

BOOK REVIEWS

MORRIS ON TORTS. By Clarence Morris and C. Robert Morris, Jr. Mineola, New York: The Foundation Press, Inc., 2d ed. 1980. Pp. xiv, 443. Price \$14.75.

W. PAGE KEETON †

Father and son have collaborated in bringing out a new and improved edition of an excellent book on torts that was first published in 1953 by Clarence Morris. As the preface to both editions quite clearly states,¹ the book was never intended as a comprehensive description and elaboration of the variously named torts that courts and legislatures have created for the protection of individual interests and the interests of other legal entities, as is true of the various editions of *Handbook of the Law of Torts*² by Professor Prosser and *The Law of Torts*³ by Professors Harper and James. Rather, this book was initially written primarily for use by first-year law students who are perforce relatively uninformed about the nature of law and the judicial process involved in making and applying "law," and about the policy considerations that have influenced courts and legislatures in the creation of legal rules and precepts for allocating the risks of losses associated with the complexities of living in an organized society.

I regard the major objectives of the book to be the following:

(1) To identify the policies that courts have relied upon and that can independently be stated as justifying the rules and principles related to most of the major torts, such as battery to the person, trespass to land, private nuisance, liability for physical harm to persons and tangible things accidentally caused, liability for economic loss attributable to misrepresentation, malicious prosecution, and defamation of the person;

(2) To create an understanding about the judicial process and the necessity, at least in this country, of perceiving the respective

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¹ C. MORRIS & C. MORRIS, JR., *MORRIS ON TORTS* vii (2d ed. 1980) [hereinafter cited as *MORRIS ON TORTS*].

² For the most recent edition, see W. PROSSER, *HANDBOOK OF THE LAW OF TORTS* (4th ed. 1971).

³ F. HARPER & F. JAMES, JR., *THE LAW OF TORTS* (1956).

roles of the trial judge and the jury in deciding when a loss shall be shifted in whole or in part from the plaintiff to a target defendant;

(3) To foster a realization that the trial court's charge to the jury is the mechanism by which legal doctrine becomes operative and effective in the judicial process;

(4) To underscore the importance of problems related to the burden of proof and the nature and quality of the evidence that is needed in order to satisfy this burden;

(5) To recognize the significance of the fact that most claims are settled and that settlements can be promoted and furthered by those who have a clear understanding of the above matters; and

(6) To foster an appreciation of the necessity for the capacity of the legal system to change legal doctrine as environmental conditions and social, political, and philosophical thought change. It is for these and other reasons that in teaching Torts I always strongly recommended that my students read certain chapters at different stages in the course. This was an important sourcebook for collateral reading.

Two important points are made about the "policy considerations" that are identified and discussed in connection with the various torts. In the first place, it is said: "Our policy analyses will deal mostly with the crude normative views that are likely to influence judges and juries. . . . Insofar as we discuss policy, then, we shall deal mostly with commonly held, non-technical ideas on the relation between tort law and the common good."⁴

In the second place, it is said (both in the first edition and repeated in this edition) that the central problem in most tort cases is: "whether the plaintiff or the defendant should bear a loss. Our own basic axiom in approaching such problems is: A loss should lie where it has happened to fall unless some affirmative public good will result from shifting it."⁵

Philosophical and economic arguments and theories are considered only to the extent that such notions have come to receive the kind of acceptance that will likely influence courts and legislatures in making and changing legal doctrine. In any event, the authors have written primarily with the original objectives of providing

⁴ MORRIS ON TORTS, *supra* note 1, at 7.

⁵ *Id.*

beginners with: (1) an understanding of the nature of the judicial process, and (2) an appreciation of the importance of thoughtful consideration of the objectives and functions of tort actions.

