

1973

Discussion in Schwartz, Torts Casebooks on Parade: The Authors Meet the Users

Harry Kalven Jr.

Follow this and additional works at: http://chicagounbound.uchicago.edu/journal_articles



Part of the [Law Commons](#)

Recommended Citation

Harry Kalven, Jr., "Discussion in Schwartz, Torts Casebooks on Parade: The Authors Meet the Users," 25 *Journal of Legal Education* 15 (1973).

This Article is brought to you for free and open access by the Faculty Scholarship at Chicago Unbound. It has been accepted for inclusion in Journal Articles by an authorized administrator of Chicago Unbound. For more information, please contact unbound@law.uchicago.edu.

PROFESSOR HARRY KALVEN, JR.

of the University of Chicago School of Law

I would like to group my remarks around two headings:

One, architecture.

And the other, esthetics.

Now I will get to those in a moment.

I think, at the outset, the notion Charlie Gregory and I had in mind in the first edition of the book in 1959 seems to me more acutely true of the field as a whole now than then.

The problem of tort law at the moment, as it was ten years ago and as it will continue to be for, I suppose, whatever future it is going to have, is that it involves a curious balance between a common law subject, a private law perspective, so to speak, and a public law perspective.

The fascinating thing about it, the excitement of torts today, is that it balances somehow between common law, private law, classic origins, techniques and approaches and emphases and the public law perspectives and techniques and criteria. And that is the difficulty as well as the fascination of it. It makes it hard to handle. It is so awfully hard to tell where that balance should be struck at the moment.

Charlie and I felt we struck it pretty well in '59. I think we barely survived striking it in '69, when we came out again, and I have no idea where it would be struck five years from now. At some point the public law aspects may take over so much as to require a radical adjustment of what had been a nice sandwich of traditional and non-traditional factors.

I can't think of any field in law where there is such a magnificent collision, between common law case-by-case techniques and big public law statutory approaches. And that is what the thing is all about really.

And the problem is to work out an emphasis that preserves, as far as possible, both those traditions for the time being, because I think it would be a great mistake to throw away the common law flavor of tort law, just as much as it would be a great mistake to ignore the new developments.

With that powerful prefatory observation, let me now go to the architecture and esthetics business. And let me begin with the esthetics since everybody else has been talking about something more serious:

I would say that, essentially a casebook is an anthology. I think an editor ought to be allowed an anthologist's privileges. Certainly it is a matter for some personal taste in what he does, how he sees things,

and what he decides to put together—the same way one would do in a book of poetry. There is no standard way of producing an anthology of poetry. I think it would be a mistake if you wanted the reader of the book to make up his own anthology out of what you gave him. Therefore, I would disagree with Bob and with John. I think there is more of an obligation for an editor to impose his personal stamp on the book, although, of course, one has to understand that the book is going to be taught by different people in different curricula with different needs. But nevertheless, I would—probably to preserve a topic for debate here—say that I would lean heavily on the side of the editor having a point of view. The reason there is so damn much about defamation in our casebook is: I *like* it!

And I am not sure the point goes beyond that. I mean, really, you can justify it in all sorts of ways, but I happen to like it very much. And I am sure that the reason that the conversion is back in the Wade casebook is that they like that. Gregory used to like it, so I had a hell of a time getting it out!

Let me continue then with a series of remarks about the esthetics of this:

One is that, I think, for the time being—I don't know how long the time being is going to be—but for the time being, torts ought to remain a traditional subject. It is a subject that should acknowledge it comes from a tradition—from a long past.

There is definitely a place for Holmes and a place for Cardozo still, and I think that one ought to keep in mind how far back you can go with writing about torts, because you have got now a hundred years of serious discussion by adults of the problems and it is a mistake to cut yourself off from that. It is partly a point about culture and partly a point about the way law really is.

Jeremiah Smith, for example, did a hell of a lot better on most topics than people who have written since. And it is a great mistake to lose that name altogether. You see, you produce a whole generation of students who never heard the name.

And while we indulge ourselves in Cardozo, I think the case for Cardozo still being the metaphysician of the torts field and for making it interesting is very good, and that one ought to work out some scheme whereby you can have Cardozo on one page and statistics on another. That is the mix called for today. And in fact, we do have that in the new edition! That is the first point. You have got obligations to tradition.

Secondly, I think—and Bob made this point—I think today you have some obligations, especially in torts, to realism, because a chief field in

which there may be a great difference, a gap, between the facts and the law in action, is torts.

It happens to be a field blessed with some empirical studies of what did happen in action. Therefore, it seems to me that the modern teaching ought to accommodate somehow empirical footnotes to what it is talking about. And there are various chances of doing that seriously now, and I think that you have that obligation, as teachers, to take that up, and show that you can learn something about the system by an empirical study of it and use that as an appropriate material for classroom discussion and for following along with cases.

