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Book Reviews

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The Law Of Maritime Personal Injuries. By Martin J. Norris. New York. Baker, Voorhis & Co., Inc., 1959. Pp. xliii, 553; with appendix and index. $17.50.

The subtitle of this book is "Affecting Harbor Workers, Passengers and Visitors," a qualification which is extremely important to an understanding of its organization and content. In THE LAW OF SEAMEN (2 vols. 1951), the same author discussed fully the legal rights of the seagoing man, both in contract and in tort. Recovery for personal injuries was covered in separate chapters on maintenance and cure, unseaworthiness, and the Jones Act. The present volume, a sequel to the earlier text, covers the maritime rights of the non-seagoing person (a somewhat incongruous statement, which nevertheless accurately reflects the law today).

Only forty pages of the present volume are devoted to "Passengers and Visitors," so for all practical purposes this is a treatise on harbor workers under the maritime law. By far the most prolific producer of waterfront litigation is the longshoreman. Numerically at least, shipyard workers comprise the next most important group, although the Supreme Court has imposed some limits upon their rights of recovery.[1] Also included are ship ceilers, ship cleaners, and others who service vessels while in port.

Had it not been for *Seas Shipping Co., Inc. v. Sieracki,*[2] this volume would never have been necessary. It seems incredible that in thirteen years one decision could have given rise to a 553-page book, but that is the fact. *Sieracki* held that a longshoreman was entitled to recover from a ship for unseaworthiness causing him injury, a species of liability without fault. Other categories of harbor workers (with some limitations as to shipyard workers) were blanketed-in later on the tenuous theory[3] that they were all doing a seaman's work. Failing to recover, these workers can still get benefits under the Longshoremen's and Harbor Workers' Compensation Act. Consequently the shoreside worker now has more and greater rights than does the seaman, for whose protection this branch of the maritime

[1] West v. United States, 361 U.S. 118 (1959).
[2] 328 U.S. 85 (1946).
[3] See Tetreault, *Seamen, Seaworthiness, and The Rights of Harbor Workers,* 39 Corn. L. Q. 381 (1954).

law was developed. This is a topsy-turvy result, which might be described as "two if by land, one if by sea," except that the harbor worker actually has *four* separate and distinct remedies.[4]

Whether the harbor worker himself will benefit from *Sieracki* in the long run is problematical. The long delays, great expense, and lump-sum recoveries incident to this type of litigation are all antithetical to the carefully considered philosophy of the Longshoreman's Act. In addition *Sieracki* has promoted claim consciousness, unemployment *pendente lite,* and an appalling amount of perjury.

Whatever may be said for the client, *Sieracki* has been a bonanza for his attorney. Even counsel for underwriters (of whom this reviewer is one) have not been heard to complain about the large amount of business thus brought their way. Lawyers from both sides of the trial table who fifteen years ago did not know "port" from "starboard" now walk with a rolling gait and talk like characters out of Joseph Conrad.

From the standpoint of the text under the significance of this situation is that the book is badly needed in port cities by trial counsel in general practice as well as by proctors in admiralty. It is a unique contribution to this rapidly expanding field. By comparison, the most recent general treatise on admiralty (GILMORE AND BLACK, THE LAW OF ADMIRALTY (1957)), covers in 146 pages the rights of both seamen and harbor workers, a subject to which Norris has devoted three volumes.

Above all, the present treatise is an excellent review of all the leading Supreme Court cases, virtually all the pertinent decisions of the Courts of Appeals (particularly the Second, Third, Fourth, and Ninth Circuits), and many important District Court cases, including a number from the District of Maryland. As an encyclopedia of the law as it existed in early 1959 the book is defective only in having a rather mediocre index. However, there is a valuable bonus in the 54 page appendix classfying the cases according to the nature of the accident involved.

Despite the vast amount of recent case law in this field, numerous important facets of the subject have not as yet been fully developed by the courts. However, the author, taking the encyclopedic approach, makes little attempt to

[4] Judge Thomsen enumerated them in Blankenship v. Ellerman's Wilson Line, New York, Inc., 159 F. Supp. 479, 483 (D.C. Md. 1958), rev'd on other grounds, 265 F. 2d 455 (4th Cir. 1959), and added, "Longshoremen and harbor workers have already been given a greater variety of rights and choice of remedies than any other group of workers on land or sea."

fill in the interstices with original research, or discussion of how the law will or should develop. GILMORE AND BLACK, and the older text by ROBINSON, (HANDBOOK OF ADMIRALTY LAW IN THE UNITED STATES (1939)) are somewhat superior in this respect.

