BOOK REVIEWS.

The Law of Torts. By H. STREET, LL.M., PH.D. (Butterworth & Co., London. 1955. Our copy from the publishers).

When an English torts professor writes a textbook in this day and age, that is news, i.e., it doesn't happen very often. If perchance he not only writes the text but publishes it under his own name as well, that is almost epoch-making. Professor Street has done as much with his recently published textbook on the law of torts and so gains the distinction of being the first English law teacher to publish a new text on the law of torts in the nearly twenty years that have followed the appearance of the first edition of Winfield. On this count alone—a willingness to present for critical examination his own views presented as his own views—surely he deserves commendation. But the book has merit beyond this that should win for it a place in any library that claims adequacy for its collection of English texts on the law of torts. In a text a little longer than Salmond and a little shorter than Winfield (by my unscientific measurement) he treats all of the area of tort law customarily covered in an English text of torts, including tort liabilities arising out of the employment relation.

With his usual modesty Professor Street describes his text as designed for student use. This is a not unfamiliar gambit since it was used by Winfield in the first edition of his work and did not keep that book out of the hands of the profession or away from the courthouse. The author will probably not object any more strenuously than his publisher to professional as well as student use. In fact, the scheme of organization adopted is one that should commend itself to the profession—after the initial shock of discovery that this is not just another edition of one of the old standards. Street has decided, wisely I think, to direct his attention primarily to the substantive law of torts and to relegate to the background the extended treatment of general principles (if there are any), parties, and remedies that one finds in the old standards. It is interesting to note that he explains his adoption of a form of organization that starts out immediately (or almost immediately) with specific torts on the ground that he has found no English law teacher who followed the Salmond or Winfield order of service. Since I am virtually certain that no American law teacher lingers on general principles, parties or remedies at the start of his torts course this aligns a substantial part of the academic common law world, at least, in support of this arrangement.

Although this text is in a sense a pioneering effort, in its rearrangement of the subject matter and in the author's willingness to stand up and be counted, it is only a modest reorientation that is undertaken and not one that is likely to raise the hackles of either the practising or academic professions. In essence Professor Street has undertaken to chronicle the "law" embodied in the decisions as faithfully as he knows how; and since he is relatively free in pointing the finger when he finds his distinguished predecessors off base in their understanding of the cases[1] he surely has a measure of confidence in his own powers of perception. This is, of course, an immensely useful job and if there is any dissatisfaction at all with this approach in writing a text on torts it is a dissatisfaction based on a different conception of the function of a text in this area of the law.[2] The function to be served by a text in turn depends on the conception one has of the nature of the law of torts. As some have asked, is it law at all?

To dramatize the large issue: Should Moses have journeyed again to Mt. Sinai to receive the law of torts? There was a time when such an enquiry would not have seemed wholly ludicrous. In that distant age there were those, and some of their number were quite respectable, who professed to believe in a sort of revelation theory of the common law—even for torts. To men of this persuasion the law of torts was viewed as a neat if bulky package of precise legal doctrines and eternal verities, waiting only application to resolve in any age the most troublesome conflicts which man in his finite unwisdom can contrive. Under this ancient view Moses certainly would have simplified life if he had brought back the entire body of tort doctrine—preferably on one tablet.

In this enlightened day there are certainly few judges, fewer practitioners, and no academics at all willing to swear allegiance to a legal philosophy offered in such designedly unattractive terms. There are other views of the nature of the common law, particularly of the common law of torts—much more at home in this century. Under the view held by the reviewer the formulations, the doctrines, and propositions have a place but a subsidiary place. They are simply the means, and inexact and often unsatisfying means at that, for expressing human judgment on human problems generated by men of a particular age and place. The resolution of these conflicts of interest

1 For illustrations of public rebuke see STREET at 23, 93, 108, 150, 180, 184, and 488. There are others as well.

2 For a stimulating statement see Wright, *The English Law of Torts: A Criticism,* (1955) 11 U. OF TORONTO L.J. 84, assessing the 6th edition of WINFIELD, edited by T. Ellis Lewis.

