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# Book Review. Cases and Materials on the Law of Torts, 2nd ed. by H. Shulman and F. James, Jr.

John T. Bauman

*Indiana University School of Law*

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to add a table of cases in the near future. The theoretician, too, will find that this is an excellent fruit of well-planned human energy. The chapters dealing with the nature and development of modern workmen's compensation give anybody who enjoys good legal writing a fine introduction to modern social law. The logical clarity of the four-fold root of the phrase "arising out of the employment" reminds one of Schopenhauer's famous doctoral thesis; and the discussion of the employment status, as distinguished from that of the contractor or the lent employee, ought to convince every reader that a course in agency is not enough to convey an understanding of these distinctions. Except for its size, the book is destined to be the Prosser of workmen's compensation. The size, about 300 pages more than Prosser, is in itself by no means forbidding; but the price excludes its adoption in class as a text that every student must buy. The price could be considerably lower—I should say, by two-thirds—if the publisher had not chosen to follow the use of the loose-leaf, or rather loose-section, binding with its resultant heavy, expensive covers. Perhaps a less expensive students' edition might be put out. If not, then the book could be assigned to groups of five or six students at a time. This might be the more feasible since it is not likely that workmen's compensation will be taught more than once a week for two hours.

There exists by now a considerable body of legal writings, including articles, books, and law review notes, on leading cases in workmen's compensation. The author has hardly included any of it. To include or not to include writings, "secondary authorities" as they are still called at times, is of course a matter of taste. I personally must regard it a deficiency; at least in a book that unlike an old-fashioned, dry, legal encyclopedia takes issue whenever controversial problems so suggest. In other words, the author, also in this regard not unlike Prosser's masterpiece, often transcends the purely legal task of exposing the law to the political one of representing one of the several possible constructions of the law as the most desirable or indeed the "right" one. Much can be gained, I think, and nothing lost if in support, or by way of contrast, the opinions of other authors are at least indicated if not dealt with. In other words, if I say, murder draws the death penalty in Massachusetts and I quote a writing instead of the law, this is reliance on a secondary authority and hence bad. But if I say, work assaults by fellow workers are in some, and ought to be in all, states regarded as compensable work injuries, this is in part law but in part simply my own opinion, to which that of others may be added with profit. However, the book's dearth in legal literature cannot grossly detract from its great value for teachers, students, and practitioners.

REGINALD PARKER.

*Willamette University College of Law.*

CASES AND MATERIALS ON THE LAW OF TORTS. Second Edition. By Harry Shulman and Fleming James, Jr. Brooklyn: The Foundation Press, Inc., 1952. Pp. xviii, 1090. \$8.50.

It is evident from the second edition of this casebook that the editors were not impressed by the criticisms directed at its predecessor. Except for the inclusion of a number of recent cases, the book remains substantially unchanged. The only reorganization attempted is a minor one. The section on

the standard of conduct formerly found in the chapter on "Motor Vehicles" has been eliminated, and so much of this material as is retained is now found in the general section devoted to the standard of conduct in the chapter on negligence.

As Professor Halpern<sup>1</sup> stated in his thoughtful review of the original edition, the editors are primarily concerned with the social problem involved in the distribution of loss resulting from accidental harm. Such disagreements as I have with this book stem from what seems to me too rigid an adherence to this approach at the expense of logical presentation of the principles of law in the field. Admittedly, in this area of the law the problem of loss distribution is pervasive, but it is neither the only problem nor the most important one. Moreover, it does not follow that emphasis on this problem is the best approach to teaching tort law.

I therefore consider it regrettable that the editors persisted in introducing the course with the *Ives* and *Henderson* cases and perceived no need for improvement in the section entitled "Bases Other Than Fault for Imposing or Withholding Liability." According to the editors, the material in this section is ". . . designed to elicit analysis of various different objectives which courts and legislatures have sought to gain through imposing some kind of what is generally regarded as tort liability." The students are presented in order with the following situations: statutes concerning robberies and the Riot Acts, a case of private necessity, a case and supplementary materials on public necessity, *Fletcher v. Rylands* (the second edition also presents the qualifying case of *Read v. J. Lyons & Co., Ltd.*), a case of absolute nuisance, a case and note on trespass to land, an animal case and statutes, two blasting cases, railroad fire statutes and cases interpreting them, a case concerning damage done by an airplane, a note on respondeat superior, two cases on governmental immunity (both new), and a case on the immunity of a charitable corporation (also new). The section closes with an excerpt from an address by Learned Hand raising a question as to the universal applicability of the fault principle.

