

with some of his lesser arguments, such as that the Immunity Act of 1954 is invalid because it requires a federal judge to exercise nonjudicial functions. I have not discussed those arguments, good as most are, because Mr. Rogge thinks, as do I, that he must stand or fall on the history. For myself, I think he fell. But in the process he does something to restore to respect rights which, if founded in history, speak of something greater still—the inviolability of the individual. Others have observed the paradox of throttling our freedoms under the guise of defending them. In a similar contradiction, Mr. Rogge has written a quite wrong good book.

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**Cases and Materials on Torts.** By CHARLES O. GREGORY and HARRY KALVEN, JR. Boston: Little Brown & Co., 1959. Pp. 1309. \$12.50.

*Cases and Materials on Torts*, edited by Professors Charles O. Gregory and Harry Kalven, Jr., is an exacting and provocative collection of cases and excerpts from torts literature for use in the classroom. This review is limited to observations that may be of assistance to the torts teacher in search of a more effective teaching vehicle. The book is not for those who, because of time restrictions or suspected deficiencies in student sophistication, feel that class work must be restricted largely to a bare exposition of tort rules and doctrines. *Gregory & Kalven* can be used effectively only by the teacher who has the opportunity to probe deeply and who enjoys a degree of confidence in the capacity and industry of his first-year students. This book promptly goes behind the scenes and stays there.

Before turning to Gregory and Kalven's organization, a word about the types of material and the mechanics of presentation used may be appropriate. The profound line of attack that the editors have developed could not be attempted within available time limits without a diligent eye toward the selection, intermixture and ordering of materials. Teachers accustomed to the usual parade of cases followed by rather spare footnotes may be struck by the editors' extensive resort to excerpts from the periodical literature. So much of this material is compressed within the book that a casual examination could give the impression that the 1300 page volume is somewhat too long for effective use. But further consideration makes it obvious that much of this same material would be assigned as collateral reading by most teachers using a less voluminous casebook. For this reason a net saving in time for the conscientious student is actually effected, because the editors have presented only those passages which bear directly upon the problem being considered at the time. If any criticism is to be made here, it would be that there may be too few cases, and that many of those which are presented have been over-severely edited. This is not a book that stresses case analysis.

Another prominent feature of the editors' method of presentation is the constant practice of following each decision with probing editorial inquiries and of enlarging coverage through the introduction of much original text matter. As a result, the student stands on much more intimate terms with the editors than is customary with other torts casebooks. Consequently, the role of the teacher in the classroom is likely to be less spectacular, since the student's curiosity has already been given the turn suggested by Messrs. Gregory and Kalven. Whether this is good or bad is a matter of personal preference. This reviewer is inclined to welcome the innovation, perhaps because in most instances the direction of inquiry indicated by the editors is the same that I would hope to give myself, and I believe that I would be happy to assume that my students were alert to these matters in advance so that I could devote my class time to probing and enlivening them further. Then there is the further consolation that many areas can be safely entrusted to the book with a resulting conservation of time. Many users may feel otherwise and experience some resentment at being squeezed between the precocious student and the persistently inquisitive editors.

The plan of organization of the book is interesting. As the editors point out in the preface, their approach is neither strictly doctrinal nor functional. There are three grand divisions—Physical Harms; Harm from Insult, Indignity and Shock; and, finally, Tort Law in the Market Place. In the first two divisions the initial attack resembles somewhat the simple plan of progression from doctrine to doctrine familiar to most law teachers. Yet even here, as will be seen later, the editors' sights are pitched high.

Following a chapter on cause-in-fact, discussed later, the book opens with assaults, batteries and imprisonments and the privileges associated with these torts. The thirty-page treatment here is spare indeed. The chapter is restricted to those aspects of intentional wrongs that involve violence and physical harm. It seems obvious that this material is selected chiefly with an eye toward sharpening the student's capacity to appreciate the distinctive features of tort, as opposed to crime, and to introduce him immediately and in a simple setting to some of the more pervasive rationales that underlie loss shifting and risk sorting. The editors are obviously anticipating negligence from the very beginning. The chapter opens with *Vosburg v. Putney*<sup>1</sup>—the problem of the unexpected result; it proceeds to *Mohr v. Williams*<sup>2</sup>—the unauthorized operation, which immediately suggests the negligence analogy. Then comes *Hart v. Geyse*<sup>3</sup>—a consent-to-fight case. Here the student is introduced to the problem of the effect of the victim's participation in the risk when opposed to the dictates of criminal policy. Only three cases are devoted to self-defense and the

<sup>1</sup> 80 Wis. 523, 50 N.W. 403 (1891); GREGORY & KALVEN 21.

