

Louisiana Law Review

Volume 18 | Number 1

The Work of the Louisiana Supreme Court for the

1956-1957 Term

December 1957

CASES ON THE LAW OF TORTS, by Leon Green, Wex S. Malone, Willard H. Pedrick, and James A. Rahl, West Publishing Co., St. Paul. Pp. xxvi, 855.

Henry H. Foster Jr.

Repository Citation

Henry H. Foster Jr., *CASES ON THE LAW OF TORTS*, by Leon Green, Wex S. Malone, Willard H. Pedrick, and James A. Rahl, West Publishing Co., St. Paul. Pp. xxvi, 855., 18 La. L. Rev. (1957)

Available at: <https://digitalcommons.law.lsu.edu/lalrev/vol18/iss1/49>

This Book Review is brought to you for free and open access by the Law Reviews and Journals at LSU Law Digital Commons. It has been accepted for inclusion in Louisiana Law Review by an authorized editor of LSU Law Digital Commons. For more information, please contact kreed25@lsu.edu.

they can be made adds rather than detracts to the value of the work as a teaching aid. Substantially everything of importance in administrative law is touched upon after all and an analysis completely satisfactory to every devotee is hardly attainable.

The format is conventional and good; some, to be sure, would prefer the paging to be given its usual place and the sectionizing relegated to lesser dominance. Likewise, reference to pages in the index and case table, rather than to sections, though more laborious, would have given readier access to the author's analysis and documentation. However, this deficiency is in part compensated for by a detailed table of contents referenced to sections and pages.

*Melvin G. Dakin**

CASES ON THE LAW OF TORTS, by Leon Green, Wex S. Malone, Willard H. Pedrick, and James A. Rahl, West Publishing Co., St. Paul. Pp. xxvi, 855.

In 1931, Dean Leon Green published his *Judicial Process in Tort Cases*, and in 1939 his second edition appeared. If imitation is the sincerest form of flattery, Dean Green was quite churlish to prior compilers of torts materials. His materials expressed ingenuity and did not follow what had evolved to be the classical structure of torts casebooks. Adopting what has been called a functional perspective and viewing the subject matter from the eclectic approach of sociological jurisprudence, Dean Green pointed to the work environment of rule and doctrine. It was a unique collection of materials.

This year, in collaboration with able assistants, an even finer if less novel collection of tort materials has appeared under the new title *Cases on the Law of Torts*. The current edition, although it features a sparkling collection of recent cases and new text, follows the same outline and general organization of the earlier editions except for the addition of new materials on "injuries resulting in death" and "conversion" and the elimination of materials on defamation and privacy which have been incorporated into a separate volume to be used in a separate course in relational interests. But it is not the details but the structure of these materials and their impact upon students of torts which warrants our examination.

Sir Henry Maine thought that the evolution of law might be traced from the stage of primitive law, through a period of strict law, an era of equity and natural law, to a "maturity of law," up to a period of "socialization of law." If by "socialization" we mean the perception that law is but one means of social control, a means rather than an end, with the function of furthering the values of our time and place, and if by that term we mean placing law in context and observing it pragmatically, then it may be said that this casebook reflects the jurisprudence of our times and is a product of the age of "socialization." Dean Green, Wex Malone, Willard Pedrick, and James Rahl — these four tortsmen of the metamorphosis — have gone beyond analysis and synthesis and have illumed the subject matter so that we may see and test the social implications of rule and doctrine.

If we examine their contribution from the standpoint of the methods of jurisprudence, we would classify it as an exercise of the method of sociological jurisprudence. Although in this respect *Cases on the Law of Torts* is not a unique collection of materials, in either law or torts, and by comparison it becomes a matter of degree, nonetheless both the original edition and this up-to-date revision are remarkable for their emphasis upon the environmental setting for legal concepts. There are constant reminders of context. The introduction explains that the materials are arranged upon the basis of Pound's theory of interests. Note material, statistical data, economic and social factors, particularly in connection with the traffic and transportation chapter, keeps one eye of the student glued to policy and consequences while the other is free to roam through rules and legal doctrine. This means that rule and doctrine are placed in a nexus which differs from that of the usual torts casebook. Facts and consequences, if not truth and consequences, are focal points for study. Freshmen still needs must learn to split the hairs of doctrine and dogma, distinguish and analogize. But in addition to the usual microscope, a telescope is handed them. They need not grub in the ground in search of stars. The context or setting for living law, the consequences, and the interplay of facts and principles, are part of the view. Experience as well as logic becomes the life of tort law.

