

Restatement of the Law of Torts. Volume III (Book Review)

David S. Edgar Jr.

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The Treasury Department is adding to the confusion by a recent ruling which holds that the proceeds of insurance policies previously assigned or transferred in contemplation of death are now to be included under Section 302-c, which section taxes transfers intended to take effect in possession or enjoyment at or after death.

In the 1935 Act, Congress finally attempted to mitigate the hardship caused by basing the tax on market values at the date of death. It did this by giving the executor the option of valuing the gross estate as of a date one year after the decedent's death. This election is available only at the time the return is filed. The author points out that if the Treasury Department differs from the executor in his valuations, the executor should not be held to this election. The language of the statute, however, supports the Treasury Department's position that the election cannot be rescinded. This obviously is inequitable.

The problem of valuations remains one of the most difficult ones in the administration of the Estate Tax Law. In several recent cases the courts have permitted the adoption of a so-called blockage rule, whereby a large block of stock need not, under special circumstances, be valued at the market value in the same way as a small lot might be valued. In the case of close corporations and particularly where a business has been carried on at a loss, the writer feels that some substantial allowance should be made in determining the value of such stock or such a business by a determination of a "negative goodwill" element. Several recent state court decisions seem to find a basis for this in the law, and taxpayers should press the issue.

Considering the lack of an extensive bibliography on the Estate Tax Law, this book is especially valuable.

BENJAMIN HARROW.*

RESTATEMENT OF THE LAW OF TORTS. Volume III. St. Paul: American Law Institute Publishers, 1938, pp. xxvi, 759.

I

An attempt to review the most recent volume of a set being published piecemeal ought not to be made without regard to the previous books.

In the first two volumes of the *Restatement of Torts*, the "pattern" or plan being followed consisted of a development of intentional torts in Volume I, and of negligence in Volume II. This enabled a teacher to make an historical and genetic approach to torts through the two main forms of trespass: Volume I lending itself to treatment as generally containing the modern law descended to us through the various forms of trespass *vi et armis*; and Volume II permitting a presentation of negligence law as a main part of what has come to us through the writ of trespass on the case.

Volume III is largely a restatement of other parts of our inheritance from case. Thus the teacher may continue his use of the *Restatement* since the

* Professor of Law, St. John's University School of Law.

publication of Volume III, in the same manner as before. He may begin with primitive punishment as law's earliest purpose and trace through to the use of sanctions to give irate complainants a substitute for revenge, and later to give compensation as well. By this time he is well into his development of trespass *vi et armis*, and he may now show how awarding compensation began to be more important than the substitute for revenge, and ultimately resulted in trespass on the case. The *Restatement* becomes, to him, as far as a still-life picture in words can be, the portrayal of an organism, whose parts are principles by which twentieth century disputes are settled, and whose whole is the present state of an evolution from two main lines of descent.

Having undertaken a given topic at a logical place, the Institute dealt with it completely, even though that meant crossing the borderline between the writs. The modern law of conversion stemmed originally from trespass *de bonis asportatis* (which was *vi et armis*) and detinue, and almost always involved, as in many cases it does today, specific intent. So we find the principles of conversion set forth in Volume I (on intentional torts, as pointed out above), even though that meant bringing into consideration, as part of the discussion, instances of modern liability based on case. Hence the influence of trover, which was case, is included in Chapter 9 of Volume I under the title Intentional Invasions of Interests in the Present and Future Possession of Chattels. Again, in Volume III, disturbance of family relations, whose *corpus juris* came to us largely through case, is properly dealt with, and as part of that development those principles which had their origin in the earlier writ are also included. Even if this were not necessary in a restatement of modern common law, it would be advisable. The value which lies, to this very day, in treatment of the law of torts on the basis of its derivation from two main sources, is not lost thereby. However, the student of historical and genetic jurisprudence must be on his guard for the few instances in which the historical pattern is radically, though logically and helpfully, departed from. But vigilance is not only the price of liberty; it is part of the price of scholarship as well.

II

The thread of intent is seldom dropped in Volume I. Through Volume II there is generally sustained, as the basis of liability for negligence, the necessity for the existence of an unreasonable risk of harm to a legally protected interest of another, the probability of harm being foreseen so that the risk is known, or foreseeable so that the risk ought to be known.

In Volume III, to a very large extent, the principles dealt with result in liability when, and often only when, the existence of the risk of harm (which is sometimes almost a certainty) is known and not merely knowable. This is true of a considerable portion of the divisions of Deceit, Disparagement, Unjustifiable Litigation and Interference in Domestic Relations; of the division on Defamation where conditional privilege is abused; and of much of that part of the division on Interference With Business Relations which has so far been published.

One may wish that this frequent essential (knowledge of a risk) had been

patterned into general principles where possible, as intent was patterned throughout Volume I, to make for an easier relation. Perhaps as an underlying principle it is not sufficiently pervading. Perhaps it is the business of each teacher, rather than of the Institute, to do the patterning. But one may wonder if the failure of the *Restatement* to do it is explained by a greater division of labor between reporters and advisers in Volume III than in the earlier volumes.¹

One may also wish that this matter had been dealt with more clearly than by such a device as the word "unprivileged"² coupled with a Special Note informing the reader that the idea so expressed is, in common legal speech, often referred to as malice.³ Nor is it adequate to set forth that the phrase "without a privilege to do so"⁴ is usually to be taken⁵ in connection with the definition of privilege.⁶

This is true in spite of the fact that many of the divisions contain topics on various privileges. This is by way of saying (in a sense, perhaps, merely paraphrasing a previous expression) that the immunity⁷ from liability for the consequences of acting without that malice—the sort often called "malice in fact"—is so common that its existence (as a common basis) ought more clearly and emphatically have been brought home.

