

2010

Professor Shanker

Wilbur C. Leatherberry

Follow this and additional works at: <https://scholarlycommons.law.case.edu/caselrev>



Part of the [Law Commons](#)

Recommended Citation

Wilbur C. Leatherberry, *Professor Shanker*, 61 Case W. Rsrv. L. Rev. 7 (2010)
Available at: <https://scholarlycommons.law.case.edu/caselrev/vol61/iss1/5>

This Tribute is brought to you for free and open access by the Student Journals at Case Western Reserve University School of Law Scholarly Commons. It has been accepted for inclusion in Case Western Reserve Law Review by an authorized administrator of Case Western Reserve University School of Law Scholarly Commons.

PROFESSOR SHANKER

Wilbur C. Leatherberry[†]

When I joined the faculty in 1973, all my colleagues called Professor Shanker “Morry.” It took a while for me to get used to doing that because I was his student in four commercial law classes. He remained Professor Shanker—the one who talked about “the majority view, the minority view, and the Shanker view.” As students, we knew that the Shanker view would be important on the exam. We also came to see that the Shanker view was always well-supported and very often should have been the dominant view with respect to commercial law issues.

Morry began teaching in 1961 as the Uniform Commercial Code (“UCC” or the “Code”) was sweeping the country. It was enacted in Ohio in 1962. Morry had several years of commercial law practice experience dealing with the jumble of statutes and case law that the UCC was designed to supplant. In my commercial law classes in 1966–68, we read cases decided under the old law (since there were so few UCC decisions that entered the casebooks in those years) and attempted to apply the new code to those fact patterns. Morry was an enthusiastic and energetic advocate of the change wrought by the UCC. He spoke with admiration about the drafters, especially Karl Llewelyn and Grant Gilmore and gave us an appreciation of what a great achievement the Code was. He also pointed out the many drafting problems and made us think carefully about how courts should construe the ambiguities and fill the gaps in the text.

As one who saw the benefits of the change wrought by Article 2, Morry wrote an article about the parallel development of strict tort products liability.¹ He argued that individuals could be compensated

[†] Professor of Law, Case Western Reserve University.

¹ Morris G. Shanker, *Strict Tort Theory of Products Liability and the Uniform Commercial Code: A Commentary on Jurisprudential Elipses, Pigeonholes and Communication Barriers*, 17 W. RES. L. REV. 5 (1965).

appropriately within the parameters of Article 2 for personal injuries caused by defective products. What the strict tort proponents saw as barriers to effective compensation could have been dealt with by courts applying Article 2 and by a few sensible amendments. What he considered unintended consequences of strict tort—elimination of any possibility of reducing the price of goods in exchange for a limitation of liability, for example—would have been avoided if Article 2 had been permitted to control the product liability field instead of strict tort.² He may well have been right, but the dominant wave was led by Prosser, Traynor, and Wade and strict tort captured the field. Although strict tort did not completely eclipse the field, as Morry had first feared, it created some confusion for practicing lawyers and fodder for academics. In Morry's words from an article he published in 1979:

Strict tort has brought about substantively little, if anything, which was not available under the Uniform Commercial Code. It has given legal scholars the opportunity to discuss the interrelationship between the Commercial Code and strict tort "with all the zeal, fury, and abstruseness of medieval theologians" But, for those who must live with these competing products liability systems and their different labels, it seems only to have brought about an enervating, costly, and confusing word game which hardly was worth the effort.³

Morry was not a conservative generally opposed to change—he eagerly embraced the major reform the Code imposed on the commercial law field. He did oppose change for the sake of change, however. For example, he saw no reason for adoption of the major revision in Article 2 that was drafted by Professor Richard Speidel but never promulgated by the Commissioners because of vigorous opposition by both business and consumer interests. That draft changed virtually every section, inserted additional sections, and renumbered the sections. Many of the changes (like eliminating masculine pronouns) were matters of form rather than substance. Any change in statutory text risks creating ambiguity where none existed or inadvertently changing substance and producing unintended consequences. Fortunately, that draft died and a later, much less

² *Id.* at 39–47.

³ Morris G. Shanker, *A Reexamination of Prosser's Products Liability Crossword Game: The Strict or Stricter Liability of Commercial Code Sales Warranty*, 29 CASE W. RES. L. REV. 550, 575–76 (1979) (citation omitted).

ambitious revision appears to have died as well. The drafters created a flexible statute that was intended to be adapted and augmented by judicial decision and Morry firmly believed in that.

