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Book Reviews

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BOOK REVIEWS

COGITATIONS ON TORTS. By Warren A. Seavey.[1] Lincoln: University of Nebraska Press, 1954. Pp. 72. $2.00

SELECTED TOPICS ON THE LAW OF TORTS. By William L. Prosser.[2] Ann Arbor: University of Michigan Press, 1953. Pp. xi, 627.

When the nation's leading authority in a particular field of the law publishes a group of essays, those who work in the field have occasion to congratulate themselves. Recently, each of the two leading authorities in the field of Torts published such a collection. Both collections were prepared as units of distinguished lecture series named after two of the giants of American law—Dean Prosser's essays comprising the fourth series of Thomas M. Cooley Lectures at Michigan, and Professor Seavey's essays comprising the third series of Roscoe Pound Lectures at Nebraska. They are related in the additional respect that Prosser dedicates his book to Seavey.

The two books are quite dissimilar. Seavey's *Cogitations* is composed of three lectures which are knit together as a unit depicting the whole law of Torts—its nature, origin, development and future. Naturally the treatment must be broad and generalized, presenting a bird's-eye view and providing only occasional and limited citation. Prosser's *Selected Topics* is composed of five lectures which give intensive and thorough treatment to particular subjects, together with two articles previously published in law reviews.[3] The several articles are unrelated and make no pretense of giving a general picture of the whole field of Torts, but the citations are quite complete, almost exhaustive.

Mr. Seavey "cogitates" first on the nature of Torts and produces some comments which every teacher addicted to the subject will second. "Although a hundred years ago it did not have a name and although it otherwise was so dimly perceived that in 1870 Holmes thought it not a worthy subject for law school instruction, Torts is in fact the gateway to the law. To the understanding heart it is the most fascinating of subjects. . . . With criminal law and constitutional law, which protect our freedoms, it shares the dubious distinction of having great uncertainty as to the conclusions to be reached in particular cases, since it is difficult to give proper weight to the com-

1. Bussey Professor of Law, Harvard Law School.
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3. Three of the five lectures were published in *The Michigan Law Review* after they were delivered but before the group came out in book form: *Comparative Negligence*, 51 MICH. L. REV. 465 (1953); *Interstate Publications*, *id.* 959; *Palsgraf Revisited*, 52 *id.* 1 (1953).

peting interests and it is frequently impossible to do more than guess the facts. As with those subjects, it must be flexible to respond to the fast-moving changes in our ideas and economy. Like them, it has little need for technicalities and great need for wisdom. . . . The basic theories of Torts . . . permeate every branch of our jurisprudence. . . . Thus the subject is important, not alone to lawyers who specialize in personal injury or defamation practice, but equally so to attorneys for banks, landowners, manufacturers, and all other persons engaged in any form of business. Its rules are applicable to every act and phase of life. Their correspondence to our ideals of practice and to economic needs is of overwhelming importance to our national welfare." (Pp. 2-5)

Fourteen pages are needed to give a thumbnail sketch of the historical development of the law of Torts from the Anglo-Saxon "theft bote" to the recent decisions permitting recovery for injury to an unborn infant. A whole lecture is devoted to "refinements." Here "a more minute examination" is given to the field of negligence. Its nature is analyzed and the component parts are treated in some detail. As we know, Mr. Seavey explains both negligent conduct and the scope of liability in terms of the concept of "risk." Negligence is "conduct creating unreasonable risk of unintended harm to another for which there is liability, if the harm is suffered." (P. 26.) The actor "is liable if, but only if, the harm was within the risk created by his conduct to a person within the circle of danger. . . . In other words, in most cases, the reason for making a person liable for negligence gives the limits of liability." (P. 32.) A lesser treatment is given also to misrepresentation and defamation.