I suppose what we are talking about is the personality of a book. Dean Green's original volume was one of the first departures from a predominantly analytical approach to law.

Shulman and James later followed the path blazed by Green and in their own way utilized sociological material. In other areas of law, so too did McDougal and Haber,¹ Michael and Wechsler,² Fowler Harper,³ and Max Rheinstein,⁴ to mention but a few outstanding examples of a sociological approach. Even the materials which might arbitrarily be classified as predominantly analytical, such as Seavey and Keeton,⁵ and Smith and Prosser,⁶ have not overlooked sociological material, although the personality of these fine books remains analytical rather than sociological, as their impact is that of rule and doctrine rather than social values, principles rather than the roots of principles.

Perhaps a description of the sequence of materials may illustrate the nuances of differences. As in Green's original edition, the new volume commences in Chapter I with note material which pictures the governmental setting of law and a brief statement of Pound's Theory of Interests. In Chapter II the sequence is from assault and battery cases, verbal assaults or insults, wire-tapping, various other intentional torts down to eviction and scrambled possession. Commencing with Section 5, "Use of Firearms," the functional perspective takes hold. "Sports and Practical Jokes," "Conduct of Children and Insane Persons," "Fright and Nervous Shock," are section headings. Chapter III covers the "Care and Treatment of Ill, Disabled and Irresponsible Persons," Chapter IV, "Occupancy, Ownership, Development of Land," with sub-sections on "Fire," "Water," and "Various Activities." Chapter V deals with "Public Service Companies," Chapter VI with "Governmental Torts," Chapter VII with "Builders, Contractors, Workmen," Chapter VIII with "Manufacturers, Dealers," and Chapter IX with "Traffic and Transportation."

This sequence and grouping of materials is a factual rather than a doctrinal one. Obviously, it is at the expense of some symmetry and sacrifices a logical denouement of principles. One catches glimpses of doctrine and principle but chameleon-like they change color or contour with a change of setting. Thus a freshman student is denied the comfort or the illusion of fixed

1. PROPERTY, WEALTH, LAND: ALLOCATION, PLANNING AND DEVELOPMENT (1948).

2. CRIMINAL LAW AND ITS ADMINISTRATION (1940).

3. PROBLEMS OF THE FAMILY (1952).

4. CASES ON DECEDENT'S ESTATES (1947).

5. CASES AND MATERIALS ON THE LAW OF TORTS (1957).

6. CASES AND MATERIALS ON TORTS (1952).

principles and the law becomes for him a seamless web. In lieu of dogma he gets the lawyer's feel for facts and what lies behind doctrine. But one may ask, is there any more certainty in *a priori* reasoning from facts than from doctrine? Facts may be as elusive as concepts. It is a commonplace that lawyers are perhaps more shocked by the version of facts recounted in appellate decisions than they are by the court's selection of principles. Selectivity is exercised as to both. Just as there is a wide range of choice between precedents and principles, there is a similar latitude as to operative facts. Pragmatically, both facts and principles are or may be stimuli for decision, or tools for rationalization, and a choice or selection between competing facts and principles depends upon a diversity of social and personal factors which, despite Professor Oliphant's invitation,⁷ have never been fused into a science of law.

It may be true that the late Jerome Frank's emphasis upon the fact-finding function and Green's division of labor between judge and jury is realism in a jurisprudential sense. It may be true that factual setting, or functional grouping, is the lawyer's approach to law. But realistically, is an orientation towards the fact content merely another mechanical rabbit, just as elusive a quarry as rule and doctrine? It would seem so. Hence, regardless of orientation, to be truly functional or realistic, legal materials must stress the jurisprudential problem of what determines selection and choice. On this score, Green and his co-authors have done very well. The economic and sociological changes which require mutation and modification of old theories are delineated or become apparent upon reflection, with or without prompting from the instructor. The note on Horse and Buggy Traffic in Chapter IX is an example of this, as are the materials on accident rates, juvenile automobile accident rates, "traffic cases and the law — what next?," and a note on English legislation. Note material as well as arrangement of cases provokes contemplation of basic social values and the consequences of decisions.