Consider an example. The almost uniform practice of ship owners who have been sued by harbor workers is to implead the plaintiff's employer under the 56th ADMIRALTY RULE or FEDERAL RULE 14, as the case may be. The owner thereby attempts to pass on to the employer any liability which he may have to the harbor worker. Of course, to the extent that he is successful in securing such indemnity, the provision of the Longshoremen's Act that the employer's liability thereunder shall be "exclusive"[5] is circumvented. Nevertheless, this has received the blessing of the Supreme Court.[6]

The Court has developed a theory that the indemnity claim is actually not a claim for tort but for breach of a contract by the employer company to perform its work satisfactorily. In many cases which are successfully prosecuted by harbor workers, there is some evidence of fault on the part of both owner and employer. This has given rise to a great deal of litigation involving the delineation of the circumstances under which the owner should be precluded by reason of his own fault from securing indemnity. The basic principle, as enunciated by the Supreme Court,[7] is simply that the ship owner may recover over, "absent conduct on its part sufficient to preclude recovery." The limits of this rule are anything but clear at the moment. Norris merely states the problem and reviews the cases. A somewhat better discussion of this particular subject is contained in Kolius and Cecil, *Indemnity Suits by Vessel Owner Against Stevedoring Contractor: A Search For the Limits of The Ryan Doctrine*, 27 Insurance Counsel Journal 282 (1960).

Take another example. The seaworthy ship or appliance which is warranted to the seaman and the harbor worker is a vessel which is "reasonably suitable for her intended service."[8] Once it is determined that reasonable fitness does not exist, the warranty is absolute. However, the injection of the element of reasonableness shows clearly that

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[5] 33 U.S.C.A. (1927) § 905.

[6] Ryan Stevedoring Company, Inc. v. Pan-Atlantic Steamship Corp., 350 U.S. 124 (1956).

[7] Weyerhaeuser Steamship Co. v. Nacirema Operating Co., Inc., 355 U.S. 563, 567 (1958).

[8] Mitchell v. Trawler Racer, Inc., 361 U.S. 808 (1960).

the owner is not a guarantor or insurer of the safety of those on board, a principle which has been recognized by the Supreme Court and other courts in general statements to the effect that the owner is not obligated to furnish "an accident-free ship."[9] What, then, does "reasonably suitable" mean? The courts have had comparatively little to say on this fundamental question. Unfortunately the present volume does not develop the subject.

One of the possible lines in which this part of the law might develop was suggested by then United States District Judge Bailey Aldrich of Massachusetts in a humorous speech before the Maritime Law Association several years ago. Speaking on "The Training of an Admiralty Judge" he said in part:

> "A Judge's job is even easier than that. All he has to learn, as you know, is to send every seaman's case to the jury; and in straight admiralty cases, when in doubt, to divide the damages, and probably neither side will be sore enough to appeal.
>
> To digress for a moment, in connection with this matter of always sending a seaman's case to the jury, there was a time when I thought that somewhere there might be an exception. Suppose the plaintiff was so grossly contributorily negligent, and the ship so free of negligence, that it must be said that the injury was due solely to plaintiff's own fault. Naturally, I figured a majority of the Supreme Court would find an answer to this, but it troubled me for a while to think what it could be. The inspiration finally came, and I stated it in a footnote to an opinion last spring. If a seaman is as negligent as all that, manifestly it makes the ship unseaworthy to have him aboard. Nor, in this happy situation, would contributory negligence of the seaman reduce damages, for the greater his negligence, the more was the ship unseaworthy. It's very simple, once you think of it."

Well, stranger doctrines than this have found their way into the Supreme Court Reports. Take, for example, the post-*Sieracki* decision in *Alaska Steamship Co., Inc., v. Petterson.*[10] There a longshoreman was permitted to recover from a shipowner for breach of the warranty of seaworthiness (without negligence) because of the failure of a block belonging to the stevedores, brought aboard by the

[9] *Ibid.*
[10] 347 U.S. 396 (1954).

stevedores, and used exclusively in the stevedores' operations in a part of the ship over which the stevedores had exclusive control for cargo-handling purposes. It is not surprising that juries are sometimes incredulous when charged that this is the law.