In the final lecture, Mr. Seavey sets forth his "relatively few complaints" with the present state of the law. I list some of them. In the field of Negligence, he finds that the courts have developed unjust rules regarding joint tortfeasors and contributory negligence. Release of one tortfeasor should not automatically release another if this was not intended; an amount paid by a supposed tortfeasor should be deducted from the damages due to the plaintiff from an actual tortfeasor even though the payor is found not to be liable; contribution should be allowed between tortfeasors. Contributory negligence should mitigate damages, not bar recovery. In the field of defamation, the distinction between libel and slander should be reconsidered, strict liability for "statements which have unknown defamatory connotations" is not warranted, and injunctive relief should be granted against personal defamation. In the field of misrepresentation, recovery should be allowed "in every case of a negligent misstatement when the speaker had reason to know that the person would rely upon it and when the hearer did rely." Mr. Seavey prefaces his list of needed modifica-

tions with a strong tribute to common law judges, and his faith in the growth and development of the common law is such that he believes that his suggested changes can better be made by the courts than by the legislature. Judicial changes in the law are not justified in fields where they would materially affect prior transactions. "But in the law of Torts predictability is chiefly important to prevent unnecessary litigation. Assuming that one has been at fault and has caused harm to another, he comes within the general tort principle which would impose liability upon him, and he is in no position to complain that he should not pay for the harm merely because of a prior decision on similar facts that no cause of action existed." (P. 67.)

I found *Cogitations* most interesting on the first reading, and I was surprised at how many stimulating ideas it provoked when I read it again for this review. I recommend that any teacher of Torts read it twice. And practitioners and students will find it worthwhile too.

Of Dean Prosser's seven "Selected Topics," four are on some aspect of negligence—res ipsa loquitur, proximate cause, contributory negligence, and landowner's liability to business guests. One is on defamation (interstate publication), one is on strict liability and one is on the "Borderland of Tort and Contract." They all make good articles—written in the familiar Prosser style—sprightly, interesting and meaty. They are of course not all equally good, and one or two of them, while most Torts authorities would be proud to have written them, do not quite come up to the Prosser standard. These leave the feeling that he was himself disappointed in them, having picked the subject with the anticipation of being able to make a substantial contribution but finding it necessary to be content with something less.

Two topics were not lectures but were articles published in law reviews sometimes earlier. The article on business guests appeared in 1942 and is generally recognized as the leading treatment of the subject.[4] The one on res ipsa loquitur appeared in 1949.[5] I do not know whether it yet is accorded by general consensus the position of leading article on the subject, but I do know that in my opinion it occupies this position. I am delighted that it is published in this collection and thus made more easily available.

Both Seavey and Prosser agree on the undesirability of the common-law rule that contributory negligence completely bars recovery. Dean Prosser devotes one article to "comparative negligence." He discusses the exceptions to the common-law rule and treats at some length the various statutes which have modified it and the problems which they raise, and he concludes the article with a draft of a model

4. *Business Visitors and Invitees*, 25 MINN. L. REV. 573 (1942), also in 20 CAN. B. REV. 446 (1943).
5. *Res Ipsa Loquitur in California*, 37 CALIF. L. REV. 183 (1949).

statute of two sections.[6] I think that the statute is an excellent one and have no criticism of the second section, but I think the first section would be improved by a slight revision. It is a little wordy, and it makes the mistake of referring expressly and solely to the doctrine of last clear chance, though there are, at least in some jurisdictions, other exceptions to the contributory negligence rule. Does the following seem slightly better? "In all actions hereafter accruing for negligence, including wrongful death and other statutory actions, contributory negligence, whether heretofore constituting a defense or not, shall not bar recovery but shall have the effect of diminishing damages in proportion to the amount of such contributory negligence."

The article on interstate defamation tackles a problem which is incapable of satisfactory solution, a fact which Dean Prosser quite adequately demonstrates.[7] He finds it necessary to recommend that we cut the Gordian knot by having Congress to adopt a federal act covering the matter.

The article on the borderland of tort and contract investigates a field which has been largely neglected by writers. It was a very useful service to provide a topographical map for this piece of terrain. The contour lines are a little vague here and there, but attorney and teacher alike will venture into the area with much more confidence now that they have a suitable map to guide them.

Many readers will regard the article on the duty--proximate-cause issue as the best one of the group. Appropriately entitled "Palsgraf Revisited," it starts with a study of that case and warns that the article will be an "expression of difficulties, uncertainties and doubts, arriving at no very difficult conclusion." (P. 192.) Mr. Prosser then proceeds to vindicate his warning. He demonstrates that "Duty is only a word with which we state our conclusion that there is or is not to be liability; it necessarily begs the question," and serves a useful purpose only "in directing attention to the obligation to be imposed upon the defendant, rather than the causal sequence of events" (Pp.