Third, I think that the solution to one of the great problems that an editor has as to precisely what approach to take is really to give up that aspiration, to be eclectic. A book should change its pace, change its rhythm, change its style, depending on what you are talking about. There are places where it is sensible to pursue appellate cases down the line with integrity, chasing a doctrinal point, if the point still holds. It is a mistake to think that if you do that once, you have got to do it every time. There are places where it makes no sense to use cases at all; you should do something quite different.

There are places like damages, where appellate cases really aren't any good,¹⁷ but you have got to use them anyway, because the topic deserves to be discussed, because I think you have to move with the nature of the material and not be stuck with whether you are going to approach it this way or that way.

The result is, I think, that the idea is to produce a book where the number of pages does not indicate how you should teach it. It should not be divisible by twenty or twenty-five or something just so it can be read that way. The sensible book would be paced time-wise in a very different fashion, so that—it is just like a race—so that you run some laps much faster than others, and the book ought to accommodate that desire. That is tricky but I think that is quite possible.

Finally, one special point about our book I am proud of and a little insistent about: There is a very considerable secondary literature in this field, which you doubtless know, and some people in this room have contributed mightily to it.

It seems to me that one obligation that the editor of a book has is to have opinions about the literature—I mean, not simply to cite it mechanically, as though he had a student do it, but to show personal judgment as to what the really good articles are, the helpful articles, the seminal articles, so that the student reading it gets some clues to what there is to read here.

¹⁷ See Note 21, *infra*.

Not everything that has been written is worth reading in the same way, and therefore I think that some adjectives along with citations make a difference.

Now let me just take a minute to restate in a way the architecture we had in mind the first time and which I think still makes some sense and is of some interest now.

The first thing was to claim that the field could be organized in three parts—that there were different aspects of torts, that it wasn't a string of topics, and that it wasn't a single unified subject matter. And the three parts that we divided it into, as you doubtless know, are:

First,—the physical act accident encompassing one function of the law of torts.

Next,—although there is no word in the language for it—to try and isolate what we call the indignity function, the functions dealing with dignitary harm, where the whole ball game is really quite different.

And then, to account for torts as a regulator of the marketplace, the economic torts or the competitive torts. This is still a third function, and again very different.

And to try, within those three areas, to unify the appropriate subject matter that went with each function.

Now one of the great problems that we all have is that the economic area is no longer manageable by us, and that is bad. And it poses a great conundrum.—what are you going to do about that? It has been emancipated. Perhaps it is better taught now as an advanced course in unfair competition.

But it is a shame, in a way, to lose what was the tort aspect of that, and there is some wonderful material there. It is the unit that suffered most in our second edition; we surrendered to the fact that you cannot have enough material in a book suitable for reaching the other purposes of tort law, and to do anything with the economic thing except to nod to it.

So we settled for what we thought would be, in a sense, a two-hour tour through the economic torts. And I think we kept the *Ultramares*¹⁸ case in as a kind of a testament to the past. But there are problems. What happens to fraud, what happens to that whole series of lovely ideas.

Then there was the great fun of grouping things around the *International News*¹⁹ case, to watching the appropriation of various things from good will to property to ideas as possible torts.

¹⁸ *Ultramares Corp. v. Touche, Niven & Co.*, 255 N.Y. 170, 174 N.E. 441 (1931).

¹⁹ *International News Service v. Associated Press*, 248 U.S. 215 (1918).

I have always thought that the best part—I mean, most effective, to my personal taste, the thing that worked out most effectively in our book was the effort to pull together the dignitary stuff—not that it is terribly important but it is great fun—and to chop up the classic torts, the intentional torts, recognizing that an enormous part of that old law really deals with dignitary harm, and that assault and false imprisonment and defamation have much in common. You deprive yourself of a great pleasure, if you are not allowed to put those materials next to each other and study them in sequence and puzzle over the different approaches the law took to deciding what was roughly the same problem. And that was the point of that section; that worked very well, at least for me, and it does seem to me there that the intrusion of the editor's emphasis does help, because he has an idea of how this stuff goes in sequence. It is interesting to follow him on that, I hope, and that that produces a kind of a unification of material in a somewhat new, refreshing, and, I think, quite positive fashion.

Let me come to the big problem that we all have, which is, of course, what to do with the physical accident. And there we had, I guess, really five things that I would like to mention that have been characteristic of our approach to it:

The first is to acknowledge—as was being acknowledged by torts teachers from the beginning of time, and writers about it—that whatever the triumph of the nineteenth century commentators was, there has always been a tension between strict liability and negligence even in classic tort terms. The two have never quite worked out the solution to the problem of inadvertent harm so that it is totally satisfactory to either side.