This edition reflects a great deal of new work, especially with reference to chapters VIII, IX, X, XI, and XII. In fact, chapter X on "Private Nuisance" is a new and quite valuable addition to the book.⁶ Private nuisance as a tort has been too often neglected by those responsible for teaching the first-year course in Torts. Prosser states that "[t]here is perhaps no more impenetrable jungle in the entire law than that which surrounds the word 'nuisance.'" ⁷ Unfortunately, the chapter on nuisance in Prosser's last edition does not help much in clearing out the jungle.

The chapter on private nuisance may be the best treatment of this subject that can be found. The classification of claimants into three groups—householders, agriculturists, and harassed industrialists—is a fresh new approach that ought to be quite helpful to a proper treatment of the policy considerations involved.⁸ Then, the further classification of defendants into four groups—(a) commercial and industrial entities, (b) municipalities and local governmental entities, (c) eleemosynary institutions, and (d) other householders⁹—will aid in the resolution of the ultimate decision of how the inevitable costs of conducting socially desirable activities should be allocated. The cases utilized for illustrative purposes and discussion have been superbly selected.

It is my view that the terms "private nuisance" and "trespass to land" should not be used except to describe actionable intentional interferences with interests in real property. Accidental interferences with interests in land may subject an actor to liability either on negligence or some kind of theory of strict liability. This does not accord with either the *Restatement (Second) of Torts*¹⁰ or the position adopted in this book.¹¹ The doctrinal rules related to liability for intentional, negligent, and nonnegligent invasions are not and ought not to be the same, and it causes confusion to use the same tort label for all three types. One who engages in an abnormally dangerous activity next to the plaintiff may well be held liable to the plaintiff for the impairment in the market value

⁶ *Id.* 259-90.

⁷ W. PROSSER, *supra* note 2, § 86, at 571.

⁸ See MORRIS ON TORTS, *supra* note 1, at 260.

⁹ See *id.*

¹⁰ See RESTATEMENT (SECOND) OF TORTS § 822 (1977).

¹¹ See MORRIS ON TORTS, *supra* note 1, at 270-72.

or rental value of his property because he knows that the inevitable effect is to interfere with the peace and tranquility of those who live nearby. Such an enterpriser may or may not be held liable for physical harm accidentally caused through the intervention of another, depending upon whether a court adopts the view that strict liability should apply for unintentional physical harm caused in that manner. The problems should not be confused. In fact, this chapter and the illustrations all help to confirm my conviction that some confusion would be eliminated by limiting private nuisance to the role of actionable intentional interferences.

The chapter on defamation¹² is a thoughtful and timely discussion of this tort in light of the "constitutional revolution" in the law of defamation that began with the Supreme Court decision of *New York Times Co. v. Sullivan*.¹³ This chapter appears to be more for those with a preexisting knowledge of this tort and its objectives than the beginner, but there is a clear and illuminating exposition of the issues that have been left unresolved.

This second edition of *Morris on Torts* is an excellent updated tool for use in the first-year course in Torts just as was the first edition. Although the authors do not pretend that it has great utility for others, it does. Any torts scholar or practicing lawyer would find this to be so.

¹² *Id.* 329-82.

¹³ 376 U.S. 254 (1964).

MR. DOOLEY & MR. DUNNE: THE LITERARY LIFE OF A CHICAGO CATHOLIC. By Edward J. Bander. The Michie Company Law Publishers, 1981. Pp. xvi, 321. Price \$12.50.

RICHARD SLOANE †

An appeal . . . is where ye ask wan coort to show its contempt f'r another coort.¹

With those words Finley Peter Dunne, a prolific journalist and political satirist at the turn of the century, expresses the chagrin of the lower court judge who has just been reversed and the skepticism that laymen and some lawyers may feel for the entire judicial system. Finley Peter Dunne's reputation as an American humorist, ranking among Artemus Ward, Mark Twain, and H.L. Mencken, has been enhanced by the recent publication of *Mr. Dooley & Mr. Dunne: The Literary Life of a Chicago Catholic*, a collection of Dunne's political aphorisms, articles, and essays dating from 1893 to 1926 that have been compiled and arranged by Professor Edward J. Bander.