6. "1. In all actions hereafter accruing for negligence resulting in personal injury or wrongful death or injury to property, including those in which the defendant has had the last clear chance to avoid the injury, the contributory negligence of the person injured, or of the deceased, or of the owner of the property, or of the person having control over the property, shall not bar a recovery, but the damages awarded shall be diminished in proportion to the amount of negligence attributable to the injured person or to the deceased or to the owner of the property or to the person having control over the property.

"2. In any action to which section 1 of this act applies, the court shall make findings of fact or the jury shall return a special verdict which shall state:

(a) the amount of the damages which would have been recoverable if there had been no contributory negligence; and

(b) the extent to which such damages are diminished by reason of such contributory negligence." Pp. 68-69.

7. He summarizes: "It seems safe to say that nowhere is there a state of confusion to compare with this. If one went shopping for law in Bedlam, this is what he might expect to buy." P. 122.

213-14.) The concept of scope of the "risk" as applied either to the consequences or to the plaintiff, he finds, affords only "an illusion of certainty" (P. 220) and "is as vague, as empty, as unworkable and as unsatisfactory an explanation of what is actually in the cases, as even the physical mechanics of Beale" (P. 228); and the broadening of the risk concept to include "normal consequences" "seems in part at least to abandon the original reasoning and adds nothing in the way of definiteness." (P. 221.) The test of "direct causation" is just "as barren"; it merely comes "closer to recognition of the difficulties of the problem and the many factors that may bear on it." (P. 232.)

The conclusion? "If there is any middle ground between the restricted scope of the original risk on the one hand, and the extreme lengths to which even direct causation may be carried on the other, it must lie in some reasonably close connection between the harm threatened and the harm done." (P. 233, cf. p. 242.) This is not a rule or a formula; it "is at most an approach." (Pp. 234, 242.)

I find no difficulty in agreeing with what Dean Prosser has to say. It seems to me, indeed, that he is in some measure setting up straw men to knock them down. Few would contend that the risk concept affords any real assurance of certainty.[8] The hazard created by a particular act may be defined almost as broadly or as narrowly as one wishes—it is often a matter of wording, just as the expression of what actually happened is often a matter of wording.[9] But the idea of the risk is still helpful. It is a useful "approach," and it is nonetheless an approach when it is broadened to include "normal consequences." There is little difference in speaking of the risk involved and its normal consequences, or of the purpose of the rule violated by the actor (the reason why his conduct was negligent), or of a "reason-

8. Even Mr. Seavey, the leading exponent of the risk concept, says: "It is quite true that even this does not always give a definite result; there are still many doubtful cases. But except in the abnormal and seldom recurring situations it is possible to predict with some degree of accuracy the limits of liability. In any event, this method of appraisal appears to be an advance over the older phrases which seem to me to be completely meaningless." COGITATIONS, p. 34.

9. The most famous example is the Texas peg-leg case, Hines v. Morrow, 236 S. W. 183 (Tex. Civ. App. 1921). Clarence Morris described the case as follows. "[P]laintiff was one of two men sent out on a service truck to tow a stalled car. The plaintiff made the tow rope fast and attempted to step out from between the vehicles as the truck started. His artificial leg slipped into a mud hole which had resulted from the defendant-railroad's disregard of its statutory duty to maintain this portion of the highway. The plaintiff was unable to extricate his pegleg and was in danger of being run over by the car. He grabbed the tail gate of the truck to use its force to pull him loose. A loop in the tow rope lassoed his good leg and it was broken. As long as these details are considered significant facts of the case, the accident is unforseeable. . . . But . . . the court quoted with approval the plaintiff's lawyer's description of the 'facts' which was couched in these words: 'The case stated in briefest form, is simply this: Appellee was on the highway, using it in a normal manner, and slipped into this hole, created by appellant's negligence, and was injured in attempting to extricate himself.'" MORRIS, STUDIES IN TORTS 254-55 (1954). The case is referred to by Prosser at p. 220.

ably close connection between the harm threatened and the harm done" (P. 233.) Risk, hazard, harm threatened—do they express different ideas? As many commentators have indicated already, the problem of the limits of liability may be considered in terms of the duty element, the negligence element or the causation element. Most of the courts speak of it in terms of cause, though there is general agreement that it is a policy decision, quite different from the determination of factual cause. I myself would agree with Dean Prosser's present view that it is better treated here, if, for no other reason, than that decisions in terms of duty are more likely to be doctrinaire and arbitrary, less likely to allow recognized consideration of the policy aspects involved.

