Vanderbilt Law Review

Volume 24
Issue 3 *Issue 3 - April 1971*

Article 7

4-1971

Book Reviews

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BOOK REVIEWS

How Harmless is Harmless?

The Riddle of Harmless Error. By Roger J. Traynor. Columbus: Ohio State University Press, 1970. Pp. ix, 117. $6.00

Poets would have us believe that beauty is in the eyes of the beholder and that nothing is either good or bad unless thinking makes it so. Equally as elusive is the legal concept of harmless error, the determination of which capriciously depends on who is applying what test and the manner in which it is applied. Just how should a judge decide whether an error is harmless? In this short, provocative, and extremely readable treatise, Justice Roger J. Traynor analyzes the history and application of the rule of harmless error. In the last century, the rule was applied so that any failure, however slight, to dot the "i's" and cross the "t's" of a legalistic requirement would be fatal error. Trivial mistakes, such as misspelling the word larceny[1] or failing to set out in an indictment that property taken from the victim by force and threats was not owned by the defendant,[2] were found by some nineteenth century judges to be incurable omissions because the indictment did not adequately inform the defendant of the full nature of the charges against him. Presently, however, even violations of constitutional rights during trial may be forgiven. There have been recent instances in which clear violations of defendants' rights guaranteed by the fifth and sixth amendments have been held permissible if the other evidence of guilt was so overwhelming that a court could describe the error as "harmless beyond a reasonable doubt."[3]

This book is based on the author's experience of more than 30 years on the California Supreme Court and his exhaustive research into the enigma of harmless error. The overriding message is simply that there is no clear explanation for the Supreme Court's preferring the *Chapman* test of "harmless beyond reasonable doubt" over the California test, which allows the judgment to stand if the particular error did not result

1. People v. St. Clair, 56 Cal. 406 (1880).
2. People v. Vice, 21 Cal. 345 (1863).
3. Harrington v. California, 395 U.S. 250 (1969) (confessions by co-defendants implicated defendant and violated confrontation clause but conviction was affirmed because of overwhelming direct evidence); Chapman v. California, 386 U.S. 18 (1967) (conviction reversed because State could not show that prosecutor's comments on defendant's failure to testify were harmless beyond a reasonable doubt).

in a "miscarriage of justice"[4] in the opinion of the reviewing court. When jury verdicts in criminal cases are appealed, Traynor observes that there are many who view the problem of evaluating the influence of error on a juror as defying rational solution. "How," Traynor questions, "can anyone determine what went on in the minds of another or of twelve others who served as triers of fact?" (p.23). An attempt to do so places the appellate reviewer in the position of arrogating the prerogative of the jury.

The treatise cites illustrations of the difficulty of distinguishing between errors that affect the outcome of a case to the detriment of a defendant's rights and those that are so innocuous that they can truly be said to be harmless. In the foreword, the author points out that all trial records contain errors that "are the insects in the world of law, traveling through it in swarms, often unnoticed in their endless procession" (p. ix). Most are harmless; some are devastatingly harmful.

Of primary concern to the author is the impact on the overall judicial process of the permissiveness suggested in the *Chapman* rule and the broader consideration of just what purpose the harmless error rule is designed to accommodate. Is it for the benefit of society or the individual? In this light, it is interesting to speculate, for example, about what would have been the actual harm if Lee Harvey Oswald or Sirhan Sirhan had been denied some basic constitutional right. Their guilt might have been so clear to the reviewing court that it would have been obvious that the infringement of a right by the trial court had not had the slightest effect on the outcome of the case. Is the defendant of primary concern in this type of situation, or the law itself? If the defendant's right to confront an accuser is taken away by an erroneous action amidst overwhelming evidence of guilt, does the declaration of harmless error weaken the constitutional structure of protections available to all by implying to the trial courts that under certain circumstances a constitutional mandate may be ignored with impunity?[5]

One important area of the harmless error problem not discussed by Justice Traynor is the situation in which a number of errors infect a given case, each of which is plainly harmless when viewed individually, but whose cumulative weight renders improbable a fair trial. Clearly, some errors are synergistic and disproportionately compound the impact on the whole.

In his essay, Traynor opts for what he terms the "highly probable"

4. CAL. CONST. art. VI, § 13.

5. Harrington v. California, 395 U.S. 250 (1969) (where a violation of the sixth amendment confrontation clause was harmless error).

rule, which makes affirmance of any judgment in the face of error conditional on an affirmative finding of high probability that the error did not affect the judgment. While this still leaves the ultimate determination to judicial discretion, Traynor feels that this rule requires the judge to weigh more carefully the issue presented and tends to "hold down excesses either of affirmance that recklessly dampens assurance of a fair day in court or of reversal that needlessly calls for still another fair day at the expense of litigants who are still awaiting their first day in court" (p. 51). This is a result devoutly to be wished.

This little book should be in every judge's library.

