FRANCIS HERMANN BOHLEN

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When Professor Francis Hermann Bohlen died the law school world lost one of its most picturesque personalities as well as one of its greatest legal minds. During the 45 years between the commencement of his law fellowship at the University of Pennsylvania in 1892 and his retirement from active teaching because of illness, in 1937, he made a name and created an impression which few men can approach. When we think of him we think of the modern American law of torts.

Yet there is no Bohlen on Torts to match Williston on Contracts, Beale on Conflicts or Wigmore on Evidence. That very fact is in itself a clue to the man. Mr. Bohlen was not interested in studying the whole field of tort law. Indeed, there were some branches of tort law about which he knew very little. He did not have the patience for painstaking historical research. Under some definitions he could not even be called a scholar. But what he did have was an intense crusading zeal, and a conviction that the law in general, and the law of torts in particular, was a tool which could and should be used to improve social relationships, and bring about equitable adjustments of the financial burdens caused by injuries to persons and property. Coupled with this zeal he possessed a richness of vocabulary and a pungency of phrasing which were a source of amazement and delight to his students, and a brilliant analytical mind which despised fictions.

As Mr. Bohlen had no desire to write a text book on torts, though in his later years he planned a book on negligence, he concentrated his writings on the particular problems which appealed to him. These were problems where the law was confused or where existing law outraged Mr. Bohlen's sense of justice. The result was a series of outstanding essays in the leading law reviews which have profoundly influenced American tort law, and, what is even more important, have profoundly influenced the approach to the solution of tort cases. Altogether Mr. Bohlen wrote thirty-four leading articles, the first of which appeared in 1900 and the last in 1937. Some of them deal with a narrow question; others are in several installments and cover a broad field. Fifteen of the essays were originally published in the University of Pennsylvania Law Review, eight in the Harvard Law Review, and three in the Columbia Law Review. The remaining eight are scattered

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through a like number of legal periodicals. In 1926 the essays published up to that time were collected together and republished in *Studies in the Law of Torts.* Mr. Bohlen's last article, *Fifty Years of Torts,* was published in 1937 after he was stricken with illness. It is a peculiarly appropriate swan song because the significant changes in American tort law recorded therein are in numerous instances the result of Bohlen's own influence. It is interesting to note that his first essay dealt with the law of contracts, not torts, and two others with questions of the law of evidence. All the others are directly or indirectly concerned with the law of torts. The two essays on evidence reflect the fact that Mr. Bohlen also taught this course, though he despised it and was shocked by the archaicness of many of the rules of evidence.

In order to appraise the calibre of Mr. Bohlen's creative thinking, it is necessary to understand the general approach to the study of law at the turn of the century. Though there were a few voices, such as Pound and Holmes, urging the view which is now commonplace, the prevailing attitude in the courts was one which placed *stare decisis* above all other rules. Judges said they had no power to make law, that that function must be left to the legislature. Opinions frequently reflected a greater interest in determining how Lord Coke would have decided the case than in ascertaining the social consequences of the decision in a world which had passed through the industrial revolution. In law schools more emphasis was laid on the scope of trespass *vi et armis* and the limitations of the action on the case than on determining how far society can protect the interest in bodily integrity without unduly interfering with the interest in freedom of individual action. Many people denied there was any "law of torts". In 1886 Sir Frederick Pollock said that "the contention . . . seems opposed to the weight of recent opinion among those who have fairly faced the problem", and he wrote his excellent text book "to show that there really is a law of torts".

Mr. Bohlen retired from practice in 1898 at the age of thirty, and started on the career which was to occupy him the rest of his life. He brought a different attitude to his teaching. He was not much interested in the decisions in the Year Books. He was deeply concerned with the age in which he was living. He believed that the right to compensation for injury should be determined primarily in the light of contemporary conditions. He believed that recovery should be permitted in many situations where prevailing law denied it. Yet he came from the propertied class and his views must have been anathema to many of his friends and associates, particularly to some of his later cronies at the exclusive and conservative clubs to which he belonged.

In 1902 Mr. Bohlen published his essay on *The Right to Recover for Injury Resulting from Negligence without Impact,* and argued in favor of such liability. The authorities were then sharply divided. Today the Bohlen view is accepted by the great weight of authority and in the minority of states which deny liability their rule is confined within narrow limits.

