

Book Review

Follow this and additional works at: <http://digitalcommons.law.umaryland.edu/mlr>

Recommended Citation

Book Review, 46 Md. L. Rev. 886 (1987)

Available at: <http://digitalcommons.law.umaryland.edu/mlr/vol46/iss3/6>

This Book Review is brought to you for free and open access by the Academic Journals at DigitalCommons@UM Carey Law. It has been accepted for inclusion in Maryland Law Review by an authorized administrator of DigitalCommons@UM Carey Law. For more information, please contact smccarty@law.umaryland.edu.

Book Review

THE LAW OF TORTS.

By Fowler V. Harper, Fleming James, Jr., and Oscar S. Gray. Little, Brown and Company, second edition 1986. (Six Volumes \$450.00).

REVIEWED BY FREDERICK DAVIS*

The publication of the second edition of Harper and James' *The Law of Torts* represents a significant milestone both in tort scholarship and in tort law generally. Not only have the resources available to the scholar been vastly enriched, but judges and practitioners will find their opportunities to appraise new and changing developments in the law significantly expanded. Professor Oscar Gray's revisions have brought the treatise fully up to date without in any way sacrificing or compromising the style, charm, or professional depth of the original work.

The original treatise, first published in 1956, consisted of three volumes.¹ The first two contained the basic text and footnotes, and the third volume consisted mainly of tables, authorities, and an index. Professor Gray's revision has expanded the treatise to six volumes. The sixth volume, like the third volume of the original treatise, consists mainly of tables, authorities cited, and an excellent index.

An ideal legal treatise needs to satisfy its diverse and demanding audiences in at least four distinct ways. First, it must be comprehensive in its treatment of the subject, with complete references to the leading decisions, controlling statutes, parallel treatises, and influential secondary authorities that may provide different or more intensive analyses to the subtopics constituting the subject matter of the treatise. Professor Gray has done a remarkably thorough job in ensuring that the revised treatise meets this expectation. All of the

* Professor of Law and Dean, Memphis State University School of Law. A.B. Yale University (1948); J.D. with specialization in international affairs, Cornell University (1953); LL.M. (honours), Victoria University of Wellington, N.Z. (1955). Member, New York, Missouri, and Ohio Bars.

1. F. HARPER & F. JAMES, *THE LAW OF TORTS* (1956). The treatise was hailed as a major contribution to tort law by almost all reviewers. See, e.g., Leflar, Book Review, 32 N.Y.U. L. REV. 1156, 1156 (1956) ("Whatever the word 'classic' means . . . this book will fit the definition.").

traditional topics of tort law are treated with considerable depth. In addition, the original treatise's treatment of the slippery "Social Insurance" issue² which, quite candidly, haunts the tort law landscape, has been masterfully updated to include the many complex and intricate social and legislative changes that have occurred over the past thirty or so years.³ In the last volume, one can find tables of cases, statutes, and authorities (bibliography) as comprehensive and diverse as one could ever hope to find in a treatise. Particularly helpful are the generous references to the *Restatement (Second) of Torts*⁴ found throughout the text of the treatise, and a table that enables the reader easily to identify those sections in the treatise where a particular provision of the Restatement is discussed. In short, not only is the revised treatise a comprehensive and informative source of tort law, but it provides invaluable cross references to other sources and authorities.

A second requirement for a useful legal treatise is that it be fully informative—not a bare recitation of case holdings, but a thoughtful description of the doctrinal resolutions of specific problems. The treatise should consider the cultural and historical traditions of the society whose law it describes, and relate to the expectations rooted in the economic and technological foundations of that society. Again, the original treatise deserved extremely high marks in this category,⁵ and Professor Gray's revision more than matches the achievements of the earlier edition in these respects.

A third requirement is that the treatise identify anomalies, mismatches, and what may be erroneous decisions or questionable as-

2. The "social insurance" dimension of the original work excited both supporters and detractors. Compare Plant, Book Review, 42 MINN. L. REV. 162, 165 (1957) (authors are biased in construing trends in favor of loss distributions on a no-fault basis) with Malone, Book Review, 17 LA. L. REV. 877, 877-79 (1957) (authors present accurate picture of what the law is "becoming") and Probert, Book Review, 8 W. RESERVE L. REV. 546, 547 (1956) ("Actually [the treatise] does not go nearly so far in that direction as legal treatises one day will go.").

3. See F. HARPER, F. JAMES & O. GRAY, 3 LAW OF TORTS *passim* (2d ed. 1986). Proponents of no-fault automobile insurance legislation may conclude that the subject deserved more comprehensive treatment, but this reviewer found the summary, which is made a subtopic of the chapter entitled "The Principle of Social Insurance," see *id.* § 13.8, at 164-72, accurate and fully descriptive.

4. Professor Gray is not shy about disagreeing with the Restatement reporters on significant issues, and marshals persuasive reasons and authorities for such disagreements. See, e.g., *id.* § 14.5, at 229-33 (reviewing the questionable positions of the Restatement on which intervening natural or human actions may relieve the actor of liability when engaging in an abnormally dangerous activity).