The doctrines with which this book is concerned seem strange to this reviewer,[11] not just because they are new, not just because they favor libellants rather than respondents, but because they are so far removed from the realities of maritime operations and so much at variance with traditional admiralty principles. The most confusing elements which have been injected into the general maritime law in the last forty years are the result not of having "liberal" judges or "conservative" judges on the Court, but of having judges unfamiliar with both maritime operations and admiralty principles. The present volume is an example of the large amount of ink which has been spilt as a consequence.

DAVID R. OWEN*

Professional Negligence. Edited by Thomas G. Roady, Jr., and William R. Anderson. Nashville. Vanderbilt University Press, 1960. Pp. 321, with index. $10.00.

This is not just another book on negligence. It is a series of specialized studies, largely by law professors, on negligence in the "learned professions." It includes within its purview doctors, lawyers, pharmacists, architects and engineers, school teachers, abstracters, public accountants, and concludes with undertakers, insurance agents, and artisans and tradesmen. Approximately one-half of the book is devoted to medical malpractice.

The chapter on the care required of medical practitioners is a most rewarding and concise study of the subject. The author has reduced generalizations to a minimum, emphasizing specific problems such as the missing sponge, the alleged warranty of recovery (growing in vogue), the scope of *res ipsa loquitur*, the use of x-rays, admissibility of text books, expert testimony, operations beyond the scope of the original undertaking, experimental techniques, the obligation of the general practitioner to refer patients to the specialist, informed consent, and other problems, all covered with a wealth of citations. In fact, the chapter

[11] And to much better qualified commentators, as well. See, for example, Chief Justice Stone's blistering dissent in Sieracki, 328 U.S. 85, 103.

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is also virtually an encyclopedia of innumerable articles in medical journals, law reviews, and text books.

This rather dour remark opens the chapter on the liability of hospitals:

> "Throughout the common law world . . . our generation has been witness to an unmistakable . . . trend of increasingly disassociating the administration of accident law from the philosophy of individual fault in favor of the collectivist principle of loss distribution, as evidenced in the movement towards stricter liability in litigation areas with a background of liability insurance. . . ."

Generally, it has been well established that since staff members are not subject to detailed control in the conduct of their professional duties (as distinguished from their administrative duties) by the hospital, there exists no master-servant relationship between them; and therefore the hospital is not liable for the negligence of its staff in professional matters. This theory of non-liability is being supplanted by: (1) a disregard of the conventional approach that staff members must be subject to detailed control of the hospital, in favor of the approach that the staff is part of the hospital organization under the control of the hospital and the hospital is liable for its acts; (2) the concept that the hospital by receiving the patient for treatment undertakes a duty of care to the patient; and (3) a somewhat strained extension of administrative duties to include professional duties. All of which is a far cry from the old theory that hospitals were facilities where patients could meet professional men for the purposes of treatment.

Prepared by the Legal Division of the American Medical Association, the chapter on malpractice insurance might well become required reading by physicians. As there is little case law on the subject, the Legal Division prepared a questionnaire based upon actual claims. This questionnaire was forwarded to thirty-five insurance companies writing malpractice insurance, requesting an opinion whether or not these claims were within the coverage of the policies issued by the companies. The questionnaire was answered by twenty-two companies. The results disclosed that coverage may be denied in four general classes of cases: (1) operative procedures, such as abortions, which are criminal violations in the jurisdiction where performed; (2) undue familiarity during a physical ex-

amination; (3) warranties that an operation or procedure will be successful; and (4) technical assault, such as performance of an operation different from or beyond the scope of the original operation. In most of these cases, the majority of companies would defend under a reservation of right, reserving the right to refuse payment of a judgment. It is interesting to note that this survey showed that by and large the physicians of reputable standing in a community are the ones generally involved in malpractice actions. In conclusion, this cogent observation is made:

> "The responses indicate that the malpractice insurance protection which the physician purchases is determined not only by the policy provisions but to a large extent by the underwriting philosophy of the company."