through the formal agencies set up by man for the purpose is thus seen as a continuing process and one fraught with human error, but a process none the less that represents man's fine and ceaseless quest for satisfying adjustment of the controversies of his society. Of course, our generalizations, our formulations of principle do affect very largely the operation of the system. Since we do associate ideas of consistency with our ideal of justice, since our judgments are cast in terms of universal principles thought to be generally applicable, since it would be too costly to approach each controversy as unrelated to those that have preceded it, since stability in human affairs does have positive value, since society does not change overnight, since we are not prone to concede error in any case and since, by and large, society will tolerate almost any solution provided it proceeds from a majestic and ceremonial source,[3] it is quite natural that the decisions of the past should exert a powerful influence on the disposition of today's judicial business. Nevertheless, a conception of the judicial process in torts cases as a continuing effort to bring human judgment to bear on the case at hand with legal formulations and doctrines viewed primarily as the tools of the trade, as the means by which judgments are expressed, even though concededly exerting powerful influences on our thought processes, is a very different way of looking at the legal world.

Perhaps the House of Lords, with its professed inability to mend its own ways, is not free officially to subscribe to the view that the common law is alive; but others are not so impeded. Professor Street certainly appreciates the dynamic quality of the common law and particularly the law of torts. He writes of law in motion and with this surely few will quarrel. It is rather his non-involvement in the process, his acceptance for the most part of the passive rôle of spectator, that disturbs. If the common law is recognized in our day as a man-made product it must be equally clear that the job cannot be maintained as the exclusive preserve of the bench, insulated as it is in a variety of ways from many of the pressures of life, and subjected as it is to the pressures of the docket. To attune the legal system to the needs of society a variety of artisans must join. The practising profession by its analysis which shapes and thus helps determine the litigated cases, the critics who assay the product in the professional journals,

[3] A prime example in my opinion is the decision in Searle v. Wallbank, [1947] A.C. 341, holding that there is no duty on the owner to fence his horse so as to keep him from being a traffic hazard — which decision I was surprised to find STREET (at page 217) apparently approving. Of course, it may be that I do not appreciate how socially desirable it is in England to permit livestock to range unattended on the highway.

the law teachers exercising their supervisory appellate jurisdiction with succeeding generations of future judges and practitioners, and certainly those scholars who undertake to synthetize and rationalize areas of the law with textbooks, all participate significantly in the law-making process that makes the profession in all its branches so stimulating and so satisfying. Why then is Professor Street so disinclined to put his own shoulder to the wheel? That he has largely forsworn in his text the rôle of participant in the law-making process may be demonstrated by a few examples.

The perennial problems of "duty" and "remoteness" are discussed in conventional fashion as separate topics. This is not to say that the treatment of these familiar twin mysteries is not provocative. Professor Street sees the "duty issue" as the means by which the judiciary determines the nature and extent of protection to be given to injured plaintiffs, with "foreseeability", that ever present help for the judiciary in negligence cases, as the favourite rationalization for announcing the decision of duty or no-duty in the particular case.[4] With what is said about determination of duties in general there can be little quarrel. Nevertheless, discussion of the nervous shock cases as though the determination of duty in such cases is to be wholly explained in terms of foreseeability of consequences leaves something to be desired. To announce as did the Court of Appeal that one who runs over a child within the mother's hearing is not liable for the mother's resulting injuries on the ground that the motorist would not anticipate that she would be affected by such an experience[5] can only persuade that there is more here than meets the eye. There must be. In a general comment Street recognizes that "foresight is only one of many possible considerations"[6] in the determination of whether or not to impose a duty, and it would have been instructive to law students, to the profession, and the bench if he had undertaken to offer something a bit beyond the enlightenment offered by the cases in the nervous shock decisions, and some of the other knotty "duty problem" cases.

It would not be fair to imply that Street is always happy with what the courts do. For example, he has little patience, as have others, with that inexplicable decision of the Court of Appeal that immunized from liability a landlord who negligently installed a defective boiler.[7]

4 STREET, 112-121.

5 King v. Phillips, [1953] 1 Q.B. 429.

6 STREET, at 119.

7 Ball v. London County Council, [1949] 2 K.B. 159. For expressions of condemnation, see Wright (*supra* note 2, at 92 and 96), and Goodhart, *Dangerous Things and the Sedan Chair,* (1949) 65 L.Q. REV. 518.