Dunne is a blue-collar Oscar Wilde—bright but blunt. Where Wilde's epigrams are delivered with a rapier, Dunne is most at home when he wields a sledge-hammer. He expresses his views of the world, particularly the legal world, through a breezy saloon-styled genius, Mr. Dooley, who is his fictional counterpart. Martin Dooley, an ignorant, immigrant Irish bartender, "with all his horse sense, his native wisdom, his cracker-box philosophy, his attacks on sham and hypocrisy,"² makes his first appearance in a piece written by Dunne for the *Chicago Evening Post* in 1893.³ Mr. Dooley's language is an Irish patois of Dunne's invention spiced with barroom expletives and racist pejoratives.⁴

As a sampler *Mr. Dooley & Mr. Dunne* only reprints highlights from among the 530 Mr. Dooley essays written over a thirty-three year period. Part of the joy of this book is to trace those

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¹ E. BANDER, MR. DOOLEY & MR. DUNNE: THE LITERARY LIFE OF A CHICAGO CATHOLIC 252 (1981). This passage appeared in the *Boston Globe* on August 18, 1907. Justice Jackson referred to it in *Land v. Dollar*, 341 U.S. 737, 750 (1951).

² E. BANDER, *supra* note 1, at 84.

³ *Id.* xv, 143-44.

⁴ *Id.* 83-85.

highlights to their original sources by consulting the chronological listing of Mr. Dooley essays contained in a voluminous 155-page appendix.⁵ The definition of "appeal," for example, is taken from Dunne's seven-page essay, "The Big Fine,"⁶ and concerns an appeal from the imposition of a \$29,000,000 fine levied against "Jawn D," presumably John D. Rockefeller. The fine was not paid and Mr. Dooley explained why:

"Th' on'y wan that bows to th' decision is th' fellow that won, an' pretty soon he sees he's made a mistake, f'r wan day th' other coort comes out an declares that th' decision iv th' lower coort is another argymint in favor iv abolishing night law schools."⁷

Professor Bander is virtually a Boswell for Dunne whose writings he has collected and edited for the past twenty years. Bander's selections in this book make hilarious reading. With so many dreary legal writers at large, Dunne is a refreshing alternative. Even so, this book might have escaped notice altogether were it not for three features that are of special interest to lawyers: (1) its sophisticated guide to the art of controversy; (2) the opportunity that it provides for analysis of wit and humor; and (3) its new, if jaundiced, insight into the character of Americans and America as an emerging world power.

I. THE ART OF CONTROVERSY

Lawyers enjoy Dunne because he is always engaged in controversy and, right or wrong, he always appears to have truth on his side. He is always a winner and whether he loads the cards in his own favor or not, the reader is usually persuaded that Dunne is right and the man or idea he pillories wrong. Dunne provides endless illustrations for the thesis advanced by Arthur Schopenhauer in his ironic essay, *The Art of Controversy*:⁸

To form a clear idea of the province of Dialectic, we must pay no attention to objective truth, which is an affair of Logic; we must regard it simply as *the art of getting the best of it in a dispute*

⁵ *Id.* 143-298.

⁶ *Id.* 252-53.

⁷ E. BANDER, MR. DOOLEY ON THE CHOICE OF LAW (1963).

⁸ A. SCHOPENHAUER, THE ART OF CONTROVERSY AND OTHER POSTHUMOUS PAPERS 1 (1896).

. . . But even when a man has the right on his side, he needs Dialectic in order to defend and maintain it; he must know what the dishonest tricks are, in order to meet them; nay, he must often make use of them himself, so as to beat the enemy with his own weapons.

Accordingly, in a dialectical contest we must put objective truth aside, or, rather, we must regard it as an accidental circumstance, and look only to the defence of our own position and the refutation of our opponents.⁹

To those ends Schopenhauer devised some thirty-eight tricks or "stratagems."¹⁰ They range from the gentlest form of unfair advocacy to the most outrageous behavior.