CHARLES GALBREATH*

A Small Business Primer

ADVISING THE SMALL BUSINESS SOURCEBOOK. Edited by Jim McCord & Nicholas S. Vazzana. New York: Practicing Law Institute, 1970. Pp. xviii. 489. $20.00.

The small businessman in our complex society has come to rely upon attorneys for something more than pure legal advice. Counsel representing business clients must be prepared to guide the enterprise in the collateral areas where basic business problems are closely intertwined with the law. Management and finance are the most obvious areas in which the lawyer's role becomes important, and in some instances indispensable. Recognizing the attorney's role as adviser to the small business, the editors have compiled a "sourcebook" with the avowed purpose of providing a "ready source of reference materials" (p. i) and suggestions for improving the attorney's fulfillment of this advisory function. The term "sourcebook" is an innovation that aptly describes the content of the book. No attempt is made to cover in depth the various applicable principles. Rather the subject matter is presented in capsule form, serving somewhat as an expanded syllabus. In this sense the book is truly a "sourcebook," or point of beginning, directing the reader to other texts in which the subject is treated in greater detail.

The method of presentation follows the format of the material used in Continuing Legal Education courses. This is not surprising since the book is published by the Practicing Law Institute (PLI) as the first of

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the series of Commercial Law and Practice Sourcebooks. The text comprises a collection of articles by prominent experts in their respective fields; most of the articles have previously been published as part of other PLI courses on corporate and commercial subjects. The arrangement follows a chronological pattern, beginning logically with the organizing of a new business, and considering state and federal regulation of securities, mergers, acquisitions and sales, financing, management, and estate planning for the ultimate disposition of the business. The subject of taxation has been purposely omitted because extensive revisions in the tax laws are contemplated.

Much of the material included is business oriented as opposed to traditional legal orientation in similar treatises. More than one-half of the text deals with management and financing, including a cursory discussion of financial statements and accounting methods. Although a lawyer advising a small business must be familiar with these matters, legal training in these areas tends to be somewhat deficient.

The editors have included in Part Six articles on franchising, restitution, and damages for price discrimination, which together with the chapters on estate planning are characterized as "Special Problems." This part is mainly a catchall for problems related to the small business but outside the normal scope of a handbook on advice to small businesses. The pages devoted to this part might have been better utilized by expanding the material on corporate control agreements, going public, and partnerships, or including chapters on employee contracts, deferred compensation, or basic tax principles.

The book is an excellent introduction to the subject of advising the small business. Its function is necessarily that of a course book, as well as a sourcebook. The lawyer experienced in a business practice will find little in this book to add to his knowledge and experience. The general practitioner with only occasional small business clients, however, can utilize the books as a ready-reference and general guide that will direct his attention to the problems to be anticipated, provide a source for more detailed research, and put him on speaking terms with practical business problems his client will encounter. The young lawyer or student will find much practical information that will introduce him to those areas of business practice of which he must be cognizant, and help him appreciate the fact that the small businessman requires more than legal advice from his attorney.

The editors have recognized the limitations of the book. The editorial note introducing Part Four frankly states that the material on financing is intended to serve "at least as a refresher, if not a first-

instance source of education, to counsel regarding the business considerations and needs of his client" (p. 173). Moreover, the principal theme of the book is stated as the need of counsel to "synthesize his legal considerations with those of a business nature entertained by his client in order to guide the client successfully through the varieties of transactions" (p. 173), in which he seeks the advice of counsel. These comments characterize the entire book. The editors have made their point. The book is recommended for its intended but limited purpose, namely a "sourcebook."

GEORGE F. SHINEHOUSE, JR.*

Legal Problems of the Design Professional

LEGAL ASPECTS OF ARCHITECTURE & ENGINEERING AND THE CONSTRUCTION PROCESS. By Justin Sweet. St. Paul: West Publishing Co., 1970. Pp. xliii. 953. $12.50.

There is no profession, other than the law, that can compare with architecture and engineering in its involvement with legal problems and relationships. Legal questions inhere in every stage of the design professional's dealings with his partners, clients, contractors, insurance, and bonding companies, and in the daily execution of the building project. The architect or engineer, for example, must comply with the licensing or registration laws of the states in which he practices; he must organize the entity through which he practices; he is required to contract with his client for the furnishing of professional services, and with consultants to assist in the execution of such services. Perhaps most significantly, the design professional is called upon to assist his client in the formulation of the construction contract. This document involves such complex legal subjects as liability and other insurance, liens, payment and performance bonds, indemnification, arbitration, default, and liquidated damages.

The legal rights, obligations, and remedies of the design professional are continuously being defined and modified by the courts and legislatures. The architect and engineer have been particularly concerned in recent years with the increasing number of malpractice suits instituted against them by the workmen and other persons injured

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during construction of building projects. The area of legal liability to third persons has not been static, and the responsibilities chargeable to design professionals seem to be expanding. Although there is concern in the profession about this trend, efforts on the part of professional associations to provide form contracts that define certain functions and responsibilities have not been wholly successful. In addition to malpractice problems, the architect or engineer is concerned with the scope of protection provided by common law and statutory copyright for his design, the security furnished by liens for the collection of his fee, and, of course, the limitations imposed by the zoning and building codes on what he may design.

