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Cases and Materials on TORTS

Ninth Edition

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To the Memory of Bernard D. Meltzer (1914-2007)
Colleague, Wit, Gentleman, and Scholar

PREFACE

This is now the ninth edition of this casebook, and the seventh one that I have prepared over the past 34 years. The origins of the casebook go back to the 1950s, when Charles O. Gregory and Harry Kalven, Jr., both exceptional and imaginative scholars, prepared the first edition, which was published in 1959. Their second edition followed some ten years later, and was in fact the book from which I first taught torts at the University of Southern California in 1969. In 1972 I joined the faculty of the University of Chicago Law School. In January 1974, with Gregory in retirement, my late colleague, Professor Kalven, asked me to collaborate with him on the third edition of Gregory and Kalven, Cases and Materials on Torts. Kalven's tragic death in October 1974 cut short our brief collaboration just as we were beginning our revision. Thereafter Professor Charles O. Gregory was kind enough to reenter the lists and to read and comment on the drafts I prepared of the third edition, which appeared in 1977. The work on the fourth edition of Epstein, Gregory and Kalven, which appeared in 1984, I did alone. Gregory died in April 1987, after a rich and full life. The fifth (1990), sixth (1995), seventh (2000), eighth (2004), and now ninth edition bear my name alone: the change of the guard between generations has now long been completed. Even so, much of case selection and organization of this book continue to owe much to Gregory and Kalven, who brought a pioneering spirit and rich imagination to the study of torts. I shall always be in their debt.

The ninth edition makes no major structural changes, but a few minor ones. Extensive treatments of tort liability in cyberspace now appear throughout the book, covering such topics as trespass to chattels,

conversion and defamation. All of the materials on conversion have been moved from chapter 8, where they were located in the eighth edition, to chapter one, where they are conventionally grouped. Extensive references have been made to the key provisions of the Third Restatement of Torts: Liability for Physical Harm, which are now working their way to final approval at the American Law Institute. New material has been added on vaccine compensation programs, which have loomed large in recent years. At the same time the other major reforms of the eighth edition have been preserved, as I have kept the revisions that were made to the historical materials on the evolution of tort law, the expanded treatment of public nuisance law, the revisions in the modern defect cases in product liability law, and the heavier emphasis on American cases in areas of defamation and privacy.

Throughout, however, my intention has been to update the materials while seeking to preserve continuity with the earlier editions. In so doing, I have sought to keep one of the distinctive features of this casebook, which is to stress the alternative visions of tort law as they developed in the nineteenth (and now complete) twentieth centuries. Toward that end, I have retained those great older cases, both English and American, that have proved themselves time and again in the classroom, and which continue to exert great influence on the modern law. But by the same token, working through these revisions has made it clear to me that today neither the law of torts, nor this casebook, are shaped very heavily by the great transformation in tort law that took place between 1968 and 1980. Although those developments continue to remain important, they have in some instances been rejected. It is no longer likely that strict liability rules will exert greater sway in medical malpractice cases, nor that market share liability will expand beyond the original DES cases. At the same time, new and important developments on the liability of HMOs for refusing to authorize treatment, the application of the Supreme Court law on the use of expert witnesses in tort cases, and the potential exposure of tobacco companies to suit by health care organizations and unions have come on the scene in recent years. I have sought to keep pace with these new developments both through common law and, increasingly, through legislation.

Five Previous editions of this book were dedicated to the memory of Charles Gregory and Harry Kalven. Time has moved on. In 2004, I dedicated the eighth edition of the book to the memory of my contemporary, the late Gary Schwartz, who died in 2001, but who remains one of the most insightful, learned and fair-minded tort professors of any generation. For many years his kindness, generosity and insight helped improve the earlier editions of the case book. Time alas continues to move on. This past year my extraordinary colleague, Bernard D. Meltzer, himself a casebook author of great distinction, passed away at age 92. I

dedicate the ninth edition of this book to him for all that he did to hone my own legal skills and to make the University of Chicago Law School the intense, vibrant and congenial place that I have called home for the past 36 years.

Time has also marched on in yet another sense. The ninth edition is the last that I shall do myself. I am delighted to announce that Professor Catherine M. Sharkey of New York University School of Law has agreed to join forces with me in a collaboration that will begin with the tenth edition.