Thus in this section students are presented on the one hand with cases holding a defendant liable although not at fault, and, on the other hand, with cases holding a defendant not liable although he is at fault. Moreover, since no attempt is made at classification, historical survivals are found side by side with cases representing modern common law or statutory innovations: My objection to this organizational plan (if, indeed, it may be called a plan) is simply that it results in a loss of perspective by a student. It is certainly true that there are situations in which liability is imposed or withheld irrespective of fault. Yet fault, not ability to bear loss, remains the fundamental method of loss distribution in use by the courts today. It would seem, therefore, that it is misleading to convey to the student at the beginning of the course the idea that there are any number of bases in use by the courts for imposing or withholding liability. In actuality, the basic rule is that loss is to be distributed on the basis of fault, and that, because of certain other social policies, exceptions are made to this rule. Because of the editors' anxiety to destroy at the outset any belief in the sacredness of the fault principle, students may lose sight of this proposition.

<sup>1</sup> 43 COL.L.REV. 552 (1943).

I have a somewhat similar objection to the section entitled "Impediments to Recovery Because of Plaintiff's Own Conduct or Relationship." The editors first present an excellent development of the defenses of contributory negligence, assumption of risk, and the last clear chance doctrine. But they then proceed to intermingle cases on consent and imputed negligence. I find this objectionable for the reason mentioned above; it makes it difficult for a student to orient himself.

The emphasis on accidental harm also results in a neglect of the law of intentional torts. While the few cases presented in the chapter devoted to intentional torts are skillfully selected, the instructor is forced to rely on lectures or the assignment of outside reading to supply the missing material. The only improvement made here is the replacement of *Herman v. Turner*, which was the poorest case in the original edition for pedagogical purposes.

While the merits of the book are manifold, its paramount value lies in the fact that the editors were not content with the conventional presentation of the cases, but, instead, rethought each problem and brought to it a fresh, vigorous approach. Thus, the section concerning the liability of possessors of land is organized to invite criticism of the unsatisfactory category rationale of the cases. The problem of liability of manufacturers and suppliers of chattels is presented as a totality and thus includes material formerly assigned to the sales course. Cases involving misrepresentation and fraud are presented from the viewpoint of the available diverse remedies, although the legal principles are not neglected. Separate consideration is given to accidents caused by motor vehicles and while here the editors strongly emphasize the social problem of loss distribution, they include materials and cases, particularly with reference to insurance, not found in other casebooks. The chapter devoted to defamation is one of the best in the book. The legal doctrine and the conflicting policies underlying it are thoroughly explored. Particularly interesting in the second edition is the presentation of much new material involving the liability of radio stations.

Although I was pleased to note that after a ten-year interim, the editors have restored *Mayor of New York v. Lord* to its rightful place in the New York reports, the second edition unfortunately perpetuated a number of trivial, but nonetheless annoying, typographical errors. On page 97, note 96 the editors cite *22 Harvard Law Review* rather than volume 33; on page 452, note 93, *30 Harvard Law Review* is cited rather than volume 43; on page 634, note 28, *47 Southern California Law Review* is cited instead of volume 14; the citation to *Dezero v. Turner*, on page 833 should be to 22 A.2d, not 122 A. 2d; and lastly, on page 963, Professor Chafee's name is misspelled.

Thus while those chapters of the book which I already liked were improved by the inclusion of significant recent cases, the objections I had to the original edition have not been overcome. I am nevertheless sure that any torts teacher will profit from the use of this book, and I think that in reviewers' jargon, he will find it "exciting" and "challenging." Finally, it is only fair to state that, in spite of what I considered to be its limitations, I found the original edition not only stimulating but also teachable. After reading over this edition, I am sure that it is even better.

JOHN A. BAUMAN.

*The University of New Mexico.*

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