It would appear from this brief summary that the design professional must be basically acquainted with the potential legal problems that invariably arise. To meet this need, Professor Justin Sweet, of the University of California Law School, has written a treatise on legal aspects of architecture and engineering, a work that had its genesis in teaching materials Professor Sweet developed for a course for architecture students. The objective of this book is to provide a background that will enable architectural and engineering students to acquire an understanding of law and legal institutions. In achieving this objective, Professor Sweet has been eminently successful. The book, however, also can be of significant assistance to practicing design professionals and to the lawyers who represent them.

Professor Sweet has divided his treatise into five major parts. Part I constitutes a review of basic contract principles, the agency relationship, forms of association, and judicial procedures. Although this section is quite fundamental, it serves the purpose of exploring some of the basic premises that underlie more subtle and complex problems of law. Part II deals with the the design professional's relationship with his client. The architect or engineer's contract with his client is the most significant document in the entire construction process. It sets forth his responsibilities, the client's obligations, and the method and amount of compensation. The architect or engineer not only creates the design, but in most instances he administers the construction contract. Many of the legal disputes that arise are the result of a misunderstanding of his function during construction. Part III of the treatise analyzes laws relating to land. As noted by Professor Sweet, the development of a concept for a building project requires an awareness in the designer of legal limitations upon the use of land. Therefore, the nature of ownership, the meanings of such doctrines as adverse possession and

eminent domain, and the varieties of land use planning are, among other subjects, of direct interest to the practicing design professional.

The legal problems associated with the construction process are discussed in Part IV. During both the preparation of the construction contract and the course of construction, the architect or engineer is under the most pressure to become involved in legal questions. Correspondingly, the average design professional is the least equipped to find his way in this area. In the development of the construction contract, the type and nature of insurance and surety bonds must be determined. A change procedure must be provided in the contract and appropriate provision must be made for the amount and manner in which the contractor is to be compensated for extra work. The construction contract must not only protect the contractor's right to appropriate compensation but also assure the owner of a sound building project. Public contracts have special requirements that may relate to the nature of the specifications or involve such peripheral issues as discrimination in employment and the consequences of refusing to testify before a grand jury. During the construction process, legal questions may arise because of mistakes in a contractor's bid. The construction contract, moreover, requires interpretation, particularly when there is more than one prime contractor. Claims by the contractor for damages arising from alleged delay on the part of the owner or design professional, and claims by the owner for damages against the contractor for his delay are common occurrences. Professor Sweet's treatise explores all of these problems and incorporates illustrative court decisions.

Perhaps distinct in the practice of architecture and engineering, the design professional acts not only as the agent for the owner but also as an arbiter between owner and contractor with respect to the performance of the contractor. He interprets the contract documents, grants extensions of time to perform, issues or withholds certificates of payment, and condemns work for defective material or faulty workmanship. Professor Sweet deals with the legal aspects of this decision-making. He raises the issue of whether such determinations should be made final under the construction contract, and whether the design professional can shed his primary role as the owner's agent and become a neutral and fair judge. Although the treatise does not discuss at length legal decisions granting or withholding immunity to the design professional in his role as an arbiter, it brings this issue to the attention of the reader.

Part V of the book examines certain professional practice

problems, such as the professional liability of architects and engineers, the availability of insurance, the licensing requirements of professional practice, and the property rights of the professional in his design. Professor Sweet points out the reasons for increased litigation involving professionals and the breakdown by judicial decision of many of the older concepts that formed a barrier against broad liability. For example, he documents the demise of the privity rule and the attack on the doctrine that the design professional cannot be liable for injuries arising from hazardous methods of contractors in constructing a project. In this context, Professor Sweet explains the importance of defining and limiting the professional's function in his contract with the owner and of securing appropriate liability insurance. He also reviews the significanee of indemnification provisions contained in the construction contract that can protect the owner and the architect against liability when the primary tortfeasor is the contractor.

In the text of his work, Professor Sweet refers to the standard contracts issued by the American Institute of Architects; these contracts and other documents are reproduced in the appendix. These forms are useful and significant tools, but they should not be used by rote. Rather, they should be carefully adapted to particular projects. These forms have been subject to modification over the years, many of the forms reproduced in this treatise are no longer current because they were modified in 1970.

Professor Sweet's treatise fills a need and a void. Published materials on this subject have not been oriented to classroom use. Each of the book's chapters not only dicusses a legal aspect in the practice of architects and engineers, but also contains review questions, questions for class discussion, and problems for consideration and resolution. Architecture and engineering schools should find this book a valuable tool. Its value, however, is not limited to the student—the active design professional and his legal counsel also should find it of significant assistance.

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