<sup>2</sup> 95 Minn. 261, 104 N.W. 12 (1905); GREGORY & KALVEN 23.

<sup>3</sup> 159 Wash. 632, 294 Pac. 570 (1930); GREGORY & KALVEN 26.

protection of property. One of these, *Courvoisier v. Raymond*,<sup>4</sup> deals with inadvertent injury inflicted while acting in self-defense—again treading on the outskirts of negligence. The same objectives are again betrayed by the inclusion of *Ploof v. Putnam*<sup>5</sup> and *Vincent v. Lake Erie Transp. Co.*<sup>6</sup> where the problem of incomplete privilege suggests restitution or the pay-your-own-way idea that will prove to be so tantalizing later when the student tackles loss-shifting more seriously. The chapter ends with the assault liability of the incompetent person, where the role of fault is again dominant.

I have sketched this first chapter in some detail because it seems to give a significant clue to the character of the entire compilation. It is obvious that the editors have little interest in encouraging a detailed knowledge of the dreary and semi-criminal myriad of rules that make up the law of intentional torts. They are using this material to introduce the competing ideas that will be found later to underlie all tort law. They are fishing for big game from the start, and I like this.

The objective of laying an early groundwork for the serious problems to come later is again evidenced by the editors' tactic of introducing cause-in-fact at the very outset. If there is any one point that is more appropriate than any other for making the initial incursion into the seamless web of tort law, this would seem to be it. The cause-in-fact inquiry is basic to all tort litigation, and the idea of isolating it at the outset seems to be a good one.

The transition to negligence comes early, at page 52, and the treatment is short and concentrated. The editors depend chiefly upon their own textual exposition plus an excerpt from Holmes, *The Common Law*. The only case included is *Brown v. Kendall*.<sup>7</sup> Following this decision is the first instance of an editorial device so pervasive throughout the book that it deserves special notice. The student is urged to compare *Brown v. Kendall* with the inadvertent injury cases already considered under assault and battery.<sup>8</sup> Throughout the book there are innumerable references of this kind back to cases which were considered earlier and which should be viewed in the light of later revelations. This makes for a growth in sophistication and lends much cohesion to the student's entire learning process.

The device of reference back is used by the editors with telling effect in the next and lengthy chapters on negligence. They tackle the subject initially along the lines formalized in the *Restatement of Torts* and in the textbooks. It is not until a later chapter dealing with the impact of insurance upon liability<sup>9</sup> that the student is urged to reconsider many of these same cases as they may have

<sup>4</sup> 23 Colo. 113, 47 Pac. 284 (1896); GREGORY & KALVEN 33.

<sup>5</sup> 81 Vt. 471, 71 Atl. 188 (1908); GREGORY & KALVEN 43.

<sup>6</sup> 109 Minn. 456, 124 N.W. 221 (1910); GREGORY & KALVEN 45.

<sup>7</sup> 6 Cush. 292 (Mass. 1850); GREGORY & KALVEN 54.

<sup>8</sup> Editors' Note, p. 57.

<sup>9</sup> Chapter 10, p. 609.

been influenced by the judicial impulse to spread the accident cost through insurance.<sup>10</sup>

The negligence chapter, then, follows the familiar pattern. The student is familiarized with the balancing phenomenon which the editors characterize as "the Calculus of Risk" and then turns to the personification of the reasonable man. The respective functions of judge and jury in administering the negligence concept are given eighteen pages. Here cases predominate over text, as is proper. The next section, on Custom, draws largely from the writings of Professor Clarence Morris. This is followed by an adequate treatment of the effects to be given criminal statutes and administrative regulations. The attack here is substantially that of all doctrinal casebooks. But I feel that, even here, Gregory and Kalven do it better, because of their constant teasing and probing and their insistence upon juxtaposing the sharply opposed views of writers and judges.

The treatment of Proof of Negligence again leans heavily upon Clarence Morris. *Res Ipsa Loquitur* is accorded thirty pages. This tendency to expand the coverage on proof comports not only with the editors' approach to negligence but with the tendency of all modern casebooks. Although the cases predominate in this chapter, the inclusion of a condensation of Professor Jaffe's article, *Res Ipsa Loquitur Vindicated*,<sup>11</sup> keeps the student alert to the controversial implications of the doctrine.

