Book Review (reviewing Young B. Smith et al., Cases and Materials on Torts (1952))

Harry Kalven Jr.
—like a dessert that tastes good and makes you want more but doesn’t seem quite entirely to satisfy no matter what spoonful you stop on. Perhaps it’s because they were written to present a particular point of view.

Clarence Morris has something to say to the student, the teacher, and the practitioner. His extremely provocative ideas will benefit all three of them and each will find his collection of his essays most usable. He has indicated that he is now engaged in writing a Torts textbook and I am sure we will all look forward to it with high anticipation.

JOHN W. WADE*


When the first editions of the Thurston and Seavey and the Shulman and James casebooks were published a decade ago, Professor Halpern in an able review compared them as almost polar opposites in their approach to the teaching of torts. He found the Harvard book the perfection of the traditional pattern begun by Ames; he found the Yale book radical, unconventional, and stimulating. He concluded that the Yale book made better reading for the torts teacher, but the Harvard book made a better teaching tool. Each book has recently had a second edition but the revisions have not served to make them meet half way. And Professor Halpern’s verdict stands. They remain the two polar approaches to the teaching of torts, and their very substantial merits notwithstanding, the one remains too traditional and the other too unconventional for most tastes.

It is therefore with special interest that the book of Dean Smith and Dean Prosser has been awaited. They have produced an excellent and substantial book. The selection of cases is first rate and there has been little cryptic editing of them. The editors have turned up a notable number of new cases. They have maintained a sound balance between the old and the recent; they have displayed a sensible willingness to include well known cases already preserved for posterity in other casebooks. They have frequently focused the development of a rule by taking several cases from a single jurisdiction as with the English cases on Rylands v. Fletcher, the New York cases on emotional disturbance, the Connecticut cases on occupier liability. Some sequences are remarkably happy and successful, as for example those on res ipsa and last clear chance. The editors have had a nice eye for the richly human case and have shown a not inconsiderable touch of humor. They have been scrupulous not to ride pet theories even in areas where Dean Prosser has been a vigorous law review commentator. They have been patient and work-

*Dean, Vanderbilt University, School of Law.

1. Thurston & Seavey, Cases on Torts (1942).
2. Shulman & James, Cases on Torts (1942).
4. Seavey, Keeton & Thurston, Cases on Torts (1950); Shulman & James, Cases on Torts (2d ed. 1952).
5. In addition to many things, including Mr. A. P. Herbert on the reasonable man and the Langdell Lyric on Brimelow v. Casson, we have here what is surely the most adequate collection of cases yet made illustrating the hazards of going to a toilet.
6. The section on business visitors affords a good illustration of this restraint. Compare it with Prosser, Business Visitors and Invitees, 27 Minn. L. Rev. 75 (1942).
manlike. They have provided material for that detailed illustration and application which is necessary if the flexible rules of tort are to be given content. And perhaps most important, they have taken their law seriously and presented it with a uniform tone of respect.

In brief, they have given us a book which teaches well and teaches the teacher, and it is ungrateful to ask for more. But despite its major strengths, the book does not to my mind resolve the differences between Seavey and James nor advance us as far as had been hoped in the solution of the troublesome problems besetting the teaching of tort law today.

There is first the editorial matter of what should be in a casebook besides cases. The Seavey book solves this with an ascetic avoidance of any notes or editorial comment whatsoever, but supplements its coverage with well over 1000 cases briefed by the editors in five to ten lines each. The James book has not attempted substantial supplementary citation of cases but gives free play to lively personalized essay comment by the editors, generous quotations from law review writing, and adds a notable amount of non-legal material. The Smith-Prosser on the other hand, as its principal editorial feature, makes very extensive use of editorial notes giving additional citations and outlining further applications of a given rule. The additional citations run into the thousands and the note materials must cover a good 150 pages in all. The notes have been done with care and precision and are always informative. They constitute a little treatise in torts in themselves and make the book a valuable source. But in the end I find the notes a disadvantage. They are almost entirely expository and seldom raise questions. They tend to deaden the book by almost invariably stating explicitly the point of the principal case preceding them. They are too detailed for student mastery and are likely to prove a distraction to the serious student. Above all, they take space which might have been used for other things.

