
PREFACE

2024 marks the sixty-fifth year since the publication of the first edition of Charles Gregory and Harry Kalven, Jr., *Cases and Materials on Torts*. With our publication of the thirteenth edition, we have arrived at the first revolutionary change in casebook organization. The casebook has now been broken into two separate volumes, a change rendered necessary by the changes in legal education over that sixty-five-year period. The first edition was published at a time when the common law was still the dominant source of law. Law schools typically had full-year or otherwise lengthy courses in torts, contracts, property, and procedure. The first edition fit into that frame by offering materials that could cover that course. In the third edition, 1977, prepared by Epstein with a notable assist from Gregory after Kalven's death in October 1974, new chapters were added on misrepresentation, economic harms, and the various individual and governmental immunities. So conceived, the book had chapters on all tort subjects and, in addition, on the various insurance coverage issues (a big point at the time) and the numerous no-fault systems, starting with workers' compensation and going through the automobile no-fault systems that were among the hottest intellectual debates of the time.

That was then and this is now. Today, the automobile is not the center of attention. Medical malpractice and products liability, areas that came alive in the 1960s and 1970s, have begun to loom larger than before. Since that time, a burst of innovation in tort law and theory took place between the late 1960s and the early 1980s. Many of the principal cases in this book derive from that period, and they are retained because they often contain the most incisive discussion of major issues that are still the leading authorities to this date. By the same token, the emergence of the large administrative state both builds on and displaces traditional common law categories. Thus, the law of nuisance is often supplemented (or displaced) by statutes dealing with various environmental law issues. Matters of product safety are often subject to detailed regulations, especially through the federal Food and Drug Administration. And much of the modern law of securities is based on the principles of misrepresentation that were first developed from the late eighteenth century until the dawn of the twentieth century. The rise of these substantive statutes, coupled with federal regulatory schemes, have had their impact on law school curriculums. The common law courses have been reduced in size and scope, and the first year now commonly has courses in legislation and/or regulation to reflect the change in legal emphasis.

The reduction in the length of the first-year torts curriculum must reflect these institutional changes. We have decided to bite the bullet and, with this thirteenth edition, present a more streamlined casebook appropriate for a comprehensive 1L Torts course. In order to make this transition, we did major surgery on three of the less-taught chapters in the twelfth edition. Material from the old Chapter 10 on Insurance and the No-Fault System and the old Chapter 15 on Torts Immunities has been incorporated into the other chapters of the book. Thus, Chapter 1 on Intentional Torts covers issues relating to intention that relate to insurance coverage on the one hand and immunities for governments on the other. Similarly, material on government immunities for medical malpractice is incorporated into Chapter 3 on Negligence, and material on explosives and public nuisances has been incorporated in Chapter 7 on

Strict Liability, while matters of federal preemption and liability for vaccines has been incorporated into Chapter 8 on Products Liability.

An advanced, companion casebook, *Cases and Materials on Torts Against Nonphysical Interests*, is in development and will be available soon. In that book, matters of privacy, defamation, and misrepresentation have received extensive new treatment, both through case law development and statutory developments, and we have sought to include these new materials in our more limited framework. In the end, we hope that two books work a sensible division between the basic first-year torts course and an advanced, upper division course (or seminar) on torts that deals with defamation, privacy, misrepresentation, and economic harms.

Notwithstanding these new developments, we have strived to preserve the basic character and feel of the book. Accordingly, its basic organization and structure remain consistent with the broad objectives of the first edition of the casebook, which first appeared in 1959 by the late Professors Charles O. Gregory and Harry Kalven, Jr., both exceptional and imaginative scholars. Their second edition followed some ten years later and was in fact the book from which Professor Epstein first taught torts at the University of Southern California in 1969. In 1972, he joined the faculty of the University of Chicago Law School. In January 1974, with Gregory in retirement, Professor Kalven asked Epstein to collaborate with him on the third edition of the casebook. Kalven's tragic death in October 1974 cut short that brief collaboration before it could begin. Thereafter, Professor Gregory re-entered the lists to read and comment on the drafts that Epstein prepared on the third edition, which appeared in 1977, some forty-seven years ago. The preparation for the fourth edition of Epstein, Gregory, and Kalven, which appeared in 1984, was done by Epstein alone. Gregory died in April 1987, after a rich and full life. Epstein was then the sole editor of the fifth (1990), sixth (1995), seventh (2000), eighth (2004), and ninth (2008) editions. Even after so much time and revision, much of the case selection and organization of this book reflect the initial judgments of Gregory and Kalven, whose pioneering spirit and rich imagination brought so much to the study of torts.

The tenth edition (2012) reflected the formation of a new partnership between Epstein and Sharkey, which in turn led to some major changes in content. That edition merged the material on joint and several liability into the chapter on causation. The material on vicarious liability was inserted at the end of the now-Chapter 7 on Strict Liability, to which was also added the materials on trespass to chattels and conversion that had formerly been located in Chapter 1 on Intentional Torts. Extensive references were made to the key provisions of the Third Restatement of Torts: Liability for Physical and Emotional Harm, approved by the American Law Institute in 2011. To these were added the changes in both appearance and organization for the eleventh edition (2016).

As with earlier editions, our intention has been to update the materials while preserving historical and conceptual continuity between the present and the past. In so doing, we 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 twentieth centuries, and the ever larger footprint of the twenty-first century. Toward that end, we have retained in the thirteenth edition 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. We continue to highlight in detail the many major expansionary changes in tort law that took place in the years between 1968 and 1980. Although many of those developments continue to remain important, others have been either modified or rejected in favor of more traditional doctrines. It is no longer likely in 2024 that strict liability rules will exert greater sway in medical malpractice cases, or that market share liability will expand much beyond the original DES cases and other fungible products. By the same token, the Internet has ushered in new challenges across the board, from how to define property torts in this new domain to thorny issues of liability for actors in the "platform economy." We have sought to keep pace with

these new developments, which occur both through common law and, increasingly, through legislation and regulation.

Five previous editions of this book were dedicated to the memory of Charles Gregory and Harry Kalven. In 2004, Epstein dedicated the eighth edition of the book to the memory of his contemporary, the late Gary Schwartz, who died in 2001, 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 casebook. The ninth edition was dedicated to the late Bernard D. Meltzer, himself a casebook author of great distinction, who passed away at age 92 in 2007. In the tenth edition, we moved from the past to the future, and dedicated jointly this edition to the next generation, our grandchildren and children, respectively. In the thirteenth edition we continue this exercise, now to increased ranks.

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