In the results which it achieved, one of the most far-reaching of Mr. Bohlen's articles is *The Basis of Affirmative Obligations in the Law of Torts* which appeared in three installments in 1905. It was then the settled law that the manufacturer of a chattel owed no duty of care to the ultimate user, except where foods, drugs, or explosives were involved. Judge Sanborn had reiterated the rule in 1903 in *Huset v. J. I. Case Threshing Machine Co.* Mr. Bohlen attacked this opinion with a pulverizing pen and with devastating effect. Eleven years later Judge Cardozo wrote his best known torts opinion in *MacPherson v. Buick Motor Co.,* in which he referred to Bohlen's "trenchant criticism" and laid the basis of the present law along the lines Bohlen had suggested. Judge Cardozo wrote many great torts opinions and it is not detracting from his name to say that he frequently reflected views first expressed by Mr. Bohlen. I well remember mentioning Mr. Bohlen to Judge Cardozo on one occasion. That magnificent, kindly face lighted up with enthusiasm and he said "He is a great man, a great Master of Torts". Such was the tribute of the great torts judge to the great torts teacher.

Space prohibits an analysis of other essays and their effect. Two of the most important later ones are *Misrepresentation as Deceit, Negligence or Warranty* published in 1929 and *Old Phrases and New Facts* published in 1935.

The literary quality of Mr. Bohlen's essays varies considerably. Particularly in the earlier ones, long complicated sentence structure makes for difficult reading. But the thought is there, and Mr. Bohlen was ever impatient of details.

Aside from his essays Mr. Bohlen's most significant contribution to law school students and teachers was his *Cases on Torts,* the first edition of which was published in 1915. The later editions reflect Bohlen's own development and the third edition, published in 1928, was adopted in more than eighty law schools and is still the best case book available.

The work which Mr. Bohlen did in the field of workmen's compensation legislation is not so well known outside of Pennsylvania, but it is another significant accomplishment. Today the right to compensation is accepted as a matter of course. Forty years ago, it was fought bitterly in many quarters. Mr. Bohlen was appalled by the frequency

of unnecessary industrial accidents and by the fact that the workman or his dependents obtained substantial compensation in less than five per cent of the industrial accident cases. He believed that the common law rules relating to compensation for injured workmen were barbarous. But with his practical common sense he realized they were too deeply imbedded to be rooted out by anything short of legislation. He also saw that the delays and expense incident to recoveries for compensable industrial accidents could only be eliminated by sweeping legislative reforms of procedure. He made a study of the English and European legislation and of every American statute on the subject. As secretary of the Pennsylvania Industrial Accidents Commission, which was created pursuant to the provisions of the Act of June 14, 1911, P. L. 917, he played a leading part in drafting the Workmen's Compensation Act which was introduced in the 1913 legislature but did not pass. Undaunted by this setback, he continued his efforts and drafted the acts which were enacted in 1915 and still remain the basic law in Pennsylvania. From 1915 to 1922 he served as Counsel for the then newly created Pennsylvania Workmen's Compensation Board and the State Workmen's Insurance Fund. In that capacity he worked out many of the details of administering the compensation law. How far Mr. Bohlen's thinking was ahead of the Pennsylvania Bar of that period may be indicated by the fact that the printed proceedings of the Pennsylvania Bar Association for the period between 1910 and the passage of the Act of 1915 do not contain a single reference to the subject. The annual reports of the Committee on Law Reform are silent with respect to the need for any workmen's compensation legislation, and no other committee report reflects the thought that the lack of speedy and certain compensation in industrial accident cases in a great industrial state was an intolerable social evil of that time.

From Mr. Bohlen's appointment as a lecturer in the University of Pennsylvania Law School in 1898 until his retirement in 1937, he was continuously engaged in teaching law except for the academic year 1903-04 when he was granted a leave of absence. During his entire teaching career, Mr. Bohlen was on the faculty of the University of Pennsylvania with the exception of the three years between 1925 and 1928 when he was Langdell Professor of Law at Harvard. Mr. Bohlen became full professor of law in the University of Pennsylvania in 1905. From 1914 to 1925, and from his return to the University in 1928 until his retirement, he held the chair of Algernon Sydney Biddle Professor of Law. In addition to torts and evidence he taught quasi-contracts. It is a curious feature of the American law school set-up that a man who becomes an authority in one enormous field of law, and needs all

of his time to work in that field, is frequently compelled to divert much of his time and energy to teaching other unrelated subjects about which he has a very inferior knowledge.