Dunne favored the stronger among these stratagems. For example, Number VIII:

This trick consists in making your opponent angry; for when he is angry he is incapable of judging aright, and perceiving where his advantage lies. You can make him angry by doing him repeated injustice, or practising some kind of chicanery, and being generally insolent.¹¹

Thus Dunne drew a vitriolic portrait of a Mr. Baer, who was a lawyer for a coal mining company during a strike:

But I'm with th' rights iv property, d'ye mind. Th' sacred rights an' th' divine rights. A man is lucky to have five dollars; if it is ten, it is his jooty to keep it if he can; if it's a hundherd, his right to it is th' right of silf-dayfinse; if it's a millyon, it's a sacred right; if it's twinty millyon, it's a divine right; . . . Nobody must intherfere with it or down comes th' constichoochion, th' army, a letter fr'm Baer an' th' wrath iv Hivin.¹²

Schopenhauer expresses Stratagem Number XXI thus:

When your opponent uses a merely superficial or sophistical argument and you see through it, you can, it is true, refute it by setting forth its captious and superficial character; but it is better to meet him with a counter-argument which is just as superficial and sophistical, and so dispose of him; for it is with victory that you are concerned, and not with truth.¹³

⁹ *Id.* 10-11.

¹⁰ *Id.* 15-46.

¹¹ *Id.* 23.

¹² E. BANDER, *supra* note 1, at 220.

¹³ A. SCHOPENHAUER, *supra* note 8, at 29-30.

In this vein Dunne vilified businessmen as politicians:

Ivry year, whin th' public conscience is aroused as it niver was before, me frinds on th' palajeems [Palladium] iv our liberties an' records iv our crimes calls f'r business men to swab out our governmint with business methods. We must turn it over to pathrites [patriots] who have made their pile in mercantile pursoots iv money wherever they cud find it. We must injooce th' active, conscientious young usurers fr'm Wall Sthreet to take an inthrest in public affairs.¹⁴

"[S]eize the hellum iv state fr'm th' pi-ratical crew an' restore th' heritage iv our fathers an' cleanse th' stain fr'm th' fair name iv our gr-great city an' cure th' evils iv th' body pollytick an' cry havic an' let loose th' dogs iv war an'—captain th' uprisin' iv honest manhood again th' cohorts iv corruption an' shake off th' collar riveted on our necks be tyranical bosses an' prim-ry rayform. . . . Where is this all-around Moses, soldier, sailor, locksmith, doctor, stable-boy, polisman, an' disinfectant? Where else wud such a vallyble Moses be thin in th' bank that owns th' sthreet railroads? If Moses can't serve we'll r-run his lawyer, th' gr-great pollytickal purist, th' Hon'orable Ephraim Duck, author iv 'Duck on Holes in th' Law', 'Duck on Flaws in th' Constitution', 'Duck on Ivry Man has His Price', 'Duck's First Aid to th' Suspected', 'Duck's Illiminthry Lessons in Almost Crime', 'Th' Supreem Coort Made Easy', or 'Ivry Man his Own Allybi' and so on. Where is Judge Duck? He's down at Springfield, doin' a little ligislative law business f'r the gas comp'ny. Whin he comes up he'll be glad to lead th' gr-great annyooal battle f'r civic purity."¹⁵

" 'Don't ye get off anny gas at me about business men an' pollyticians. I niver knew a pollytician to go wrong ontill he'd been contaminated be contact with a business man. . . . What is pollytical graft, annyhow? It ain't stealin' money out iv a dhrawer. It ain't robbin' th' taxpayer direct, th' way th' gas comp'ny does. All there's to it is a business man payin' less money to a pollytician thin he wud have to pay to th' city if he bought a sthreet or a dock direct.' "¹⁶

¹⁴ E. BANDER, *supra* note 1, at 58.

¹⁵ E. BANDER, *supra* note 7, at 141.

¹⁶ *Id.* 145-46.