The editors, having presented the positive aspects of negligence in the first chapters, initiate a consideration of the limitations on recovery with an exploration of the effect of plaintiff's fault and plaintiff's participation in the risk. This precedes discussion of the duty limitation and proximate cause, thus reversing the usual practice. Eleven pages are devoted to comparative negligence, including the texts of several statutes and the Maritime Rules.

The duty limitations are classified into three groups—those related to affirmative action, the trespasser limitation, and the privity limitation. Thus much of the treatment of products liability and the immunity of land occupiers is initiated here. But again, in conformity with the overall pattern, both topics are reintroduced later. Products liability is explored in some depth nearly four hundred pages later, after the student has concerned himself with the impact of insurance on common law rules. The liabilities of the occupier of premises and the landlord are briefly considered first under the treatment of duties. Then they are given somewhat more detailed consideration in a separate succeeding chapter. Finally, the student is again reminded of the problem of the

<sup>10</sup> In this chapter the authors draw freely from all the preceding chapters and assign cases for reconsideration. Among these are: *Ryan v. New York Cent. Ry.* (from p. 312); *Charbonneau v. MacRury* (from p. 96); *Moch Co. v. Rensselaer Water Co.* (from p. 305); *Daniels v. Celeste* (from p. 478); *Motts v. Michigan Cab Co.* (from p. 476); *MacPherson v. Buick Motor Co.* (from p. 294); *Morris v. Cleveland Hockey Club* (from p. 205); *Harris v. Lewistown Trust Co.* (from p. 399).

<sup>11</sup> 1 BUFFALO L. REV. 1 (1951); GREGORY & KALVEN 184-92.

landlord and tenant after the phenomenon of insurance has been introduced. Thus the editors' reliance upon cumulative layers of student understanding goes on.

The chapter on the tort liability of occupiers of land conforms generally with the treatment of this subject in other casebooks. It is noteworthy that negligent injuries by occupiers to persons using the public ways are hardly mentioned. Although the omission accords with the practice in several other recent casebooks, this reviewer feels that a complete neglect of the area of public nuisance deprives the student of an unusual opportunity to gain a more profound understanding of the historical development of negligence law. There seems little doubt that the first serious incursion upon the traditional immunity of the landowner came when his interests came into conflict with those of the traveling public.<sup>12</sup>

Having concluded a relative-analytical approach to negligence law, the editors introduce an excellent chapter on damages. One can profitably compare the one hundred pages devoted to damages by Gregory and Kalven with the much more spare treatment accorded this subject in competing casebooks.<sup>13</sup> This chapter, to my mind, is one of the finest of the book. Under the subheadings, "Frontiers of Damage Theory"<sup>14</sup> and "A Postscript on Policy,"<sup>15</sup> the editors have succeeded in bringing into arresting focus the interdependence of problems of substantive liability and damage. Another good feature of this chapter is the realistic consideration of the respective functions of judge and jury in the damage area.

Throughout my reading of *Gregory & Kalven*, I was struck with the basic similarity between the overall approach of these editors and the attack adopted in the familiar casebook of Shulman and James. Both pairs of editors are seriously concerned with presenting the phenomenon of an expanding stream of liability urged on in recent years by new media for the distribution of accident costs, and justified by some rationale other than the simple notion of moral blameworthiness. Shulman and James are eager to come to grips with this transition almost at the outset and I have not been able to escape the feeling that the attack of these editors is too precipitous from the standpoint of effective student understanding.<sup>16</sup> It seems to me that Gregory and Kalven have taken the wiser course. As indicated earlier, they do encourage a skeptical attitude even in the first pages dealing with intentional wrongs, but they pro-

<sup>12</sup> The reviewer has attempted to elaborate upon this observation in Malone, *Ruminations on Group Interests and the Law of Torts* 13 RUTGERS L. REV. 565, 568-70 (1959).

<sup>13</sup> E.g., thirty-three pages in *Smith & Prosser*; sixty-six pages in *Shulman & James* (2d ed.), including substantive treatment of wrongful death. In other casebooks damage problems are scattered throughout.

<sup>14</sup> P. 449.

<sup>15</sup> P. 505.

<sup>16</sup> This a minor criticism of an otherwise splendid casebook which this reviewer used in the classroom for many years with great satisfaction,

ceed to explore the traditional analytics of fault and present the formal structure of negligence at a deliberate pace. Only after this pattern has been made to emerge do they undertake a frontal assault upon the fault concept. Their attack is initiated at page 511 with a consideration of traditional areas of liability without fault. My only serious criticism of this chapter is the failure of the editors to afford anything more than a mere peep-in on the law of private nuisance. This omission strikes me as particularly serious when it is borne in mind that exploration in depth of the fault notion is an avowed objective of the editors' approach. Nowhere else is the process of balancing competing interests so bared for exploration as in the nuisance cases. The inclusion of just a few well selected decisions would have done the job. Here could have been the natural complement to the earlier chapter on the Calculus of Risk in Negligence cases. Here the student could have learned that prevention of harm may be more important than reparation by way of damages. Here he could have become acquainted with the possibility of reconciling conflicts through the adjustment afforded by the qualified injunction of equity.