It is interesting to note how far we — or rather Dean Green and associates — have come. Not too long ago, there was vehement argument over whether analytically one could properly

7. "[N]ot the judge's opinion, but which way they decide cases, will be the dominant subject-matter of any truly scientific study of law." Oliphant, *A Return to Stare Decisis*, 6 AM. L. SCHOOL REV. 215 (1928), reprinted in COHEN & COHEN, READINGS ON JURISPRUDENCE AND LEGAL PHILOSOPHY 586, 589 (1951).

conceive of "torts" as a distinct subject. It was argued that there were no unifying principles or universals to weld together torts law in the sense that there was a law of contracts or real property. Analytical teachers came to the rescue, fashioned or perceived postulates, and the subject achieved the dignity of identity, albeit it was jerry built from what was left over from contracts and criminal law. The analysts and logicians made their contribution in systematizing the subject, in classification. Concentration upon fusion of the subject into an integrated whole, inevitably, led to some neglect in inter-relating torts to the larger scene. To complete the picture, to avoid a confusion of means with ends, it became essential that the subject be related to the values of our time and place so that its sociological function might be observed.

However, a functional approach with its emphasis upon facts may come perilously close to another pitfall. That dangerous condition near our traveled way is what we might term a "hardening of the categories" approach to tort law. One basic theory or philosophy of tort law, typified by Salmond, is that any harm is *damnum sine injuria* unless the situation is one for which courts have traditionally accorded relief. The basic premise is that "loss shall lie where it falls, unless some good purpose is served by changing its incidence,"⁸ and the corollary is that all such "good purposes" have been settled by past decisions. Precedents, specifically recovery in like or identical circumstances, determine what is compensable. The opposite philosophy is that which may be called the dynamic or *prima facie* theory of tort liability, that is, an injury is *prima facie* actionable unless the defendant establishes justification or excuse (privilege), and its corollary is that bad motive plus harm equals tort.⁹ Of course, there are areas in tort law where one or the other philosophy has bested the other, and the competition between these approaches becomes keen when courts are confronted with such new assertions of interests as privacy or unfair competition. The stagnant approach is a situational one — stressing factual resemblance rather than the implications of theory or doctrine. The dynamic approach stresses the ramifications and implica-

8. SALMOND, *LAW OF TORTS*, c. 1 (6th ed. 1924), reprinted in COHEN & COHEN, *READINGS IN JURISPRUDENCE AND LEGAL PHILOSOPHY* 210, 213 (1951). See also Goodhart, *The Foundations of Tortious Liability*, 2 *MOD. L. REV.* 1 (1938).

9. See Seavey, *Bad Motive Plus Harm Equals a Tort*, 26 *ST. JOHN'S L. REV.* 279 (1952); the basic analysis by Holmes in *Vegeahn v. Gunter*, 167 *Mass.* 92, 44 *N.E.* 1077 (1896); and Winfield, *The Foundation of Liability in Tort*, 27 *COLUM. L. REV.* 1 (1927).

tions of principle rather than fact similarity. Superficially, it would seem that fact stress inhibits the free development of law to the needs of the times.

How does *Cases on the Law of Torts* avoid the pitfall? This reviewer feels that safe navigation is accomplished by the materials marking both fact environment and principles and following the beam of sociological purpose which illuminates both. From the lawyer's standpoint, there is a marked difference between defending or suing a public utility on the one hand, and an ordinary citizen on the other. There is a difference between defending a doctor in a malpractice case or in a traffic case. Moreover, it is a difference worth noting. But for the difference to be meaningful, we must go behind both fact situation and doctrine to ascertain, if we can, why diverse patterns have emerged. These materials, by organization and content, focus attention on that which lies behind judicial selectivity. One cannot read the excellent collection of malpractice cases, covering over sixty pages of double columns, without getting a three way fix on facts, principles, and purpose.

