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Book Review

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*Reviewed by William Samore**

NEGLIGENCE CASES: WINNING STRATEGY: by Harry A. Gair and A. S. Cutler. Published by Prentice-Hall, Inc., Englewood Cliffs, N. J., 355 pp. 1957.

Undoubtedly, there are more negligence cases on American court calendars today than any other type of case. For every plaintiff's lawyer in such cases, of course, there is also a defendant's lawyer. Then why is it that there are so many more books on how to win for the plaintiff than there are books for the defendant? Apparently, the market is not saturated. This book is one of the latest—a poor lawyer's Belli.

In most, if not all of these plaintiffs' books, there seems to be present a belief that simply because the plaintiff is harmed, the defendant ought to pay. This book is no exception. The defendant's counsel "fawns," is "unctuous," smiles "knowingly, if not connivingly"—while plaintiff's lawyer is the champion of justice. Surely this is an obvious begging of the real question. Yet, there may come a day when the defendant will again be generally liable without fault, as he was long ago and still is in some special matters. But that day has not yet returned.

To say that there are many books on negligence trial practice does not mean that to read one is to read all. But certainly there is some duplication. For example, a favorite topic of most authors on this subject is a discussion of how to prepare the witness for when the cross examiner asks: "Have you ever discussed this case with anyone?" The sameness is a little monotonous. Still there is something different in every book. If a lawyer has not read any at all, this book is a good place to start. Even if a lawyer has been practicing for years, there is always something to learn. Perhaps here he may discover that a long used tactic is a poor one, and why. Surely, no practicing attorney can claim that he knows all the answers.

The authors cover every step in the winning of a negligence case, from the time the plaintiff enters the lawyer's office, through the selection of a jury, opening statement, direct examination, cross examination, and summation, to requests for instructions. Included are examples of each of these steps, presumably from

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the authors' own experience. Following most of the chapters is a check list that conveniently and succinctly summarizes the chapter. Finally, there is a section on settling negligence cases.

The authors rightly emphasize the medical aspects of negligence cases. Involved are causation and the amount of damages. While refraining for the most part from crusading, the authors feel strongly about the fee problem in expert medical testimony. They hope for the day when medical facts will not be an issue; when, instead, a non-partisan court-appointed expert (as already is the case in New York City) will decide the disputed medical facts. In the meantime, they suggest that medical experts be made subject to subpoenas requiring their opinion testimony. They believe that a doctor owes a moral duty to the patient to testify. One result of this would be the reduction of the enormous fees sometimes demanded by medical experts.

There is an index to this book, and one solitary footnote. But then, of course, this is not a book on rules of law. The authors assume that the reader knows the substantive rules of negligence. Their purpose is to show the trial lawyer "how to" win his case, using the strategies and tactics that the authors' experience have proved to be successful.

If the advice of the authors can be summarized in a phrase, it is this: Be a boy scout; always be prepared. From the first page to the last, time and time again, the reader is warned that trial work is not play. As the authors so pithily put it: "There are ten ingredients making up a successful trial lawyer in personal injury cases: One part personality and ability. Nine parts unremitting, grueling preparation and hard work."

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CASES ON THE LAW OF TORTS: by Leon Green, Wex S. Malone, Willard H. Pedrick, James A. Rahl. Published by West Publishing Company, St. Paul, Minn., 855 pp. 1957.

There are at least seven casebooks on Torts. Now we have another. One difference is that this one is authored by four professors, while the largest number of authors of any of the others has been three. A great percentage of the cases here contained have been decided within the last ten years. Still the authors do not attempt—indeed, should not attempt—to escape the inclusion of older familiar cases, such as *I de S et ux. v. W de S*; *Palsgraf v. Long Island R. Co.*; In re *Polemis and Furness*

Withy & Co., Ltd.; *Smith v. London & S. W. Ry. Co.*; *MacPherson v. Buick Motor Co.*; and many others.

The book is set in the new double column type, with wider margins than usual. This is heartily approved. The result is easier reading and more space for students' notes.

But the greatest distinction is perceptible upon examination of the Table of Contents. Nowhere do we see familiar headings such as Negligence, Nuisance, Assault, Battery, False Imprisonment, Misrepresentation, Trespass, and Strict Liability. Invasion of Privacy is used, but this term is not to be confused with the newer tort. The authors use this term under what would traditionally be called assault and battery. The newer tort, and Defamation, are not in this volume at all. They are included in a second volume, authored by Leon Green.

Why this studied effort to avoid the use of traditional headings? The authors have grouped the materials according to fact patterns. Some of the Chapter headings read: "Threats, Insults, Attacks, Fights, Invasions of Privacy, Restraints, Nervous Shocks"; "Occupancy, Ownership, Development of Land"; "Public Service Companies"; "States, Counties, Towns, Cities"; "Builders, Contractors, Workmen"; "Manufacturers, Dealers"; "Traffic and Transportation"; "Injuries Resulting in Death"; "Sales, Credit and Service Transactions." Some of the section headings are: "Use of Firearms"; "Sports and Practical Jokes"; "Conduct of Children and Insane Persons"; "Persons using Ways, Streets"; "Railway and Automobile Traffic"; and "Passenger Transportation."

The main advantage of this organization is said to be that, in addition to learning tort doctrines (whatever that abused term may mean), the student learns that the facts of a case are paramount. The practicing lawyer thinks about the facts first, say the publishers—"doctrines do not decide cases but only provide the talk or professional language for bringing the facts into focus and opening the way for judge and jury."

There are other claimed advantages in such "factual" grouping of tort cases. Some of them are, for example, appreciation of the doctrine of precedents, and learning that tort law develops in accord with changes in social environment; yet these are certainly not peculiar to this type of organization.

The best way to decide whether or not these advantages actually emerge in practice is to use the book. What the results of such an experiment would be, your deponent knoweth not, yet.