5. See, e.g., P. Keeton, Book Review, 45 CALIF. L. REV. 230 (1957); Leflar, Book Review, *supra* note 1; Malone, Book Review, *supra* note 2.

sertions by treatises or courts. These may be unnecessary barriers to a better match between legal doctrine and societal expectations. Again, both the original treatise and the revision abound in such useful contributions. One such contribution that has always intrigued this reviewer and that has, by and large, been ignored by courts and scholars, is the indefensible practice of applying the objective standards of "normal" intelligence, memory, perception, and community knowledge in determining whether certain conduct or omissions constitute contributory negligence although no substantial public interest is advanced.⁶ Jury instructions in many states set forth only one definition of "negligence," thereby subjecting a deserving plaintiff to a standard that logic does not require the plaintiff to meet.⁷ It may well be that the advent of comparative negligence has reduced the seriousness of this problem, but, even so, there may be some injustice in discounting the plaintiff's recovery because he or she is held to an impossibly high standard.⁸ The treatise details these incongruities and anomalies, without diminishing the professional manner with which the treatise covers and describes the applicable law, a remarkable achievement.

Fourth and finally, a treatise must give perspectives to attorneys, judges, teachers, and students, allowing them to obtain a sense of the law's flow. This enables lawyers to construct innovative arguments and rationales necessary to accommodate the peaceful changes, which the law must accept, with the social stability of which the law is a surety. The satisfaction of this requirement may be one of the treatise's best achievements. The late Professor Warren Seavey lightly chided the original authors of the treatise for a number of propositions and perspectives embodying some extrapolations for which legal doctrine, as then perceived, provided little textual support.⁹ In retrospect one can only applaud the vision of the original authors, while noting that Professor Seavey's reservations have not been fully vindicated by history. In any event, Professor Gray has fully preserved this dimension of the treatise, which continues to provide its readers with a feel for the momentum of the law of torts, while slighting neither doctrine nor precedent.

6. See F. HARPER, F. JAMES & O. GRAY, *supra* note 3, § 16.2 at 391-93. *But see* Keeton, *supra* note 5 (arguing that there should not be differential definitions of negligence).

7. See, e.g., MISSOURI APPROVED INSTRUCTIONS 11.02 (2d ed. Supp. 1978).

8. For decisions struggling with this problem and not meeting it with the directness that the Harper, James & Gray treatise offers, see *Snider v. Callahan*, 250 F. Supp. 1022 (W.D. Mo. 1966) and *Lynch v. Rosenthal*, 396 S.W. 2d 272 (Mo. App. 1965).

9. Seavey, Book Review, 66 YALE L.J. 955 (1957).

Professor Gray is to be congratulated for the preservation of what I would call the stylistic coherency of the treatise. So often, revised treatises tend to reflect the divergent styles of both the original authors and revisers, with the result that the treatise assumes the form of a compilation without much internal consistency. Professor Gray's close association with the original authors and his obvious respect and esteem for their work undoubtedly helped him to avoid this pitfall. Yet, given the enormous amount of new material that Professor Gray was bound to incorporate, the preservation of the Harper and James style and "lilt" must surely have placed special requirements on Professor Gray's composition powers—requirements which he satisfied, I might add, with astonishing success.

In reviewing the original treatise almost thirty years ago, Professor Dix Noel made the following comments:

The writing of a full-length treatise on torts is a considerably more complex task today than it was a generation ago and it is not surprising that the authors have found it necessary to devote about thirty years to the preparation of these volumes. The number of court decisions which must be considered is staggering, to say nothing of the constantly growing body of statutory law. It is also essential to be aware of the many new and complicated developments in our economic and social life.¹⁰

As valid as those observations were in 1958, consider the additional force that they would have today, given what amounts to a geometric progression in the development of case law and statutes. In this light, it is difficult to think of an adjective equal to the task of describing the labor of love that Professor Gray has completed. The classical terms "colossal" and "herculean" come to mind, but even these terms cannot capture the extent of the commitment to accuracy and comprehensiveness which this revising author has brought to the treatise. If this reviewer is certain of nothing else, it would be that the original authors would fully approve of the awesome job which Professor Gray has done.

Professor Gray, by his noble efforts, has heartened all of us and given new meaning to the words of Mr. Justice Holmes who eloquently described the gratifications and rewards which a commitment to the law can provide:

I say . . . that a man may live greatly in the law as well as elsewhere; that there as well as elsewhere his thought may

10. Noel, Book Review, 25 TENN. L. REV. 321, 324 (1957).

find its unity in an infinite perspective; that there as well as elsewhere he may wreak himself upon life, may drink the bitter cup of heroism, may wear his heart out after the unattainable.¹¹

While some may regard the term "heroic" as somewhat extravagant, I would disagree. One definition of a hero is that of "[a] central personage taking an admirable part in *any* remarkable action or event; . . . hence, a person regarded as a model . . ."¹² It would be difficult indeed to gainsay that Professor Gray is a central personage in a remarkable event. The diligence, perseverance, and commitment to excellence that Professor Gray's achievement embodies cannot help but serve as an inspiration to all teachers and scholars, and to practitioners and students as well. Clearly this effort will be regarded as a model.

A milestone indeed. The publication of this revised treatise on *The Law of Torts* has made all of our jobs a bit easier and a bit more enjoyable. Thank you, Little, Brown and Company, and thank you Professor Gray. A job well done!

11. THE MIND AND FAITH OF JUSTICE HOLMES 31 (M. Lerner ed. 1943).

12. WEBSTER'S NEW INTERNATIONAL DICTIONARY OF THE ENGLISH LANGUAGE (2d ed. 1942).