Book Review (reviewing Clarence Morris, Morris on Torts (1963))

Harry Kalven Jr.

There is only one thing I do not like about Mr. Morris' book, and it is a petty dislike. He has peopled his text with such characters as Mr. Bellicose and Mr. Quiet, Mr. Iceman and Mr. Walker, Mrs. Shopper and Mr. Merchant, and Mr. Nasty and Mr. Highstander. I simply wish he hadn't yielded to the impulse.

I state this point at the outset to clear the deck for unqualified praise of the Morris venture and his skill in bringing it off. He had a very clear objective in mind—he wished to write a concise discussion of tort law for the student as a supplement to the traditional case book classwork. He has succeeded admirably, and tort teaching everywhere is the beneficiary. In no small part his success is due to the integrity with which he has stuck to his purpose. He was not led off into trying to make the book useful to the bar, too, by loading it with references. It cites perhaps five hundred cases in all, and the large majority of them are avowedly taken from the better-known torts case books. Again, he was not seduced into trying to revolutionize torts teaching by writing a book which would replace, at long last, the case book. I do not quite see how one could teach this book. I do see very well why one should use it as an adjunct of class discussion and as a stimulus toward making full use of the class hour.

Finally, the book has been done so thoughtfully and honestly that it is not simply a rehash of Morris' formidable series of law review articles, even in those areas of negligence law which directly overlap the content of the majority of essays collected in his Studies in Torts. One, however, cannot help slightly raising an eyebrow, in passing, at his devoting eight pages to administrative safety measures.

Perhaps to keep the book accessible to as many law students as possible, the organization has been left unexciting. We start once again with the intentional torts, proceed to negligence and then to strict liability, and conclude with misrepresentation, defamation, and malicious prosecution. The economic torts, except for misrepresentation, are not treated; the emotional dignitary torts are given little emphasis; and damages are touched very briefly indeed. The strength of the book does not lie in giving a unifying vision of the tort field.

The table of contents approach is, however, particularly misleading in this case. If the sequence is conventional, the emphasis is at times quite striking. Thus there is a decisive emphasis on negligence as the central problem and a generous last chapter is reserved for a sober assessment of the current personal injuries scene and for proposals for reform. Chapter VII on proximate cause is a sane, lucid fifty-page essay on a topic to which Prosser's fine book devoted approximately sixty pages. On the other hand, two staples of tort teaching, occupier-liability and manufacturer's liability, are treated merely as obsolete examples of the no-duty problem and disposed of in ten pages, whereas the use of criminal statutes
in changing civil no-duty rules, an esoteric topic on which Morris almost
deserves a trademark, receives about the same amount of space. The
sharpest shift of emphasis is found in Chapter V on problems of proof of
negligence. Here Morris provides another superior fifty-page essay
which integrates his prior law review reflections and has the special vir-
tue of demoting *res ipsa loquitur* to where it belongs, as but one of many
aspects of the proof problem.

The book, then, is first of all a superior dope sheet written in a clean,
conceise style, brief enough that a student can readily read it through
more than once. But it constantly transcends the dope sheet category,
without, I think, losing its basic utilitarian quality. And it does this be-
cause Morris does not treat his material as a junior Restatement, nor does
he condescend to the beginner. He treats his reader with intellectual re-
spect and his subject with a steady tone of curiosity and perplexity. The
utility of the book to the student, therefore, is not simply that it aids in the
digesting and memorizing of a mass of detail. It is that, but it is at least
equally a stimulus to serious reflection. And it is here that the book has a
clear edge, for student purposes, over Prosser's invaluable hornbook.

The book bears the marks of many other virtues: it is eminently sane, it
is stubborn about working through the points it raises, it has some genuine
originality, and it is at home at more than one level of analysis and with
more than one approach. These are, of course, well-known Morris virtues
and need not be labored, but I was particularly impressed by the last
characteristic. The text constantly stresses the realities of tort life. It is,
however, a controlled realism and we are reminded that "the current
scene must not be caricatured." Again, the text is insistent about the im-
portance of procedure and about the role of the advocate in selecting
alternatives. But here again there is balance, and it is done without the
crusader's fervor to make everything procedure. The book is so successful
on this score that the discussion of advocacy in tort cases is itself a dis-
tinctive contribution.

Finally, Morris' versatility adds another dimension. He is at once
the hardheaded trial lawyer and the serious student of jurisprudence. A
further sustained theme of the book is the candid and explicit facing of
the policy issues that permeate tort law. He is not an urgent reformer nor
is he simply fashionable in his views. It is a principal thesis of his that
not all tort losses should be handled by society on a single principle. He
is articulate and informed about risk-bearing analysis, but does not use
it to exclusion of all other possible considerations. And the final chapter
on reforms of personal injury law is not an afterthought, but an ap-
propriate continuation of the policy discussion which has been going on
throughout the book.

One brief series of illustrations of these points from the start of the book
will have to suffice. Selecting, of all things, the deadly topic of trespass
q.c.f., Morris in ten introductory pages moves through a series of cases
and succeeds in raising the chief policy issues of tort law. Then as we
turn to Chapter II on assault and battery, we seem solidly in the dope-
sheet type of summary but suddenly in the discussion of consent to breach
of the peace, he flashes a pretty point, upsetting the classic Bohlen attack
on the majority rule. A few pages later in a conventional summary of the
defense of public necessity he carries through a risk-bearing analysis
with sufficient persistence to upset the fashionable conclusion that this
is the clearest of cases in which the community should bear the loss. And
so it goes.

Clarence Morris says in his preface: "I have tried to cut as deeply as
I know how." With remarkable frequency he has succeeded. And that
is sufficient praise for any book.

Harry Kalven, Jr.*

$18.50.

The third volume of Professor Powell's projected five-volume treatise
continues his treatment, begun in the second volume, of permissible in-
terests in land. It completes the discussion of future interests (in the usual
sense of that term) by considering a variety of problems in the construc-
tion of deeds and wills, especially the effect of gifts limited with reference
to the death, or the death "without issue," of someone receiving a prior
interest by force of the same instrument, and of class gifts, including
therein limitations to heirs of a grantor or a grantee. Thereafter, it deals
in turn with powers of appointment, easements (including the interest
ordinarily distinguished under the label of profit à prendre), licenses,
franchises (a very brief examination), and security interests (mortgages,
judgment liens, mechanics' liens, tax liens).

All judges of Powell's work seem to agree that its merits are substantial,
though of course there is no universal agreement concerning the relative
extent of its merits and demerits.1 In truth, if the treatise is to be evaluated
with reference to the objectives he envisioned for it, it is difficult to be-
lieve that any man now alive—and very possibly none who ever lived—
could have made a better job of it; and from one point of view, criticism
might well stop there save for the usual laboring of minor good and bad
qualities far beyond their relative importance. A few reviewers—with
whom the undersigned casts his vote—have voiced a regret that Powell
should have spent his great learning and ability on the task of writing a
treatise in the traditional fashion, the great bulk of which necessarily re-
peats what has been set forth equally as informatively or usefully in
many other places, feeling that the legal world, and perhaps broader
worlds as well, would have been better served had he directed his atten-
tion to work which may variously be described as more pioneering, more
penetrating, or more creative. But to wish vainly that he had aimed at
accomplishments nearer to one's desire seems hardly a proper means of
appraising his success in accomplishing the task he set for himself.

* Professor of Law, University of Chicago Law School.
1 The first and second volumes were reviewed by Howard Williams at 28 Texas Law
Review 611 (1950) and at 29 Texas Law Review 860 (1951), respectively. The Index
to Legal Periodicals lists many other reviews, particularly for the first volume.