Happily, there is substantial basis for belief that the Court itself has seen the light on this one.[8] What is significant is the fact that Street expresses his dissatisfaction with the decision solely on the ground that it is inconsistent with other cases, noting in this connection that "it is hazardous to formulate principles under this head beyond what the cases have actually decided . . . "[9] It is true that in concluding his discussion of the liability of non-occupiers he does raise the question whether the broad rule of manufacturer's liability laid down in *Donoghue v. Stevenson* may not become the operative principle but his reluctance to take up the cudgels is illustrated by the comment that "Until this point has been considered by a higher court it is perhaps premature to make the generalization that the broad principle shall always apply . . . "[10]

The desirability of something beyond the rather special type of light offered by the cases is surely emphasized by the relation of the "duty" and "remoteness" issues. For the most part the English judges seem to think these are two issues separate and distinct—even though they have difficulty on occasion in keeping them straight. To one schooled in the American approach to torts under Leon Green this is, of course, an oddly bifurcated view of what many of us regard as the single problem of "whether the law should extend its protection so far."[11] Of course, the problem of where to limit liability is an extremely difficult matter to rationalize in language that will carry conviction. If the term "remoteness" has some central and dependable meaning distinct from the ideas available under the duty concept then there can be no valid objection to a stable with two horses instead of one. On the other hand if the term is simply a synonym for "no-duty" it may nevertheless provide useful alternative language for articula-

[8] In Riden v. A.C. Billings & Sons Ltd., [1956] 3 W.L.R. 704, a duty of care was imposed on a contractor in favour of a visitor injured by a defective condition of the premises chargeable to the contractor. Denning L.J. expressly refused to follow Ball v. London County Council and Birkett L.J. agreed that a duty of care should be imposed on the contractor. Roxburgh J. dissented but on the ground that the plaintiff's knowledge of the danger relieved the contractor of any other duty to her.

[9] STREET at 191, and also 181.

[10] STREET, at 192.

[11] The phrase is Holmes's and appears in Robbins Dry Dock and Repair Co. v. Flint, (1927) 275 U.S. 303, wherein the court declined to allow a tort recovery in favour of one contractually entitled to use property damaged by the defendant's negligence. The professional torts academic will recognise the extent to which the reviewer's point of view reflects the influence of Leon Green — see GREEN, JUDGE AND JURY (1930), cited with some frequency by STREET whose conversion has not perhaps been fully accomplished as yet.

ting a decision declining to impose liability for damage concededly done by a negligent defendant—if it is so understood. The present confusion on the point, however, surely warrants consideration by a modern text on the subject.

Without addressing himself directly to this question of the nature of the relationship between the remoteness and duty issues Street seems quite willing to accept the pronouncements in the cases that the two issues are really distinct.[12] His demonstration that they are in fact separate, far from ending an old controversy, seems likely to start a new one. There are cross currents in his treatment of the subject, but his main thesis seems to be that "remoteness" really raises only questions of physical cause, i.e., "whether the defendant's act was a substantial factor in producing the harm complained of."[13] This would, of course, relegate "remoteness" to the category of a fact issue to be determined by the jury under appropriate instructions (where juries are still used) and Street thinks this is the disposition indicated by the cases.[14] This would certainly eliminate much confusion, effectively separate questions of causation in the physical sense from the duty problem—and surprise a goodly number of people in the process for some venerable texts[15] and highly placed judges[16] have most certainly regarded "remoteness" as presenting a legal liability issue for the judge. Perhaps this point, whatever the merits, demonstrates that a resolution, however firm, to state "the law"

12 STREET at 146, "many judicial decisions confused duty with causation." The discussion on animals starts out with the following proposition: "This topic illustrates how essential it is to grasp the nature of duty in negligence, its separateness from causation, and to mark off negligence from forms of strict liability" (216-217).

