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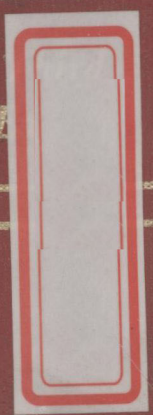
Cases and Materials on TORTS



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Cases and Materials on
Torts

THIRD EDITION

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Late Professor of Law, University of Chicago

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Professor of Law, University of Chicago

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To the memory of
Harry Kalven, Jr.

Preface

In early 1974 Harry Kalven asked me to collaborate with him on the third edition of Gregory and Kalven, Cases and Materials on Torts. In the months that followed, we reached basic agreement about the structure and organization of the new edition, and were about to begin putting our plan into operation. His tragic death in October 1974, cut short our joint effort. The actual preparation of the third edition has therefore fallen upon me, aided of course by the helpful advice and generous assistance of Charles Gregory. In preparing this edition, I have tried to keep to our original plan, and have altered it only where it became difficult if not impossible to adhere to it. The passage of time has made necessary many revisions in this casebook, but I have tried to keep as much as possible of the second edition in order to preserve, wherever possible, its distinctive character. In their preface to the second edition, Charles Gregory and Harry Kalven wrote that "the study of the tort law emerges as the great opportunity to watch the common law at work." That statement is all the more true today, and it is hoped that the third edition of this, their casebook, will enable the students of the next generation to learn the culture of the common law, a culture so much a part of the heart and mind of Harry Kalven, Jr.

Richard A. Epstein

Chicago
August 1976

A Second Preface

In 1973 Harry Kalven and I realized that a new edition of our casebook on Torts would soon be needed. Things were happening too fast in this field. A 1974 Supplement, prepared substantially by Harry alone, helped to keep the book up to date, but in the meantime, we were discussing plans for a thoroughgoing new edition. I had retired from teaching at the University of Virginia in June 1967, and was living in rural New Hampshire. We both knew that I could play only a passive part in preparing the new edition; and the plan was for Harry to continue, with Professor Richard A. Epstein of the University of Chicago law faculty taking over most of the research and editorial work. Between them, they had pretty well "roughed out" what the new edition would be, and I was wholly in agreement with their plans.

When Harry died so suddenly in October 1974, the future of the casebook was in Richard Epstein's hands. Knowing as I did how Harry had trusted Richard's knowledge of the field and his judgment in selecting and editing materials, I did not hesitate to assure the publishers that he was clearly the one to shoulder the task of compiling, assembling and editing the materials for the third edition. I am certain that this volume will justify Harry's fortunate choice. I think Richard Epstein has done a masterful job, and I am sure that Harry would have been delighted with it.

Charles O. Gregory

Jaffrey, New Hampshire
September 1976

Acknowledgments

In preparing the third edition of the Gregory and Kalven casebook, I have found myself fortunate indeed to draw upon the assistance and learning of so many members of the legal profession. First and foremost, I must thank Charles O. Gregory, who, while not involved in the active preparation of the text, read and commented upon each portion of the manuscript. In addition, I should like to thank Walter J. Blum, Gerhard Casper, Robert C. Ellickson, Gareth Jones, Stanley N. Katz, William M. Landes, John H. Langbein, Michael E. Levine, Jeffrey C. O'Connell, Richard A. Posner, George L. Priest, Walter J. Wadlington, and Zigurds L. Zile for their advice and comments on specific portions of this manuscript. I should also like to thank the following students at the University of Chicago: John Adams, James Bird, Reed Groethe, Anne Rapkin, and Dana Smith for their indispensable assistance in researching this book. A special and deep note of thanks is due Deans Phil C. Neal and Norval Morris, who have given the greatest possible support for the preparation of this new edition.

I also wish to thank the authors and copyright holders of the following works for permitting their inclusion in this book:

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Introduction

Eight years have passed since the publication of the second edition of the Gregory & Kalven casebook, and they have been perhaps the eight most eventful years in the entire history of tort law. It is impossible and unwise in the space of this brief introduction to canvass these changes in any detail; it must be sufficient to point out that there have been major developments — to mention only the most important — in the law of medical malpractice, of products liability, of comparative negligence, of imputed negligence, of occupier's liability, of no-fault insurance, and of defamation. A casebook which gave an accurate account of the tort law in 1969 simply cannot do adequate service today, and that reason alone justifies the appearance of the third edition of this casebook, which a generation of teachers and students have found a valuable instructional tool.

The aims of this casebook are much the same as those of the previous two editions. There is first the goal of giving to the student an accurate sense of the current legal position, in this, one of the most active and important branches of the law. But this casebook would fail in its essential mission unless it accomplished two other tasks. First, it should provide the student with an opportunity to examine the processes of legal method and legal reasoning. Second, it should give the student some sense of the different systematic and intellectual approaches that have been taken to the law of torts over the years.

The importance of method cannot be underestimated in legal education. A casebook — certainly this casebook — is not a reference book, much less a treatise. The standard legal curriculum, of necessity, touches on only a tiny fraction of the huge and evergrowing body of substantive rules, and even many of those examined 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 deal with 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 those which have long ceased to represent the current law. Likewise, in order to capture the nature of legal debate, in many principal cases we have reprinted not only the opinion of the court but that of concurring or dissenting judges. With Rylands v. Fletcher, at page 77, infra, for example, five separate opinions from three different courts are reproduced, because each adds something to the total picture.

A sound legal education requires more than attention to 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 and philosophical perspectives not only by the common law judges, but also by generations of academic writers. 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 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.