I like, too, the suggestion that it be phrased in terms of a reasonably close connection between the risk involved and the damage suffered. This is not a rule capable of being applied automatically. It is a standard, expressed as a standard[10]—similar to "what a reasonable prudent man would do under the same or similar circumstances" in tort law, or "fair return on fair value" in public utility law or "due process of law" in constitutional law or "fair competition" in trade regulation. It involves administrative discretion and permits individualized application to the particular case without having to express a rule to take care of it—a rule with language in it which may cause difficulty in a case somewhat similar. In practice this standard is more freely administered by the court (as distinguished from the jury) than the prudent-man test for negligence is.[11] For this reason more emphasis is placed on prior holdings and certain applications of the standard are likely to become crystalized. But these crystalized applications should not be transformed to a detailed set of rules which apply as rules to other types of situations by

10. Standards are "legally defined measures of conduct, to be applied by or under the direction of tribunals. . . . In framing standards the law seeks neither to generalize by eliminating the circumstances nor to particularize by including them; instead the law seeks to formulate the general expectation of society as to how individuals will act in the course of their undertakings, and thus to guide the common sense or expert intuition of jury or commission when called on to judge of particular conduct under particular circumstances. . . . [A] common idea of reasonableness or fairness runs through them all, and in consequence they must have a valuable application with time, place and circumstances. Moreover most of them contain a large moral element and so application of them calls for common sense or the average moral judgment rather than for deductive logic." Pound, *Administrative Application of Legal Standards*, 44 AM. B. ASS'N REP. 445, 456-57 (1919); see also Pound, *Hierarchy of Sources and Forms in Different Systems of Law*, 7 TULANE L. REV. 475, 485 (1933).

11. The test of whether the court should take the negligence standard from the hands of the jury is itself a standard—whether a reasonable jury could reasonably have found negligence. This is often not the test for determining whether the court will take the issue of proximate cause out of the hands of the jury. Sometimes it is said that the issue of legal cause, as distinguished from cause in fact, is always for the court; but it is often left to the jury with varying types of confusing instructions.

analogy; the discretion involved in applying the standard should be exercised in any new situation. A standard expressed like this can be more easily handled by either court or jury than the usual alternative of a group of contradictory rules, and it describes what is actually being done to a surprisingly accurate degree.[12]

Of course, it fails to provide certainty of prediction in an individual case. That is not what a standard is for. Perhaps it *is* merely "an approach." But the standard of a reasonable prudent man in determining negligence has never been anything more. Justice Holmes once inveighed against the uncertainty which it created and sought to reduce it to a set of definite rules; but he failed in his objective and courts and commentators alike agree now that the standard is better. A difference between the two situations lies in the fact that the negligence standard is applied usually by the jury while the one on extent of liability is often applied by the courts. This accentuates the natural tendency to rely on previous applications to particular fact situations and sometimes serves to turn particular applications into crystalized rules. This last tendency has produced much of our difficulty. It should not be permitted to reach the point where the "rule" obscures and supplants the standard from which it derives. After all, an experienced court should be better able to exercise the administrative discretion involved than an inexperienced jury, and it should not find itself incapable of acting without a specific rule to set out the exact result. Perhaps the very experience produces the difficulty. But other standards are handled by the court adequately and properly, without breaking them down into a mass of rules.