Richard A. Epstein

Chicago
February 2008

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In preparing the ninth edition of this casebook I have been fortunate enough to draw on the comments of many teachers and students who have used the book. In preparing this edition, I have benefited from extensive comments on the earlier chapters by Stanton Krauss. In addition, I have received additional assistance and suggestions on various points of this volume from Jennifer Arlen, Michael Corrado, Thomas Miles, Paul Schwartz and Catherine Sharkey. This edition of the casebook also continues to benefit from comments that many people have made on previous editions, including Kenneth Abraham, Jennifer Arlen, Vincent Blasi, William Cohen, Michael Corrado, Richard Craswell, Theodore Eisenberg, Robert Ellickson, Stephen Gillers, James Henderson, Gail Heriot, Morton Horwitz, Jason Johnston, Spencer Kimball, Alvin Klevorick, Stanton Kraus, William Landes, Fred McChesney, Mark Miller, Cornelius Peck, Malla Pollock, Richard Posner, Glen Robinson, Howard Sacks, Gary Schwartz, Perry Sentell, Ken Simons, Geoffrey Stone, Alan Sykes, Aaron Twerski, Ernest Weinrib, and Jerry Wiley. I should also like to thank in addition all the unnamed casebook users who have filled in their forms to explain what they did and did not like about earlier editions of the book.

My largest debt, however, goes to the team of diligent research assistants who helped in the preption of this book. Chad Clamage, Uzair Kahani, Kayvan Noroozi, and Ramtin Teheri, did an enormous amount of work in preparing this edition. They were ably assisted by Corina Wilder Davis, Brad Grossman, Dan Fine, and Paul Laskow. Once again my

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INTRODUCTION

The ninth edition of this casebook appears four years after the eighth edition, and some 49 years after Charles O. Gregory and Harry Kalven, Jr., published the first edition of this casebook in 1959. Those 49 years have been marked by both continuity and change in the law. From the late 1950s until the mid 1980s, these changes tended to move largely in one direction. With the exception of the law of defamation and privacy, tort liability expanded on almost all fronts. Today, however, the picture is far more clouded. In the traditional areas of physical injuries, tort liability appears to have reached its high water mark, and in some jurisdictions—California and New York—the tides have been receding. There are now many cases in which eyebrows should be raised because liability has been denied, not because it has been established.

In the midst of these ebbs and flows in tort liability, certain questions have remained with us in more or less the same form in which they were faced by the earliest of common law lawyers. The tension between the principles of negligence and strict liability in stranger cases surely falls into this class. The debates framed in the nineteenth-century cases have largely shaped the subsequent analysis in important areas of the law, such as those dealing with abnormally dangerous activities and with ordinary nuisances, both of which continue to take on additional importance in an age that shows greater preoccupation with environmental harms and toxic torts.

Yet in other areas we have witnessed major transformations, both in the types of cases brought to litigation, and in the choice of legal theories used to decide them. In 1959—the year of the first edition—the paradigmatic tort action was still the automobile collision. When one thought of

institutional tort defendants, the railroads came first to mind. The areas of products liability and medical malpractice cases were, when viewed with the benefit of hindsight, still in their early childhood, while mass torts and toxic torts (the two often go together) still lay a decade or more in the future.

The emergence of new types of litigation has taken its toll on traditional tort theory. The question of "proximate cause"—whether a remote consequence could properly be attributed to the wrongful conduct of the defendant—was the dominant issue of causation in 1959 and the major source of contention among academic writers. That is no longer true today. Increasingly, modern tort litigation concentrates on two other problems. The first involves the difficult questions of evidence and statistics necessary to establish the factual connection between, for example, the defendant's drug or waste discharge and the medical injuries of the plaintiff. The second involves the rules designed to deal with multiple causation when two or more parties are charged with responsibility for all or part of the same harms. Both of these shifts in emphasis have accelerated in the past generation, and are duly taken into account in this edition.

Notwithstanding the enormous substantive changes, the educational aims of this casebook are much the same as those of the previous eight editions. The primary goal remains one of giving to the student an accurate sense of both the legal evolution and the current legal position in tort law. In this context, that means incorporating into the book the output of the American Law Institute, which has now published multiple volumes of a Third Restatement dealing with Liability for Physical and Emotional Injury, Apportionment of Liability Among Multiple Defendants, and Products Liability. It also means taking into account the continuous set of legislative initiatives, which, not by coincidence alone, have taken place in the same areas that have generated the new Restatement output.

This casebook, however, would fail in its essential mission if it did not accomplish two other tasks. First, it should provide you an opportunity to examine the processes of legal method and legal reasoning, with an eye to understanding the evolution of legal rules, and the huge impact that these changes have had on our social institutions. Second, it should give students some sense of the different systematic and intellectual approaches that have been taken to the law of torts over the years.