Beginning with Chapter Nine the editors plunge into a profound consideration of the more complex aspects of risk bearing. There are three chapters—The Institution of Insurance; Insurance, Risk Bearing and the Common Law; and, finally, The Ultimate Policy Issues. These topics absorb nearly two hundred and fifty pages of the book. The initial sections, devoted to the expansion of insurance coverage, are designed to introduce the insurer and to dramatize his pervasive presence in accident litigation, thus bringing the shortcomings of the traditional fault concept into prominence. The editors then consider (or reconsider in expansion) a variety of common law rules and doctrines of tort and damages which have come to reflect the presence of the insurance device or of the capacity of particular enterprises to absorb loss. They then proceed to explore statutory incursions upon the fault premise, such as owner-consent statutes and the Illinois Dram Shop Act, which demonstrate legislative reaction to the availability of insurance. The final chapter of this group, "The Ultimate Policy Issues,"<sup>17</sup> examines the broad conflicts of policy reflected in the several competing rationales of liability with which it is hoped the student has by this time become familiar. Here cases give way almost entirely to excerpts from controversial literature. Two familiar analogies to no-fault liability that have already gained complete acceptance—*respondeat superior* and workmen's compensation—are explored in some detail. This presentation leads ultimately to compulsory liability insurance and several of the proposed automobile compensation plans. These final topics absorb about seventy pages of questioning, controversy, and suggested possibilities of reconciliation and adjustment. Some readers may feel that the treatment here is elaborate almost to the point of becoming wearisome. This reviewer hastens to add that his own reaction is favorable. This book is designed with the serious student in mind.

<sup>17</sup> Chapter 11, p. 689.

It would seem that he could be depended upon to explore much of the content of this chapter on his own initiative.

Having concluded a sketch of the first division of Gregory and Kalven's casebook we may turn back for a moment to the editors' announcement in the preface that their approach is neither strictly doctrinal nor entirely functional in the sense of being a consideration of torts law classified according to the fact type of activity involved. Their scheme of treatment is not easy to describe. It is basically a proceeding from the relatively simple to the more complex. They begin, as we have seen, with physical injuries inflicted upon person or property. Here the harms are those resulting in impact, and the interests invaded are relatively easy to evaluate and have been accorded a maximum of legal protection. This division consumes nearly eight hundred pages of the book.

The second division, "Harm from Insult, Indignity and Shock," tackles injuries to the personality. Here the hurts are generally inflicted through a more subtle kind of conduct—communication and social misbehavior—and the interests invaded are complex and difficult to evaluate in terms of damages. The harms here are of a general kind to which we are all exposed to a greater or lesser extent, and the focal point of inquiry is whether the defendant has gone "too far." In an effort to open this area to a unified exploration, the editors have grouped together assaults, batteries and imprisonments, intentional infliction of emotional disturbance, privacy, defamation, and negligently inflicted shock and fright. By deferring to this late point any consideration of the simple indignities of assaults and imprisonments they have reversed the traditional order of presentation of these topics. It seems to me that the gain is significant. Most casebooks begin with all the familiar intentional physical wrongs as they affect both person and personality and then present immediately the transition to intentional insult and shock as a distinct tort. As a result, the bewildered beginner is a witness at the outset to the judicial labor pains and language distortion attendant upon the emergence of a new type of wrong. I fear that this is simply too much for him at this stage of his education.

I am not at all sure that Gregory and Kalven were wise in placing in this division the cases involving shock and fright resulting from negligence. This was done, I presume, to maintain an orderly doctrinal transition from the insult cases. But, as a result, the student's newly aroused interest in social misbehavior and abuses of communication is interrupted and he is plunged back into the area of traffic and transportation. The live problems in the negligence cases do not center around bad manners and hurt feelings. The harms involved are to the physical person. What is really meaningful in these cases is the inquiry of what to do about the hurts inflicted by automobiles and trains. This material would seem to be more appropriate under the earlier chapter on Damages.<sup>18</sup>

<sup>18</sup> The suggested placing of the negligent shock and fright cases in the Damage chapter could enliven the student's interest in many ways. For example, I suggest that the reader

The editors devote slightly more space to defamation than is the current practice in casebooks. Their treatment, however, is good, and the modern aspects of this tort, relating to mass communication media, are emphasized. Inclusion of defamation in this division is probably justified on the ground that the harm is one of communication and the plaintiff's interest, being intangible, presents the same difficulties of evaluation with which the student has by now become familiar. In view of the universal practice of seeking to compress the entire law of torts into a single first-year course, there is perhaps no better place to interject defamation than here.