So, too, a relating of division three in Volume III, on Absolute Liability, to the pattern of negligence in Volume II, might have been briefly made. Though absolute liability is responsibility for the consequences of the *mere*

¹ Compare personnel lists Volume I, p. iii, and Volume II, p. iii, with list Volume III, p. iv.

² *E.g.*, § 558.

³ *E.g.*, Volume III, p. 326, Special Note. Therein we are told that "the idea expressed in the *Restatement* by the phrase 'without a privilege to do so' is the notion of malice. Though that phrase is often to be found in Volume III, this Special Note is the only explanation of it in terms of malice. Yet the Special Note is tucked away under this single section (§ 624) relating only to Disparagement. An Introductory Note to Chapter 29 (Wrongful Prosecution of Criminal Proceedings) discusses malice in a brief explanation of why the term "malicious prosecution" is not used in the name of the chapter except parenthetically. It, too, fails to relate the meaning of malice and the meaning of the phrase "without a privilege to do so." It also neglects to connect the phrase "primarily because of a purpose other than that of bringing an offender to justice"—used in that chapter—and a similar phrase in Chapter 30 (on civil proceedings) to the "without a privilege" phrase elsewhere used as expressive of malice as in § 624, Special Note. It can hardly be contended that the frequent use of phrases relating to the absence of privilege in Volume III constitutes a pattern like that for intent in Volume I. The words "intent," "intentional" and "intentionally" have in their common meaning the idea which the *Restatement* desires to convey. Without explanation, however, phrases relating to the absence of privilege will not be taken as expressive of the presence of malice by ordinary readers. True, the explanation is given. But it is given, as pointed out above, only in a Special Note to a single section (§ 624) on one tort (Disparagement) alone. The ordinary user of the *Restatement* will not see the Special Note unless he is doing research on Disparagement.

⁴ *E.g.*, § 624.

⁵ *E.g.*, § 558, Comment a.

⁶ Volume I, § 10.

⁷ It is hardly a privilege to act though the existence or even certainty of harm be knowable so long as it be not known.

doing of an act under certain circumstances (no matter how carefully it is done), and "negligence" is generally reserved as a name for carelessness in the manner in which a permitted act is done, they have a common basis in the existence of a risk and in the fact that the existence of the risk need not be known if it is knowable.

III

Of course, the *Restatements* do not purport to be textbooks on jurisprudence or handbooks of what many modern curricula include under the name of "Elementary Law", nor do they attempt to instruct in the basic function of law. Critics have made much of this. A list of their evaluations, quite complete up to a short time ago, recently appeared in these pages.⁸ The writer sympathizes with those who wished for more than utterance of dogmatic formulation, but knows that more was unnecessary in view of the purpose of the *Restatements*. Part of this purpose, that they be stepping stones (when annotated to show local law) along the road to intelligent law revision,⁹ is better served by the brevity of conclusive statement than by lengthy discussions of rationale. One does not, in his pleadings, allege his evidence or anticipate his adversary's.

IV

For the rest, scholarship, care and courage continue to be far more than adequate. Perhaps some harm was done in the Council to the work of the reporters, in various parts of the *Restatement*. If so, it was less than one would expect in the natural order of things, and it is a small price to pay for the value which lies in the fact that the authority underlying its guidance is the composite authority of reporters, advisers and Council members.

DAVID S. EDGAR, JR.*

⁸ Maloney, *Restatement of Law of Property* (1937) 12 ST. JOHN'S L. REV. 3, n.8. In this understanding survey of the *Restatement of Property*, Professor John P. Maloney, before concluding that the work under review by him "is the most scientific system, from the standpoint of arrangement and classification * * * that we know of," summed up the comments of various critics by saying, "The *Restatement of the Law of Property* contains nothing about a rational basis for property * * *." It is but to extend that summary by a paraphrase to say that the *Restatement of Torts* contains little about a basis, rational or otherwise, for private obligations toward the personality and property interests of others, except for what may be read by inference in a brief, quasi-historical comment in Volume I (Scope Note, pp. 26-28), applying expressly only to Volumes I and II, and a portion of the Introductory Note to Chapter 35 in Volume III on the origin of remedies for disparagement from the action on the case for deceit. Yet of the *Restatement of Property*, Professor Maloney is able to say, "* * * but it does outline the history and shows how the rules developed as a part of the common law." Although in any field this is not much more than the finding of a basis for things that be, in that they have long been, it does, at least, permit important inferences about the value of those things in past experience. That, as well as function, is part of social science. Would that the reporters on torts had given us as much.

⁹ Law revision is, always, in the end, a matter of local judicial and legislative behavior anyway, even in the case of uniform laws.

* Professor of Law, St. John's University School of Law.