

A Treatise on the Law of Torts (Book Review)

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nology employed by this most important contribution to the science of Jurisprudence." It is, indeed, a pleasure these days to read an outline on any legal subject that is not the product of hasty preparation. In this volume, it is apparent that Professor Whitney has been collecting material for the past decade and has assembled it in a logical, clear manner.

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A TREATISE ON THE LAW OF TORTS. By Fowler Vincent Harper. Indianapolis: The Bobbs-Merrill Co., 1933, pp. cxi, 714.

This volume is the most recent textual contribution on the law of torts. The approach is original. So is the treatment of the theme. The subject of torts is extensively discussed, despite the modest statement of the author in the Preface.

The principles of the Restatement of the Law of Torts are frequently referred to, and favorably. This is not to be wondered at when it is remembered that the author, himself a professor of law in Indiana University, is a loyal disciple of Professor Bohlen, reporter to the Institute which prepared the Restatement. The Restatement has not any sanction, of course, except the legal learning of the eminent jurists who framed it, which is considerable. The rules of the Restatement were formulated after an exhaustive and complete examination and analysis of tort cases in the various jurisdictions. The Restatement states the law as it should be, in the opinion of its framers. Some of it is already the law of New York; much of it perhaps is not. Very slowly, but surely, the courts of this state are adopting the principles of the Restatement, and thus making them authoritative by adding them to the body of our common law. Doubtless our Legislature may, from time to time, enact some of the principles of the Restatement into statutes in those cases where the common law rule has been contrary for such a long period of time that our courts would refuse to change it by decision, and disturb thereby the doctrine of *stare decisis* which lies at the foundation of the application of the rules of our common law system of jurisprudence. The students in our law schools should be taught, of course, the law as it is; but law school instruction should not stop here. The law as it should be or will be should also be discussed, if the ability to reason along juristic lines is to be developed fully. The Restatement is of inestimable service in this type of instruction. Your reviewer is a great admirer of Professor Bohlen, and of the Restatement; but your reviewer, in common with us all, should not swallow the Restatement "hook, line and sinker" (so to speak) simply because it is the Restatement. As a professor of the law of torts, your reviewer has often been in a quandary as to just how extensively he should use the Restatement in the classroom, lest he confuse his students. If the case system of law instruction possesses the virtues which it admittedly has, instruction in the classroom must continue to be based very largely upon

the law as the courts have laid it down. Your reviewer has doubted the wisdom of using the principles of the Restatement too freely in the classroom, especially with first-year students, lest they be confused between what is the law as announced by our courts, and what are the principles of the Restatement. For the purposes of class discussion and the development of a legal mind in the student, the Restatement is admirable, but the teacher should point out what part of the Restatement is already law, and what part of it is not. It is true that not only the quantity but the quality of a student's legal knowledge should be the goal of instruction in our law schools, but the student is entitled to know, and wants to know, what is and what is not the law on a given state of facts.

The influence of foreseeability in determining legal duty has been given attention by Professor Harper, who states that cases involving this principle "are frequently stated by the courts as proximate cause problems, but the results seem better understood in terms of negligence." There appears in this issue of *St. John's Law Review* an article on "Foreseeability" by Professor David Stewart Edgar, Jr., which I have read. A perusal of it will be of interest to the reader.

Reference is also made to a review of Professor Harper's book in the *Columbia Law Review* for June, 1934, by Professor James P. Gifford.

Your reviewer acknowledges his indebtedness to this book. It has assisted him in his classroom work. Other teachers of the law of torts will find it helpful, as will the actively practicing lawyer. Professor Harper gives the reader a viewpoint, and a modern one. The volume reflects the prodigious amount of labor entailed in its preparation, as well as the scholarly ability of the author.

Obviously it is quite impossible, within the limitations of a review of a work of such scope, adequately to comment upon it. The author has considered his theme under six general divisions: Social Policy of the Law; Interests in Personality and Property; Invasions of Interests in Economic Relations and Transactions; Invasions of the Interest in Reputation; Various Interests Receiving Limited Protection; and Tort Liability as Affected by the Character and Relationship of the Parties. This method of treatment indicates a more original and a more modern presentation of the theme than usually has been given to it by other and earlier writers. The author's statement in the Preface is doubtless correct that "it is of the greatest importance to observe that the technical development of these rules is directed to the end that the various principles of policy may be made effective in the governing of human relations. The interplay of these social policies may, and often does, require the greatest nicety and sometimes illogical development of legalistic doctrine. The unitary character of the law, therefore, is not to be looked for in the doctrinal development thereof, but in the broad notions of policy from which these doctrines derive. It is this social, rather than legalistic, basis of tort law that affords the unifying principles." With this statement your reviewer, as always, is in heartiest accord.

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