13 STREET, at 154.

14 "If, approaching the case in this way, the court finds that the negligence is a real or effective cause (the choice of epithet is immaterial) then there is liability:" 149. "Despite unqualified statements in text books to the contrary, remoteness is only a rule of law in the sense that the judge directs the jury on the meaning of legal cause, and that he decides whether there is any evidence that any particular consequence could fall within this definition: whether it is in fact too remote is a decision for the jury:" 150.

15 WINFIELD (6 ed.), at 75; CHARLESWORTH, LAW OF NEGLIGENCE (2 ed.), at 589. Both of these are duly noted by STREET at 150. To similar effect see Fleming, *Remoteness and Duty*, (1953) 31 CAN. BAR REV. 471-479.

16 Lord Wright in In re Polemis, (1951) 14 MOD. L. REV. 393, 398: "Remoteness of damages is of course a question for the judge but he must decide it on what are the facts and on what has actually happened." To this reviewer the cases that have actually presented "remoteness" questions in torts cases are proof in themselves that the judges approach problems of liability limitation, when phrased in terms of remoteness, as presenting questions of law to be resolved by the court. As illustrative only, see Liebosch, Dredger

cannot be an adequate pole star for the writing of a text on the judicial handling of torts problems. Street in fact recognizes in his introductory remarks on "Duty and Breach" that the text writer must do more than report the cases if light is to be shed. How much more is the troublesome problem.

In many ways the observations offered here amount to no more than the usual reviewer's regret that the author of the text reviewed did not write with a freer rein and at greater length. Of such objections there are, of course, no end. Thus none of the previously published texts have done much with the various problems generated by the comparative negligence statutes.[17] As yet, unfortunately, the reported cases shed little light on these questions; nor does Street. Again, in common with most torts teachers, Street cannot generate much enthusiasm for the field of intentional torts. To determine by reference to an English torts text what a modern department store or super-market can and cannot do to meet the shoplifting problem has been a difficult assignment—and still is. Similarly, the determination of English text writers to stick to their own torts last to the exclusion of doctrines that smack of contracts is continued in Street and one can only hope that the student concerned with problems of product liability will gain an adequate appreciation of the relevance of warranty theory from some other source. Finally, it must be noted that Street is essentially a text on the English law of torts. While there are some references to decisions from other countries of the Commonwealth, the focus is on the House of Lords and the Court of Appeal and this provides what many will regard as an unduly limited vista.[18]

v. Edison S.S., [1933] A.C. 449. Evidence that STREET does not advance as broad a proposition as his text on remoteness indicates is found tucked away in his discussion of contributory negligence (at 161), where he observes with respect to writers who think that remoteness does not relate to contributory negligence, that "The error of these writers lies in their confusing cause in fact with legal causation."

17 It should be noted that STREET does address himself to the question of whether the apportionment statute applies to landowner cases where traditionally the obligation of the landowner to the invitee has been phrased as a duty of care to one who is himself in the exercise of due care for his own safety: 203. A similar question may arise as to product liability where the buyer knew or should have known of the defect in the item. Such questions as the principle on which apportionment is to proceed STREET dismisses as being governed by "the causative potency of the act, and its blameworthiness." What this means in terms of the careless pedestrian run down by the speeding motorist is not disclosed and there should be some sort of guide for a judge's viscera. There are other problems of apportionment in the presence of two or more defendant tortfeasors that are left for others to illumine — as doubtless they will.

18 See Wright, *The English Law of Torts: A criticism,* (1955) 11 U. OF TORONTO L.J. 84, at 112.

Is it possible in this day and age to insulate the English courts from the impact of common law development in other jurisdictions and is it desirable to do so in any case?

But these are largely carping criticisms. Professor Street has produced a treatise on the English law of torts that can compete on most favourable terms with the best of the established texts. Within the limits of just over five hundred pages he has packed an amazing amount of information about what the English courts have done in tort cases together with his own evaluation of many of the cases in the light of other decisions as well as their treatment in the earlier texts. As an American law teacher about to teach by the case method an Australian torts course inevitably concerned with English decisions, the book impresses me as a good job and one that should assist both the student and the practitioner.

To those who hunger and thirst after a sense of righteousness in tort literature there are still the law reviews and perhaps we may yet see a Commonwealth torts text written as well to illumine as to mark the path of the law.

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