

At Tennessee, I continued to teach torts. Then, in 2006, I became the president of Colby-Sawyer College in New London, New Hampshire, where I spent 10 years. While at Colby-Sawyer, I continued to write about torts and give talks on torts to Louisiana judges and lawyers, and I continued to see and talk with Dave. But I was not teaching torts to first-year law students. Now back at LSU, I am very thankfully teaching torts again. I am rereading leading cases, especially Louisiana cases, and I am trying to get my students to understand them. One of the great things about teaching students is that it is the best way to learn the material yourself. And so, while I was never far away from Louisiana tort law—one of my favorite subjects—I was also not rereading its most important decisions every year. Now I am.

As I read those decisions, as I read those that have been decided more recently, and as I read articles and books about the subject I love, I have become convinced. Back in 1997, Dave Robertson was right. The flexibility for which I advocated has bred inconsistency and, I daresay,

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22. David W. Robertson, *Admiralty Jurisdiction Over One Co-Tortfeasor Cannot Effectuate Admiralty Jurisdiction Over Another*, 37 J. MAR. L. & C. 161 (2006).

23. David W. Robertson, *The Vocabulary of Negligence Law: Continuing Causation Confusion*, 58 LA. L. REV. 1 (1997); David W. Robertson, *Allocating Authority Institutional Decision Makers in Louisiana State-Court Negligence and Strict Liability Cases*, 57 LA. L. REV. 1079 (1997).

24. Thomas C. Galligan, Jr., *Cats or Gardens: Which Metaphor Explains Negligence? Or, Is Simplicity Simpler Than Flexibility?*, 58 LA. L. REV. 35 (1997); Thomas C. Galligan, Jr., *Revisiting the Patterns of Negligence: Some Ramblings Inspired by Robertson*, 57 LA. L. REV. 1119 (1997).

25. David W. Robertson, *The Vocabulary of Negligence Law: Continuing Causation Confusion*, 58 LA. L. REV. 1 (1997); Thomas C. Galligan, Jr., *Cats or Gardens: Which Metaphor Explains Negligence? Or, Is Simplicity Simpler Than Flexibility?*, 58 LA. L. REV. 35 (1997).

confusion. I was wrong, and I recant. In his brilliance, Dave tried to make things clear and simple. He convincingly analyzed and articulated legal concepts in ways that people who were not as brilliant as he was could understand. That way, those people can apply those concepts in a fairer, more just way. He also respected the role of the jury (fact-finder) in deciding the ultimate fact-specific scope of the defendant's liability. It took me 30 years to really get it.

Thus, if I ever find myself in a certain cypress grove—and I doubt I deserve it—I will make sure to find a certain cypress tree and let it know that when it came to who should decide what in a negligence case, I was wrong in 1997, and he was right.

Dave was not a physically tall person, and he was not a large person. He was diminutive, but in the forest of torts scholars, he is—and always will be—among the tallest trees, certainly one of the tallest cypress trees.