The importance of understanding method and historical evolution cannot be underestimated in legal education. A casebook—certainly this casebook—is not a reference book, much less a treatise. Indeed with the rise of the online services, internal case and page references are cut back to a minimum, often without an explicit indication of omitted citations, in order to ease the flow of the text. The great problem of legal work today is not too little law, but too much. A click on a single principal case puts you on a trail that branches off in a thousand directions. Faced with this surfeit

of information, the standard legal curriculum, by necessity, touches on only a small fraction of the huge and ever-growing body of judicial decisions, Restatement provisions and statutory material, much of which will change with time. The education of the lawyer of the future therefore rests on an ability to deal with a mass of legal materials, to identify the underlying assumptions, to determine possible implications for analogous cases, and, above all, to deal with the persistent uncertainty, ambiguity, and at times downright confusion in the law. To help with these tasks it is essential to trace the development of a legal principle over time, through a line of cases that illustrates its application and tests its limits. To that end this casebook contains many cases from the nineteenth century and before, even some that have long ceased to represent the current law. Much of the material in the ninth edition does not represent modern cases, but earlier decisions whose intellectual value has survived the passage of decades, or even centuries, including one short but insightful passage from the Lombard laws on comparative negligence that dates from 733 A.D! Likewise, in order to capture the nature of legal debate, in many principal cases I have reproduced not only the opinion of the court but those of concurring or dissenting judges. With *Fletcher v. Rylands, infra*, at 127 for example, five separate opinions from three different courts are reproduced, because each adds something to the total picture. These cases are often of exceptional value because their facts and variations in reasoning by the judges have made them focal points for subsequent analysis both in judicial opinions and in legal scholarship, where modern articles tend to gravitate to the discussion of the classic cases that have already been analyzed by previous generations of scholars.

A sound legal education requires more than attention to doctrinal and analytical skills. The law of torts in particular is one of the richest bodies of law, and it has been examined and explored from historical, philosophical, and institutional perspectives by judges and scholars alike. It is essential for all students to gain some sense of the diverse possible approaches to tort law, lest the constant probings of the Socratic method lead to an unhappy form of intellectual nihilism. The materials selected are designed, wherever possible, to allow torts to be confronted not only as a collection of discrete rules but also as a systematic intellectual discipline.

For the past four or five decades, judges and scholars have voiced fundamental disagreement about the proper orientation toward the tort law and about the proper choice of its key substantive rules. Speaking first to the question of general orientation, it is possible to identify three major positions. The traditional view—which had unspoken dominance at the time of the first two editions—looked upon the law of torts as a study in corrective justice, as an effort to develop a coherent set of principles to decide whether *this* plaintiff was entitled to compensation or other remedy from *this* defendant as a matter of fairness between the parties. Issues of

public policy and social control were of course never absent from the judicial or academic discourse, but they did not dominate judicial or academic attitudes toward either particular cases or general theory. Fairness, justice, and equity, however elusive, were the dominant themes. Most laypeople, and many judges, instinctively approach most tort cases in just this fashion.

Over the past 40 or 50 years, the traditional approach has been under attack from two flanks. On the one hand there is renewed insistence, which today is often expressly articulated in the cases, that the compensation of injured parties is in itself a valid end of the tort law and that the doctrines of tort law that frustrate that objective must be hedged with limitations or totally eliminated unless strong justification is given for their retention. The older presumption that the plaintiff had to show "good cause" to hold a defendant liable (roughly speaking) has yielded in some quarters to a new presumption that the defendant who has demonstrably caused harm must show why liability should not be imposed. That shift in presumptions, which is today hotly contested, has two major implications. First, the risk of "inevitable accidents" were usually borne by the plaintiff under the dominant view from the late nineteenth to the mid-twentieth century, both for private and institutional defendants. But since that time institutional (but not individual) defendants have been much more likely to be required to respond in damages should the risks of these inevitable accident materials translate into physical or emotional harm. Institutional defendants charged with tort liability, it is said, can shift the loss to society at large, either by altering the nature and type of products sold and services provided, or by spreading the risk through liability insurance. Second, in suits against institutional defendants, defenses based on plaintiff's conduct—notably contributory negligence and assumption of risk—receive a narrower interpretation and no longer bar, but at most reduce, the plaintiff's recovery.

The second critique of the traditional approach comes from a different quarter, that of economic theory. Looking first at the tort law as a system of social control, advocates of the economic approach have generally argued that the proper function of the tort law is to lay down workable liability rules that create incentives for both individuals and firms to minimize (the sum of) the costs of accidents, the costs of their prevention, and the administrative costs of running the legal system. In this view of the subject, the compensation of individual parties is not an end in itself, but only a means to enlist private parties to help police the harmful activities of others. Tort law is thus understood as a part of a complex system that also contains criminal laws and legislative sanctions, not to mention contractual and customary limitations on proper conduct. Given its systematic orientation, this economic approach tends to downplay both the importance of corrective justice in the individual case and compensation