This brings me to what I regard as a tragic shortcoming in law school curriculum planning. We have become thoroughly accustomed to the tradition that restricts torts to a single introductory course of five or six semester hours. So complete is this attachment that a proposal that any advanced torts course be added in the second year is likely to strike administrators as hilarious. As the result of our intransigency, one measly semester is about all that is available to teach the completely unsophisticated freshman all he will ever know in law school about personal injury litigation (which comprises seventy percent of all lawsuits in this country). This compression must be made so that the second semester can be devoted to a hop, skip and jump treatment of more advanced and complicated areas of torts. As the problems become more complex, the rate of progress is accelerated into a frenzy until the teacher finally falls in exhaustion and the student is in a state of either utter bewilderment or complete indifference. The next year, after the student has recuperated, there will be abundant time for a leisurely seminar on Professor Glotz's favorite topic, "Mr. Justice Sutherland's Opinions on Migratory Birds."

How profitable it would be if the torts teacher could utilize the magnificent casebook of Gregory and Kalven and proceed at a fairly leisurely pace for one full year up to the defamation chapter (900 pages). He would cover all the injuries to the person, personality and property. The course would be sophisticated, but understandable. There would be time to explore the really meaningful corners which the editors have teasingly suggested and which are within the intellectual grasp of the serious beginner if he is not pushed along too fast. The remainder of the material (about 400 pages) has a very obvious common denominator that recommends it for separate treatment in an advanced course. The injuries here are all to relationships, rather than to person, personality or property. The rules of defamation afford about the only protection that law accords the individual's claim to live a respected life in the social community, the political community, the professional community. This is something quite different from his interest in being free from insult, indignity, and

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glance at the editors' infelicitous abridgment of *Wilkinson v. Downtown*, p. 842. The life has been virtually edited out of the case because, as the book is set up, the student is not yet in a position to appreciate the sharp contrast between the traffic setting and the situation of the practical joker.



shock. The hurt is broader than mere injury to the personality. But, by the same token, the defendant's countervailing claim to communicate freely must be taken into strict account. This is why the cases are so hard, and this is one reason why the doctrines are involved almost to the point of being nonsensical. This is too big a bite to be digested during the last few hectic weeks of the first-year torts course.

The same observations are even more appropriate to Gregory and Kalven's last grand division, "Tort Law in the Market Place." This ingenious grouping includes fraud, trade libel and a bewildering variety of unfair practices in competition, including the appropriation of advertising values and other intangibles. The common denominator binding this topic to defamation is obvious. We need only substitute the trade community for the social community. Again the injuries are to relationships, rather than to person, personality or property. The fact that both litigating parties are usually members of the trade group and that the group interest itself is at stake increases the complexity. It is here that the demand for protection strains the judicial process to its uttermost limits and frequently exceeds the capacity of the common law for growth. The editors make this clear, and they anticipate the course in trade regulation by pointing out the highlights of legislative intervention and the operative area for the Federal Trade Commission and other administrative bodies. Certainly this is not stuff that can be packed effectively into the last gasping moments of a first-year torts course. Since, however, by tradition the trade cases must be left there, I hasten to add that Gregory and Kalven have made the most of the assignment within the available limits of time and space. I regret that their fine handiwork in this area will probably pass without fair appreciation in the classroom.

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**Sacco-Vanzetti: The Murder and the Myth.** By ROBERT H. MONTGOMERY. New York: The Devin-Adair Co., 1960. Pp. x, 370. \$5.00.

**The Untried Case.** By HERBERT B. EHRMANN. New York: The Vanguard Press, Second Edition, 1960. Pp. xxiii, 268. \$3.95.

## I

The tradition of each of the two principal teachers of the Western world—Jesus and Socrates—includes an account of an unjust trial, controlled by religious and patriotic influences. Jesus was apparently a pacifist opponent of those favoring a rebellion against Rome, like that in which Josephus fought a generation later. Socrates, an artisan, expressed the aristocratic opposition to the democratic and expansive imperialism of Pericles and his successors. Western history includes the execution of Arnold of Brescia by Pope Hadrian