II. WIT AND HUMOR

Dunne's success is due just as much to his wit as to his winning ways with "Dialectic." The following illustration of Dunne's wit describes President Theodore Roosevelt's imaginary reaction to Upton Sinclair's book, *The Jungle*, which exposed conditions in the meat packing industry in 1906:

Tiddy was toying with a light breakfast an' idly turnin' over th' pages iv th' new book with both hands. Suddenly he rose fr'm th' table, an' cryin': 'I'm pizened,' begun throwin' sausages out iv th' window. Th' ninth wan sthruck Sinitor Biv'ridge on th' head an' made him a blond. . . . Sinitor Biv'ridge rushed in, thinkin' that th' Prisdint was bein' assassynated be his devoted followers in th' Sinit, an' discovered Tiddy engaged in a hand-to-hand conflict with a potted ham. Th' Sinitor fr'm Injyanny, with a few well-directed wurruds, put out th' fuse an' rendered th' missile harmless. Since thin th' Prisdint, like the rest iv us, has become a viggityaryan . . .¹⁷

III. THE CHARACTER OF AMERICA AND AMERICANS AT THE TURN OF THE CENTURY

This book also contains extracts from Dunne's pungent comments on race relations, women's rights, the trusts, prohibition (which he abhorred), the role of Theodore Roosevelt in the invasion of Cuba and of Admiral Dewey during the war in the Philipines. He had little use for ambassadors, educators, lawyers, judges, bankers, or politicians. Reformers he despised.

A few short illustrations:

"If I had me job to pick out," said Mr. Dooley, "I'd be a judge. I've looked over all th' others, an' that's th' on'y wan that suits. I have th' judicyal timperamint. I hate wurruk."¹⁸

"D'ye think th' colledges has much to do with th' progress iv th' wurruuld?" asked Mr. Hennessy.

"D'ye think," said Mr. Dooley, 't is th' mill that makes th' wather run?"¹⁹

An ambassadure is a man that is no more use abroad thin he wud be at home. A vice-prisdint iv a company

¹⁷ See E. BANDER, *supra* note 1, at 243. The full quotation was taken from 2 M. SULLIVAN, *OUR TIMES 1900-1925* 535 (1939).

¹⁸ E. BANDER, *supra* note 1, at 207.

¹⁹ *Id.* 34-35.

that's bein took in be a thrust, a lawyer that th' juries is onto, a Congressman that can't be reilicted.²⁰

I'm not so much throubled about th' naygur whin he lives among his opprissors as I am whin he falls into th' hands iv his liberators.²¹

A fanatic is a man that does what he thinks th' Lord wud do if He knew th' facts iv th' case.²²

A man that'd expict to thrain lobsters to fly in a year is called a loonytic; but a man that thinks men can be tur-rrned into angels be an iliction is called a rayformer an' remains at large.²³

"Th' inthrests iv capital an' labor is th' same, wan thryin' to make capital out iv labor an' th' other thryin' to make laborin' men out iv capitalists."²⁴

I care not who makes th' laws iv a nation if I can get out an injunction.²⁵

"[N]o matter whether th' constitution follows th' flag or not, th' Supreme Coort follows th' election returns."²⁶

[T]his counthry, while wan iv th' worst in th' wurruld, is about as good as th' next if it ain't a shade betther.²⁷

As Roscoe Pound wrote in his introduction to *Mr. Dooley on the Choice of Law*: "When some day historians come to study the beginnings of a time of far-reaching change in American life, the philosophy of Martin Dooley will be a real factor in understanding them."²⁸

Professor Bander has produced a superb collection of comic satire that shows Dunne at his noblest and his least admirable—with dimples and warts in full view. I recommend it to lawyers, aspiring lawyers, and all other people who have earned a smile.

²⁰ *Id.* 57.

²¹ *Id.* 199.

²² *Id.* 199.

²³ *Id.* 199.

²⁴ *Id.* 203.

²⁵ *Id.* 199.

²⁶ *Id.* 201.

²⁷ *Id.* 74.

²⁸ E. BANDER, *supra* note 7, at xx.

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