As a teacher of Torts to first year students Mr. Bohlen was picturesque in dress and speech. Students regularly awaited his appearance to discover what new vision of sartorial elegance he would present. While he used the case system he used the case as a spring-board to jump into a discussion, principally by Bohlen, of all the points it brought to his mind. His repartee with students was a source of delight to the class and at times it rose to dazzling brilliance. From a broad literary background Mr. Bohlen drew forth anecdote and quotation to make his points. He realized with Holmes that "A word is not a crystal, transparent and unchanged; it is the skin of a living thought and may vary greatly in color and content according to the circumstances and the time in which it is used," and that much of the confusion in the law results from a failure to agree on definitions. Mr. Bohlen's quotation from *Punch* of "I expected the unexpected but this was unexpected" gave me a clearer idea of an "extraordinary" intervening force than any statement I have heard since.

Mr. Bohlen despised mediocrity and made short shrift of the stupid student. He was often impatient and unreasonable. In one class he gave the ingenious illustration of a defendant who hung a red lantern on the plaintiff's front door in order to reflect upon her chastity, and then asked whether that should be classed as slander or libel. The class was amused by the facts and burst into a roar of laughter, whereupon Mr. Bohlen slammed his book on the desk, muttered something about "prurient minds" and walked out of the room. Even in the perspective of eighteen intervening years that reaction, particularly from a man whose own thought and speech were frequently ribald and Rabelaisian, still seems to me to have been wholly unwarranted. Yet it was typically Bohlen to flare up suddenly and without cause.

Former students differ on the question of Mr. Bohlen's greatness as a teacher of Torts to first year law students. When I sat under him in 1924-25, I had the impression he had forgotten how ignorant first year students are and how hard it is for them to understand legal concepts which to him were self-evident. Consequently, I felt that he was talking over my head much of the time. Also, Mr. Bohlen frequently went off on tangents and rode rapidly away in all directions, leaving his students far behind him. Some other students praised his teaching highly and all of us agreed at the end of the course that we had learned more tort law than we had realized we were absorbing.

Yet I am sure I never appreciated Mr. Bohlen's greatness fully until I sat with him years later in the torts conferences of The American Law Institute.

When the Institute started to restate the law of torts, it was natural for it to select Mr. Bohlen as Reporter, and he served actively in that capacity from 1923 until illness struck him down in 1937. It is still too early to appraise his work finally, but there seems little doubt it will have enormous influence in molding the future tort law of America along lines Mr. Bohlen believed desirable. The chance to restate rules where there was considerable case authority in conflict, gave Mr. Bohlen his great opportunity to choose the rule which appealed to him as best suited to meet the needs of contemporary conditions. Such was the authority of his name and the strength of his arguments that his views generally prevailed in the Institute. An outstanding example of the Institute's adoption of a small minority view is seen in Section 60 of the Restatement of Torts, which provides that consent to conduct constituting a crime does bar a tort action for an invasion of bodily integrity resulting from such conduct. Mr. Bohlen wrote an article in 1924 condemning the majority rule to the contrary and the arguments he used there proved unanswerable in the Institute discussions.

In the torts conferences with his Advisers, Mr. Bohlen did not have to worry about talking over their heads. They constituted a distinguished group of judges, lawyers, and teachers who knew the fundamentals. Mr. Bohlen could let himself go and he did. He used his Advisers as sounding-boards and some of his spontaneous discussions were so brilliant, the Advisers would sit almost breathless for fear of interrupting his train of thought. Often one of them would quietly signal to the stenographer to take down what Mr. Bohlen was pouring out because we knew that when he later tried to recapture it and write it down, he could not reproduce the original sparkle and felicity of expression. In these conferences, Mr. Bohlen was often irritated by criticism and he generally resigned as Reporter at least once during a conference. Yet he was more affected by criticism of his literary style than of his substantive statement of law. He welcomed full discussion of difficult problems and he attached much weight to the opinions of the judges. This was another example of his practicality and his desire to have rules of law fit the realities of life. If the judicial Advisers voted one way and the academic Advisers another, Mr. Bohlen nearly always sided with the former upon the theory that they could determine how the rule would work in actual litigation better than men who had had no actual experience trying or deciding cases. He often changed his own view after hearing the objections of the judges; much

less frequently he was convinced of error by the argument of another law teacher. He frequently said the conferences were the greatest post-graduate course in torts that existed. They certainly were for the Advisers.

Francis Hermann Bohlen's name stands high as author, Reporter, teacher. His intuitive judgment was generally sound, and often more reliable than his analysis of a particular case after a hurried reading. Holmes spoke of "the secret isolated joy of the thinker who knows that, a hundred years after he is dead and forgotten, men who never heard of him will be moving to the measure of his thought". By that test, I believe posterity will place Mr. Bohlen's name high in the ranks of legal scholars. For the present, the legal world is a less interesting place without him.