Morry was sometimes frustrated to see that judges—and lawyers—did not always understand legal rules or the underlying policies and purposes. For example, he wrote an article about an Ohio case in which the Supreme Court confused the Statute of Frauds and the parol evidence rule.⁴ In the article he was very critical of the court's opinion but he expressed some regret that he was so hard on the judges when it was likely that the lawyers had done a poor job of presenting and explaining the issues.

Morry contributed an article to our law review providing a thorough Shanker-view analysis of the application of UCC 2-708(2).⁵ He argued for strict interpretation of the statutory language that other commentators were ignoring in order to justify awarding damages to the lost-volume seller. He argued that, in the real world, few if any sellers were likely to suffer losses relating to a reduction in the number of units sold when a buyer breaches. In the event of a breach by the buyer, the seller who could resell the goods would lose nothing more than the difference between the contract price and the resale price, plus incidental expenses relating to the resale. In his view, that remedy was the only one the Code provided—and wisely so. Other commentators and courts believed that, at least in some cases, the seller lost volume, meaning that he sold one less unit than he otherwise would have sold. They construed UCC 2-708(2) to allow that seller to recover his profit plus the overhead applicable to that lost sale.

The same issue of the law review included an excellent student note providing an economic analysis of the lost-volume argument.⁶ That piece was early in the wave of economic analyses of legal issues. It applied microeconomic theory and concluded that Morry was right to be skeptical about the likelihood that a seller would actually lose volume in the event of a buyer's breach. The piece also demonstrated that calculation of the appropriate damage award was considerably more complex and difficult than it appeared to be. The two pieces

⁴ Morris G. Shanker, *Judicial Misuses of the Word Fraud to Defeat the Parol Evidence Rule and the Statute of Frauds (With Some Cheers and Jeers for the Ohio Supreme Court)*, 23 AKRON L. REV. 1 (1989).

⁵ Morris G. Shanker, *The Case for a Literal Reading of UCC Section 2-708(2) (One Profit for the Reseller)*, 24 CASE W. RES. L. REV. 697 (1973).

⁶ Comment, *A Theoretical Postscript: Microeconomics and the Lost-Volume Seller*, 24 CASE W. RES. L. REV. 712 (1973).

were often cited together in discussions about the lost-volume-seller problem.⁷

Morry must be our longest-serving faculty member. It is hard to imagine his 49 years of service being exceeded by anyone. He strongly influenced the thinking and the approach to legal issues of a huge number of students. In class, he was demanding but never unkind. He insisted on class preparation and called on students who returned to class after unexcused absences. He did not just accept a student's statement that he was unprepared. Instead, he sometimes used an unprepared student as a blank slate with respect to issues treated by the Code section being considered. I recall being a truly blank slate on at least one occasion. He gave me credit for stating principles that would be right under the common law while pointing out that, had I read the Code section, I would have known that the Code rule was different.

When I began teaching Contracts and, later, Sales, Morry was generous about discussing issues, but not overbearing or controlling about how I chose to handle the courses. He always provided me a copy of his teaching materials and clearly hoped I would use them, but I never did. I knew from his classes that I could not teach the courses his way. I lacked his practice experience and his depth of understanding of the history that underlays the Code, especially Articles 2 and 9.

He taught Article 9 in a course called "Property Security," which included materials on real estate mortgages. He was convinced that familiarity with real estate mortgage law would help students understand personal property security issues in Article 9. When he gave up teaching that course after the major revision of Article 9 (including addition of a number of sections and major reorganization, including renumbering), he urged me to teach an Article 9 course. He accepted the fact that I was not prepared to teach material about real estate mortgages, but assumed that, because I had been well taught with respect to the Code, I could do the job on Article 9.

Morry was a very supportive faculty colleague, but was not reluctant to argue against what he regarded as proliferation of courses that distracted students from the core courses—like commercial law courses. He remained steadfast in his conviction that our principal obligation is to prepare lawyers for the real world of law practice.

Morry was a teacher and a scholar. His one foray into administration was a semester spent as acting dean after Lou Toepfer

⁷ See, e.g., Robert E. Scott, *The Case for Market Damages: Revisiting the Lost Profits Puzzle*, 57 U. Chi. L. Rev. 1155, 1158 n.13 (1990).

2010]

PROFESSOR SHANKER

11

left the deanship to become president of the university. Morry did not enjoy that role and quickly returned to his faculty position. He was never fond of meetings and was quick to supply a motion to adjourn as faculty meetings came to a close. Others will now make that motion, but Morry set a standard of excellence and dedication for this school and for legal education that will rarely, if ever, be exceeded.