This functional approach, which might be termed a horizontal or strata classification, results in a specification or individualization, a special adaptation of general principles as they are applied or rejected in identifiable classes or patterns of cases. The grouping cuts across the vertical lines of intentional, negligent, and strict liability torts. The result is much the same as if a zoologist were to group flying, terrestrial, and swimming animals into separate groups because he was specifically interested in locomotion. In light of the purpose, such a classification makes sense and has utility. It is presumed that Dean Green's purpose and specific interest is the basic problem in torts, allocation of risk, or the question of who should bear the loss. If one concedes that this is the fundamental or basic question in tort law, then it makes sense to group cases according to where the loss has been customarily placed rather than according to doctrine which gains or loses vitality according to the factual milieu, at least if inquiry is provoked as to why fact context is more important than symmetry of doctrine.

I suppose that it is poetic justice if not just to subject *Cases on the Law of Torts* to a functional test. How will these materials serve as a teaching tool; what is their practical validity? In the hands of the co-authors, all true initiates of functional

classification, able teachers all, these materials doubtlessly are highly proficient. They have been trained to use the tool. For the neophyte, or one inured to a predominantly analytical and doctrinal approach or emphasis, re-orientation is required or confusion will ensue. The strands of doctrine placed in fact context may seem an unseemly fragmentation; synthesis may never emerge. If there be a felt need for a systematic exposition of doctrine and principle, these materials may be found wanting. To some it may be disconcerting to catch fleeting and periodic glimpses of negligence, of such doctrines as *res ipsa loquitur*, and negligence per se, before such matters are more fully developed. If a casebook is viewed as an analytical exposition of its subject matter, perhaps doctrines and principles should be sketched at least in outline before specific applications are presented, or variations of doctrine and principle should be accumulated in juxtaposition. However, pedagogical technique may function interstitially to supply such marrow as the occasion calls for and ramifications of doctrine may be anticipated where necessary. In the hands of an experienced teacher of torts these materials admit of such supplemental denouement of doctrine as student comprehension seems to require while at the same time the importance of facts and values in the adjudicating process is highlighted to an unprecedented extent.

By their excellent choice of cases and appeal to imagination and pragmatism, the authors have fashioned a worthy successor to Dean Green's original volume. The law of torts long will be indebted to Dean Green for his perception and discernment in seeing the forces behind rule and concept and his emphasis upon basic values.¹⁰ Professor Malone, whose dissection of comparative negligence and causation have exposed the anatomy of doctrine as the substance of policy,¹¹ and the skilled help of Professors Pedrick and Rahl, have combined to revitalize Dean Green's functional approach into a highly useful casebook which, in the hands of a skilled instructor, may impart a wider understanding and insight into torts and the judicial process than many contemporary casebooks of less ambitious and more con-

10. Dean Green's *RATIONALE OF PROXIMATE CAUSE* (1927), and *JUDGE AND JURY* (1930) are minor classics and enriched tremendously the philosophy of tort liability.

11. Professor Malone's *Ruminations on Cause-in-Fact*, 9 *STAN. L. REV.* 60 (1956); *Contributory Negligence and the Landowner Cases*, 29 *MINN. L. REV.* 61 (1945); and *Comparative Negligence — Louisiana's Forgotten Heritage*, 6 *LOUISIANA LAW REVIEW* 125 (1945) are splendid examples of an eclectic approach to tort law.

ventional perspective. The faithful student and the faithful reader will find that he never loses sight of the fact that law is but a means to an end and that we live in an age of "socialization of the law." It is a tragedy that some of our victims of conceptualism and "mechanical jurisprudence"—whether on the bench or at the bar — who need it the most, probably will not get the perspective which would be theirs if they studied law at mid-Twentieth Century and had the good fortune to assimilate their torts from these materials. For in the final analysis what distinguishes this casebook from its fine competitors is its total perspective and its illumination of context. Whether this is biting off more than a freshman student can chew must be left to the judgment of the individual instructor.¹²

*Henry H. Foster, Jr.**

12. For a discussion of the application of jurisprudential methods to teaching torts, see Cowan, *Jurisprudence in Teaching Torts*, 9 J. LEGAL ED. 444 (1957).

*Professor of Law, University of Pittsburgh.