The chapter on modern trial techniques in malpractice suits, by eminent California counsel, may represent techniques in California, but not in Maryland. It advises ". . . that patient's counsel carefully and thoroughly condition the jurors' minds from the very onset to a psychological acceptance of this type of litigation . . ." by "intensely" questioning the jurors on their *voir dire* ". . . so that eventually even the judge will join with you in questioning the jurors as to their state of mind upon these subjects, so that by the time your jury is empaneled, each and every one of them has been thoroughly indoctrinated with the truisms of which you speak. . . ." It is believed that Maryland judges would take a rather dim view of this approach, while defense counsel would suffer contempt of court, apoplexy, or worse.

A study of the endless struggle to maintain discipline in school children provides the main substance for the chapter on the tort liability of teachers. At common law the right to discipline was derived from the fact that the teacher was in *loco parentis;* today it flows from the fact that the will of the parent cannot defeat the policy of the State in the maintenance of public schools. If the teacher is charged with the use of excessive force, the issue immediately arises whether or not the teacher has gone too far and abused the privilege. In this situation the teacher stands alone since the school authorities have the immunity of their sovereign body; this also occurs when a teacher is charged with negligence. In some states

these problems have been solved by insurance coverage or by private indemnity for loss incurred by a teacher. Significantly, the great majority of reported cases have come from those states carrying private insurance coverage.

The chapters on pharmacists and on architects and engineers follow each other and are in marked contrast. The pharmacist's duty runs for the benefit of third persons, while that of the architect or engineer does not, a lack of privity of contract between the third person and the architect or engineer being a defense. As a result, much of the chapter on architects and engineers is concerned with the problem of privity of contract. The chapter on pharmacists, by contrast, begins with a history of pharmacy when the pharmacist ". . . was both physician and pharmacist, just as the surgeon and the barber were still one." It reflects what is believed to be the Maryland law, citing cases long familiar to the Maryland lawyer.

While medical malpractice is at present the most flourishing source of malpractice litigation,[1] lawyers were among the first to be held liable for their negligence. Unlike medical malpractice litigation, legal malpractice litigation has decreased over the years. The attorney's liability for negligence arises out of the attorney-client relationship, which is created by contract; but the action against the attorney may be either *ex delicto* or *ex contractu*, there being an implied contractual duty on the part of the attorney to use due care. The chapter is well documented, with special reference to law review articles.

Where the injury is to persons, as distinguished from injury to property, the courts, following *MacPherson v. Buick Motor Co.*,[2] have granted a right of action to third persons injured by the negligence of another. But, in commercial transactions the courts have refused to follow *MacPherson v. Buick Motor Co.*, and have denied a right of action to third persons who have suffered an economic injury because they have been unable to find any duty to a party not privy to the transaction. The doctrine of privity of contract has bedeviled diverse, and seemingly separate, fields of law, as evidenced by the various discussions in this volume; but in no field of law has it come under more serious attack and scrutiny than in the law of accountants. The strained and tortuous modifications of this doctrine in its application to accountants, from

[1] Estimated at 6000 cases in 1959.
[2] 217 N.Y. 382, 111 N.E. 1050 (1916).

Derry v. Peek[3] through *Glanzer v. Shepard*,[4] the famous *Ultramares* case,[5] up to and including *State St. Trust Co. v. Ernst*,[6] with shifting emphasis from fraud to gross negligence (or gross negligence amounting to fraud), is clearly and concisely set forth with voluminous reference to cases, annotations, and law review articles in the chapter on accountants.

The remaining chapters deal with the liability of abstracters, funeral directors (at times a gruesome subject), insurance agents, and artisans and tradesmen. They add little by way of informative discussion but contain an excellent collection of cases.

G. C. A. ANDERSON*

Mobile Home Parks And Comprehensive Community Planning. By Ernest R. Bartley and Frederick H. Bair, Jr. Vantage Press, Inc., 1960. Pp. 147. $3.00.

The authors have apparently valid credentials for the treatment of their chosen subject. Each has an interest born of personal experience as a mobile home dweller and nurtured by years of professional planning. Mobile homes (the word "trailer" was long ago discarded by the industry as both inexact and odius) are an evident adornment on today's landscape. Their use is increasing, and the authors detail many factors in support of their view that this trend will continue. Planning and regulatory measures, in the opinion of the authors, have woefully failed to keep abreast of this trend; the mobile home resident and the community at large have been the victims of this failing. Planning and regulatory measures have been inadequate and frequently reflect community antipathy to the mobile home and its occupants. It is to the enlightened correction of these failures that the authors devote their work.