If there is to be material other than cases in a casebook, and of course there is, it should be in the text proper and in

7. The revised edition of Seavey does have brief introductory essays to the major chapters.

8. The handling of law review citations struck me as erratic but the references to the Restatement are excellent and frequently done with a useful challenge to the authority behind Restatement positions. One minor but persistent irritant is the frequent citation or even quotation in the notes of cases without any indication that the case is also in the book as a principal case.

9. But is not the Sinram case misread in the note on page 1213? Would the owner of the cargo have been in any stronger position than the underwriter had there been no insurance of the cargo?

10. Some of the notes, of course, are swell, such as those on pages 617, 761, 830, 978.

11. In general the editors seem to me too explicit in disclosing the pattern behind the cases. There may have been too much mystery in the older casebooks, but a little mystery here as elsewhere in life still seems a good thing. The James book, for all its departures from the past, does have some substantial sections without subtitles.

12. Again a mild protest about ignoring statutory material altogether unless it happens to be in a case. It is noteworthy too that none of the three books is any longer committed to a historical approach to tort theory. The present book is right that it is too late in the day to exploit the historical development down to MacPherson v. Buick.

13. The existence of Dean Prosser's book seems to have posed something of a dilemma for the editors. Only in the chapter on malicious prosecution do they quote from it extensively.
sufficient quantity to be independently discussable. A casebook is for the student, not for the bar, and I should like to enter a dissent against the current practice, which this book exemplifies, of lavishing excellent scholarship on the notes.

Then there is the problem of what to do with the materials other than those dealing with the negligent causing of physical harm which we all agree is the core of torts today. There are first those sore thumbs—occupier liability and manufacturer's liability. These are close to negligence theory today but have had a stubbornly independent history. The Seavey volume treats them within negligence under the heading "Special Relationships." The James volume treats them along with auto accidents as a series of functional areas to be studied after the general theory of negligence has been worked through. But the Smith-Prosser appears to treat them as independent rubrics and places them not only after the material on negligence but after the material on strict liability and nuisance as well. None of the books makes any attempt to handle defamation and misrepresentation, which all three treat at length, as other than independent rubrics. The Smith-Prosser follows tradition and begins with an elaborate study of the classic intentional torts and their defenses. The James book in an unparalleled act of rebellion puts this material very briefly at the end of the book. Finally the Smith-Prosser, although it has a good unit on injurious falsehood, gives only token treatment to the competitive tort material, and the James book eliminates it altogether. Workmen's compensation materials which are dealt with to some extent in the James are left completely for the agency course in the other two books. There are two problems here. One is what, if anything, should be done about the "emancipated" tort fields such as labor law and unfair competition. Perhaps torts can no longer serve as a useful introduction, but certainly the Smith-Prosser is not a solution on this point. The second problem is whether torts must continue to be presented as a grab bag of separate uncoordinate topics. There are difficulties in finding a satisfying pattern of integration and there is some conflict between emphasis on over-all theory and emphasis on accurate reporting of the law. But I think it is something of a disappointment that the present book has not wrestled with the problem of integrating a tort theory15 and that it has achieved its objective of accurate reporting at a price. The law can without distortion be placed in the context of a theory even though it does not fully exemplify that theory. And unless this is done the myopia which...
always threatens the virtues of the case system is a real hazard to teaching.