There is in the tort law today fundamental disagreement about the proper orientation toward its subject matter 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 — largely unchallenged until recent years — was to look at 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 from *this* defendant as a matter of fairness between the parties. Issues of public policy and social control were of course not absent, but they did not dominate judicial or academic attitudes either to particular cases or to general theory.

Today the traditional approach is 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 about 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 is — crudely speaking — yielding today to a newer presumption that requires the defendant to show why, with harm established, liability should not follow. The major implications of the shift in presumptions are two. Where it was once the dominant sense of the common law that losses from "inevitable accidents" were outside the tort law, today the view is increasingly that these losses should be shifted by the law first to some particular defendant, and then by use of market mechanisms throughout the society at large. Secondly, defenses based upon plaintiff's conduct — notably contributory negligence and assumption of risk — have received narrower interpretations in recent years, and by degrees may yet be removed from the substantive law.

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 to create incentives upon both individuals and firms to minimize (the sum of) the costs of accidents and the costs of their prevention. 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, by private action, the harmful activities of others. The economic approach tends to downplay the importance of corrective justice in the individual case and compensation for individual victims of accidents, treating the first as largely incomprehensible and the second as better achieved through voluntary insurance arrangements. Until very recently its importance was largely academic, but today its influence is increasing in the decided cases.

The diversity of opinions upon the proper approach to the tort law carries over to disputes about the proper substantive basis of tortious liability. From the earliest times until today courts have entertained three main theories — each subject to many variants — for recovery in tort. There is, first, recovery for harms intentionally inflicted by defendant upon plaintiff. Second, there is recovery for harms negligently — through the want of reasonable or ordinary care — inflicted upon the plaintiff. Lastly, there is recovery under a theory of strict liability, that is, for harms inflicted upon the plaintiff by a defendant who acts without negligence and without any intention to harm.

In dealing with these theories it is important to keep in mind several important themes which reassert themselves throughout the law of torts. One set of issues concerns the relationships between the general approach to the law of torts and the choice of specific theories of liability in particular cases. To illustrate: when does a concern for corrective justice require the use of a strict liability principle, a negligence principle, or an intentional tort principle? What about theories based upon the need for individual compensation, or upon the importance of the tort law as a means of minimizing accident costs by channelling scarce resources to their most efficient use? Second, it is important to ask what are the limitations upon recovery that are consistent with the basic theories of liability, and with their basic orientation to subject matter. In this connection it is important to ask the extent to which a plaintiff who otherwise makes out a good cause of action should be denied recovery because of, to use the standard classification, his own conduct — be it called contributory negligence or assumption of risk — the conduct of a third party, or an act of God. Finally, it is crucial to consider what might conveniently be termed the "boundary" questions in the law of torts. As stated, any of the three theories of liability — strict liability, negligence liability or liability for intentional harms — could apply to any case involving harm. Why is it, no matter what general orientation is adopted, that one theory is chosen for one particular case, while another theory is chosen for another? To anticipate for a moment, does, for example, the commitment to a theory of strict liability in classical trespass cases — those involving the direct application of force upon the person or property of another — require (or allow) the use of a similar theory in cases involving slips and falls on business or residential premises, or for the harm caused by those engaged in ultrahazardous activities or the manufacture of dangerous products? Similarly it

must be asked whether the choice of a negligence theory in medical malpractice cases commits us to that theory for routine traffic accidents or whether a theory of intentional harms in assault cases commits us to that theory in defamation cases.

With our major conceptual dimensions identified, it is perhaps desirable to close this introduction with a word about the organization of this book. The subject matter of the law of torts can be approached from a large number of different perspectives, and the order of organization is by no means "neutral," as instructors with one outlook are apt to use certain materials in one order while those with a different outlook are apt to use somewhat different materials in yet another order. Here we have tried to adhere to traditional modes of presentation that can, it is hoped, be varied with minimum confusion to suit the tastes of different instructors. We have thus begun with an examination of the principles governing intentional torts, which can be conveniently concluded before turning to the bulk of the materials which deal with the accidental infliction of physical harm. Thereafter we turn to the law governing accidents and to the recurrent tension between negligence and strict liability. Chapter 2 approaches this conflict from a historical perspective, and Chapter 3 covers much of the same material from an analytical one. The next four chapters are devoted to an elaboration of the basic principles of tortious liability. Chapter 4 deals with negligence; Chapter 5 with causation; Chapter 6 with affirmative duties to act; and Chapter 7 with affirmative defenses based upon the plaintiff's conduct. The next three chapters are concerned with the application of all the general theories of liability to particular activities and instrumentalities. Chapter 8 is devoted to owners and occupiers of land; Chapter 9 to animals, ultrahazardous activities and nuisance; and Chapter 10 to products liability. Chapter 11 concudes the basic coverage with a treatment of damages in physical injury cases.

The next five chapters complete the discussion of physical injuries. Chapter 12 deals with vicarious liability and imputed contributory negligence. Chapter 13 with what remains of defendant's immunity from liability based upon status; and Chapter 14 with the role of insurance companies in resolving accident cases. Our next two chapters discuss systems designed to replace or supplement the traditional tort law, with Chapter 15 dealing with workmen's compensation, and Chapter 16 the many varieties of so-called "no-fault" insurance.

The last three chapters of this book are concerned primarily with non-physical injuries. The torts concerning emotional tranquility are covered in Chapter 17, defamation in Chapter 18, and privacy the last chapter, Chapter 19.

References to Prosser on Torts are to its fourth edition unless otherwise specified.

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