

1957

# The Law of Torts by Fowler V. Harper and Fleming James Jr.

Walter Probert

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## Recommended Citation

Walter Probert, *The Law of Torts by Fowler V. Harper and Fleming James Jr.*, 8 W. Res. L. Rev. 546 (1957)

Available at: <https://scholarlycommons.law.case.edu/caselrev/vol8/iss4/11>

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## Book Reviews

THE LAW OF TORTS, by FOWLER V. HARPER and FLEMING JAMES, JR. Boston; Little, Brown and Company, 1956, 3 vol., 2062 pages, \$60.00.

Legal thinkers have come a long way since the days when they first tried to capture the subject matter of the law of torts in verbal strait jackets. Indeed they have a long way to go in producing the kind of thinking in the legal arena which will provide the judiciary with more than pushbuttons for solving intricate social problems. There is no harm in pushbuttons so long as they are wired for action, that is, for social action. This latest work on torts is no less than a milestone in legal man's attempt to correlate his activities with that of the society he serves — in his attempt to wire up his conceptual pushbuttons to the dynamic conditions of today's and tomorrow's affairs.

Both authors are old hands in dealing with the doctrine of torts, and they do as scholarly and as authoritative a job with the doctrine of torts as has yet been done. Their combined years of experience in teaching, practicing and writing in the area give them some advantage over the man who must spend all his time in practice. They have had the time and the occasions to reflect on the bigger scene and to wonder how this doctrine is working out in practice. They have come to definite conclusions on some of the good and some of the bad of tort cases — and they have incorporated these conclusions in their treatise.

Outstanding in this respect is their handling of the existence, ever increasing in scope, of liability insurance and the impact of this institution on judicial decision. In various places in this treatise and by various means, the authors clearly express their view that courts should openly recognize how the existence of the institution of insurance provides a means of spreading the costs of "accidents" beyond the individuals who may technically be labelled the "immediate causes" to the larger groups who might just as well be considered the "social causes" of those accidents. To those who are steeped in legal doctrine and no more, to those who do not appreciate the workings of this doctrine in its historical and evolving social contexts, such statements may seem impertinent. To those people, the authors might be more persuasive if they argued *only* that courts are spreading the risks of accidents among the community in just this way, that such is "the law." Fortunately, contemporary legal theory in the United States is making giant inroads on all aspects of the legal process, including its vast and important literature. Sophisticated men and women in the legal arena now appreciate that lawyers and judges deal with human affairs and that everything happening in those

affairs is pertinent to judicial problem-solving. This treatise is now good authority and such facts of life and such sociological arguments as are presented by the authors are bound to have a telling effect on the future course of judicial decisions.

Plaintiffs' lawyers will of course take Harper and James to their hearts because the authors do clearly describe the trend away from an individualized "fault" theory to a theory of social responsibility in an era of almost unbelievable interdependence, unbelievable at least to those who are not aware of what has been happening around them. But this is not meant to be just a plaintiff's brief. If today's facts and judicial decisions happen to favor plaintiffs as a class, everyone should know about it and talk about it, not under the guise of "duty" and "proximate cause," but in the pure light of today's conditions. Defendants will ultimately find themselves in a better position in an arena where such problems are frankly thrashed out.

Please do not conclude that "The Law of Torts" is only a sociological text. Actually it does not go nearly so far in that direction as legal treatises one day will go. The authors' presentation of social problems is not sufficiently correlated with legal doctrine in a scientific sense to call it any more than a halfway step to a scientific policy approach to the problems of torts. Very likely the legal profession as a whole is not ready for the whole step. This, then, is the best yet — both from the perspective of social interests and from the perspective of legal technicality. The problems are presented, at least, and the role that doctrine *may* and often does play is outlined. As always, the ultimate job of persuasion is left in the only place it presently fits — in the arguments of counsel for defendants and counsel for plaintiffs.

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MORALS, LAW AND POWER IN INTERNATIONAL RELATIONS by  
PERCY E. CORBETT. Los Angeles: Haynes Foundation, 1956, 51 pages,  
\$1.50.

When I read the text of Professor Corbett's three Haynes Foundation lectures, given at the University of California in Riverside last year, I had to think of a delightful story. It comes from the titanic era of American international law, between the two world wars. In a stimulating debate, so the story goes, in which the late Edwin Borchard of Yale had the main word, Professor Fenwick of the *American-Journal-of-International-Law* and the *Pan-American-Union* fame, was heard to mut-