The subject is treated from its economic, social, political, and legal implications. The authors conclude that from all of these viewpoints, failures have been costly and unpleasant (a fact apparent to any observing traveler, in the opinion of this reviewer). An intelligent solution to the problems must begin with the planning phase and the

[3] 14 A.C. 337, 58 L. J. Ch. 864 (1888).
[4] 233 N.Y. 236, 135 N.E. 275 (1922).
[5] 255 N.Y. 170, 174 N.E. 441 (1931).
[6] 278 N.Y. 104, 15 N.E. 2d 416 (1938).
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enactment of suitable regulatory measures including zoning, building codes, subdivision regulations, health and sanitation codes. The authors feel quite strongly that the problems must be resolved within the framework of existing regulatory measures and that treatment of the problem through separate regulatory measures would be a serious error. They suggest and discuss workable legislative provisions for dealing with the peculiar features of mobile home living which may be fitted into the framework of existing measures. The book contains many valuable references to sources for further study and the text is supplemented with a valuable model ordinance which may be adapted for local usage.

In the opinion of the authors, good planning in urban areas requires allowance for mobile home parks in areas zoned for multi-family residential use and similarly requires judicious placement of such parks within the zone. In this connection, local readers may be interested to consider the practice followed by the County Commissioners of Howard County, as reported in *Costello v. Seiling*.[1] In urban areas, mobile homes should not be permitted outside of mobile home parks. In rural areas, on the other hand, the individual mobile home should be permitted, but on a basis which will insure its removal and relocation should the area be rezoned to residential. Numerous methods are reviewed for dealing with the existing substandard mobile homes and parks, and for insuring their improvement or eventual amortization. This the authors believe can be accomplished by applying existing and familiar regulatory measures relating to substandard housing.

The authors have treated this subject in an interesting and authoritative manner. No one can seriously doubt their conclusion that failure to deal intelligently with the mobile home and its location has created problems that communities can ill afford. Their facts, discussions, and suggestions can provide helpful insights in achieving solutions to these problems. While certainly of interest to the lawyer in general practice, the book will be of unquestionable value to professional planners and to drafters of regulatory measures.

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[1] 223 Md. 24, 161 A. 2d 824 (1960).

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Reflections With Edmund Burke. By Timothy E. Sheehan. Vantage Press, Inc., New York. 1960. Pp. 288. $5.00.

Woodrow Wilson was insisting sixty years ago that "Burke was right" about the French revolution, and more recently Professor Talmon has demonstrated that the Jacobins were the first totalitarians (THE RISE OF TOTALITARIAN DEMOCRACY (1952)). This makes Burke the first anti-totalitarian ideologue and polemicist, and he remains to this day incomparably the greatest. So it is natural that a world hastening to rehabilitate its moral (so much more vital than its military) defenses against the grimmest totalitarianism of all should turn again to the orator-statesman-philosopher who reflected on the French Revolution 200 years ago.

Former Congressman Sheehan has made this turn and like his fellow seekers has found a trove of political and social wisdom. In this book he offers a kind of concordance of Burke quotations running from "Absurdity," "Accidental Causes," "Accountant," and "Accusers," to "Words," "Worth," "Writers," and "Youth." In the somewhat haphazard and non-categorizing character of the head-words, however, the quality of the book is pretty clearly shown. In brief, if it is the love's labor of an *amateur* of Burke, it is also a somewhat amateurish job.

Mr. Sheehan gives his quotations without page references, so we cannot readily check context or wider relevance. He does not even tell us what edition of Burke he uses, whether the 8-volume Bohn or the 12-volume Little, Brown recommended for British and American readers, respectively, by the Burke scholars at the "Burke Factory" in Sheffield (England), who are bringing out the definite 10-volume edition of the Burke correspondence.

But it is somewhat pointless to criticize a man because he hasn't done something he never intended doing anyway. Within his own design for an unpretentious book of Burke maxims and aphorisms, Mr. Sheehan has done well for the general reader. And he provides at least a jumping-off place for some who may discover a desire to go into the large Burke literature in a more searching way.

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