The third point goes to what might be called the *realpolitik* of tort law. The Smith-Prosser, like the Seavey, stays serenely above these facts of life. There is no indication that for the practitioner tort has become almost equated with auto accidents, there is no explicit concern with the dominant role of the jury or with the fact that in many areas the use of the jury in civil cases is confined almost entirely to personal injury litigation, there are no indications of the structure of the personal injury bar, the contingent fee, settlement practices, and finally there is no facing up to the facts of liability insurance. I do not mean to suggest that the first year student should be taught to regard the appellate doctrine which he reads as illusory or taught that factors quite different from those in his casebook control the actual results or taught that the only criterion for the importance of a legal rule is its frequency in litigation or in the day to day work of the lawyer. But surely some correctives of perspective are required. And the objective should be not to debunk the rules of law but to consider, while the tranquility of school still permits it, some of this additional data which bears significantly on the law's performance.

I reach then my last consideration. The James book views tort law, in the fashionable metaphor, as social engineering, as the administration of risk and loss. In its view we do not have today a fault system with a few curious islands of absolute liability; we have rather a system adjusting beneath the surface of its rules to the fact that fault is an outmoded criterion of liability and we approach at numerous points a de facto system of absolute liability, which on some happy tomorrow will merge in an explicit system of absolute liability. The radical beginning of their book with its 150 pages on liability other than fault serves to set the tone. I do not subscribe to their enthusiasm for the absolute liability solution nor to the crusading spirit with which they present it. But I do subscribe to their emphasis on this theme as the cardinal policy debate of tort law. And in contrast I find the studied silence of the Smith-Prosser almost deafening. There is no place in their book where

16. The Seavey does have a useful note on jury statistics (pp. 190-1).
17. There is however an excellent chapter on damages and the recent emergence of very high awards is noted.
18. The James book achieves considerable success on this level.
19. The contrasts between the two books are apparent at every turn here. A vivid instance is the handling of the tenement landlord's liability. The Smith book, although it has good coverage of lessor liability generally, confines itself to a four line reference to the New York multiple dwelling statute. The James book gives us not only the *Boy* case in Pennsylvania but a five page note on the economic consequences of imposing liability on the landlord.

But the major point is that the Smith book maintains a studied silence not only about the kind of writing that James, Ehrenzweig, Gregory, Friedmann, and others have been doing lately but about such stand-bys as the Columbia Plan of 1932. There are no references to insurance; no references to enterprise aspects or the implications for tort in the fact that the defendant who pays is so frequently liable on respondent superior grounds; and also no reference to the way tort becomes absorbed as a branch of public law under social health and employment insurance programs as nearly happened in England. The chapter on strict liability, although useful in its own right, actually emphasizes the limitations which have been imposed on *Rylands v. Fletcher* and the small following that Section 519 of the Restatement has acquired.

Ironically the most flavorsome unit in the book from this vantage point is the
the issue can be seriously joined. They have made a clear and deliberate choice to stick to the law as it is at the moment. Certainly there are dangers in the other approach. It is easy to exhort us to be imaginative, and use the materials of psychology, economics, and sociology. It is, as we are all learning after the first flush of enthusiasm, very difficult indeed to do anything with these issues at pointblank range. Perhaps one must sacrifice either an interest in law or an interest in the larger policy controversies. Perhaps the editors have been only wise and prudent in retreating to the sure area of legal competence. Perhaps the book is sound in giving the teacher superior coverage of the legal data and leaving it solely up to him to season it as he will. Their sober judgment on the point is entitled to great weight. But once again I confess to some disappointment that they have not seen fit to wrestle more with the problem.

And once again, the things they did not do, which might perhaps be done, should not obscure the superb job they have done on what they set out to do.

HARRY KALVEN, JR.*

excellent note on cattle trespass statutes (pp. 662-5) which does reveal nicely the conflict between the cattle and the agriculture interests.

A touch of psychology might have enlivened the materials on emotional disturbance. There appears to be strong basis for the view that miscarriages cannot, after all, be induced readily by fright. See Note, 15 U. of Chi. L. Rev. 188 (1947).

*Associate Professor of Law, University of Chicago Law School.