And therefore, you had living, in a sense, unhappily together and unpeacefully together, in common law, the idea of strict liability and the idea of negligence as the appropriate principles for handling inadvertently caused losses. And part of the job, I think is to pose that tension before you go on to other things.

With the advent of insurance and the facts of life about economics and so forth, you have two new tensions added:

One is the possibility that the case system itself could, on a case-by-case basis—and in a way, Clarence Morris has written the most helpful article yet on this topic, the one he wrote some time ago—in an effort to have the common law absorb the new data, work out new criteria for liability that included the fact of insurance but didn't get overwhelmed by it.²⁰ We have tried in one chapter to indicate what hap-

²⁰ See Morris, *Hazardous Enterprises and Risk Bearing Capacity*, 61 *Yale* 1172, 1179 (1952).

pens if you look at the cases in which insurance is being acknowledged as a fact in the case, and see what difference that makes, and to what degree you can adjust things. Remember, you are moving in common law, and you are moving in a court, and this depends on the parties bringing this up.

Then you move up to the legislative level, in which you have a chance to overhaul the whole thing, you can now do anything you want because you have got the legislative overview of it, and you again use the same kinds of insights, and see what possible reforms are available that way.

And that is the point, of course, at which you bump into most sharply the awful problem that you seem to have lost your field altogether, that you have no connection with torts at all. To make a point I have often made in public, I think, in debating the Keeton-O'Connell plan, the difficulty I have always had with their plan was there was an effort to evolve out of the tort system with the plan.

Well, one or two last observations of this kind:

One is that another thing that we thought was enormously important and interesting was damages, and that, therefore, appropriately, a torts book ought to have a lot of material on damages, partly because that is where the pragmatic test of tort liability is, and partly because the topic is so curious. I mean, the perplexities of liability incidents are really nothing compared to the perplexities of damage awards.

It is a tough field because the cases aren't any good. There has never been a decent case on damages.²¹ In fact, what the system—what the torts field—has always needed is a *Palsgraf*²² case on damages.

There has never been a case like that. I mean, with the equivalent of that case, that kind of theorizing about the rationale of damages—the whole topic would seem very different to us. There are really very few damage cases that stand up to serious analysis that way.

But the topic is marvelous. And I think it is true—and I think that Bob would agree with me on this; I haven't asked him—that when it comes to reform, the problem of damages was at least as important as the problem of liability, that the common law view of damages is as much a component to put on the table when you are talking about reform plans as is liability.

And that “sleeper”, the collateral benefits rule, has turned out to be a great basic rule—almost the main item, so to speak, in the liability

²¹In a discussion with Professor Davis of the University of Missouri during the “audience participation” portion of the Round Table Program, Professor Kalven noted that L. J. Diplock's opinion in *Wise v. Kay* [1962] 2 W.L.R. 96 (C.A.), was an exception: a good appellate opinion on damages. The case is reprinted in the Gregory & Kalven casebook, 2d edition at 468-475.

²²*Palsgraf v. Long Island R. R.*, 248 N.Y. 339, 162 N.E. 99 (1928).

reform proposals, along with pain and suffering. So we make a big pitch for damages.

Finally we had the idea of adding an actual chapter on the liability insurance policy as a fact of real life.

Well, that is the story. It is pretty much the same way this time. Obviously, we have all suffered from the same three problems in putting out new editions:

(1), the increasing news about auto plans.

(2), the increasing news about products liability.

And (3), the difficulty of having defamation constitutionalized, and how you accommodate it.

I am flattered to have John adopt what I thought was a kind of a last ditch, desperate solution to the problem of what to do with the *New York Times*²³ case—great as it is. It is simply that you give a chapter over to constitutional law finally to account for that—what an odd development that is, but what a wonderful one again, and here again torts had an incredible change occur in it! Within my lifetime and most of your lifetimes, who would have thought you would have a large part of tort law become constitutional law? That is a sensational difficulty to have on your hands!

Well, it remains fun, and I think that is the best thing about it.

I think it also remains a great chance to watch the common law at work and we need a few chances like that still in law school.

Thank you.

The next casebook considered was, "Cases on the Law of Torts" by Professor Leon Green of the University of Texas, Dean Willard H. Pedrick of Arizona State University, Professor James A. Rahl of Northwestern University, Professor E. Wayne Thode of the University of Utah, Professor Carl S. Hawkins of the University of Michigan and Professor Alan E. Smith of the University of Texas. There is a story, perhaps apocryphal, that arose out of an alleged conversation reportedly held at the West Publishing Company the last time this casebook was about to go to press. One of the young business types at West said to one of the more senior ones, "Can the tort field economically support another casebook?" The older and wiser businessman said with summary business acumen, "It will withstand this one if we just can persuade the authors to adopt it!"

²³New York Times v. Sullivan, 376 U.S. 254 (1964).