It would seem that a recognition of the technique of using a standard in solving the problem of extent of liability will do much to eliminate the overemphasis which has been given to the problem by courts and teachers alike. We do not then look for prediction with certainty and we are not as much concerned with reconciling a series of fact applications.[13]

12. Dean Prosser concludes his article with the declaration that "the old words 'proximate' and 'remote' . . . convey [the idea] of some reasonable connection between the original negligence and its consequences, between the harm threatened and the harm done." (P. 242). Perhaps they do, but they are apt to convey a number of other ideas, too. I think that speaking of a reasonable connection between the risk and the injury makes the "approach to the problem" a little more meaningful and lets either court or jury understand somewhat more clearly what it is trying to decide. Posing the problem in terms of a standard, making it apparent that discretion is being exercised, increases the likelihood that it will be wisely exercized, with due consideration for the various policies involved. The term "proximate cause" seems more likely to produce an attempt to reach a result through deductive reasoning when the decision is not one which logic alone can determine. Judge Edgerton's test of "justly attachable cause" is phrased in terms of a standard, but it provides less of a guide than the reasonable-connection test. Edgerton, *Legal Cause*, 72 U. PA. L. REV. 211 & 343 (1924).

13. There is, of course, a good deal more to be said on the subject of

Dean Prosser's remaining article is entitled, "The Principle of *Rylands v. Fletcher.*" This suggests a rather dry and unstimulating rehash of the facts and holding in that case, and I left this chapter till the last in going through the book. But the reading changed my opinion entirely. This is by far, I think, the best and most valuable article in the collection. It accomplishes what the model law review article should do, in providing an analysis of groups of cases in such a way as to present a new and constructive principle which can prove extremely helpful to courts, attorneys and teachers in handling cases in the future.

The article starts with a treatment of *Rylands* and the English cases following it, and concludes that they produce the rule that "the defendant will be liable when he damages another by a thing or activity inappropriate to the place where it is maintained, in the light of the character of that place and its surroundings." (P. 147.) (This is the development of Lord Cairn's concept of the "non-natural use," as expressed in his opinion in the House of Lords.) The article then discusses the American cases, showing that a majority of the jurisdiction follow *Rylands,* despite the frequent statements to the contrary. The wild-animal cases, the blasting and other ultrahazardous-activity cases and the absolute-nuisance cases, when properly considered, demonstrate "that the same courts which purport to reject the English principle have in fact applied it under another name, and that under that name the doctrine is universally applied in the United States. There is in fact no case applying *Rylands v. Fletcher* which is not reasonably duplicated in all essential respects by some American decision which proceeds on the theory of nuisance." (P. 170).

Under the broad principle which derives from all of the cases, liability is imposed upon a defendant who maintains a "condition or activity which involves an unreasonable risk of harm to persons or property in its vicinity." As in negligence cases, the unreasonableness of the risk is determined by balancing the magnitude of the risk (probability and gravity of the harm threatened) against "the utility of the defendant's conduct, both to the defendant himself and to the community."[14] But there are two differences from the negligence cases: (1) the decision as to unreasonableness is made by the court,

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proximate cause. Much of it is said by Dean Prosser himself in another recent article, *Proximate Cause in California,* 28 CALIF. L. REV. 369 (1950). With its factual grouping, it provides some very helpful analysis. I am sorry that it was not reprinted in the book, too. There are some inconsistencies between it an "Palsgraf Revisited," but we should all be permitted some inconsistencies when considering the subject of proximate cause.

14. Dean Prosser adds here that if the risk is unreasonable, it need not be extreme. "The Restatement's limitation of the principle to 'ultrahazardous activities' appears to be definitely too narrow, unless 'ultrahazardous' is to be defined in some other sense than that of extreme danger which we cannot eliminate." (P. 185)

not the jury; and (2) the "risk must result from the defendant's intentional conduct, and he must be aware of it." Finally, the condition or activity must be "an extraordinary, abnormal, excessive or 'non-natural' one foreign to most of the community"; it must be "inappropriate to its location." (Pp. 185-87).

My abstract of the article may give you the essential idea but almost certainly fails to carry the conviction which a reading of the whole article will produce. If you pick out only one of Mr. Prosser's "Selected Topics" to read, this is the one. If all of the appellate courts would read it, a large portion of the field of Torts would rapidly begin to take on a more sensible order. It is unfortunate that this chapter was not previously published in a law review and thus may not receive the dissemination it deserves. It is too bad, also, that the article does not have a more enticing title. Can someone think of a better name for the broad principle summarized in the preceding paragraph than the "Principle of *Rylands v. Fletcher*"?

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