1986

The Law of Torts

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Book Review


Reviewed by Michael L. Richmond****

INTRODUCTION

Critics acclaimed the first edition of Harper and James' torts treatise as making an important contribution to the development of the law. Not content to summarize the law as it existed,¹ the authors challenged their readers to explore beyond the narrow boundaries of the then current law of torts. Those consulting its three volumes found a master plan for a new way of looking at how society should compensate those who suffered harm from the intentional or careless acts of others. The authors rejected traditional formulas of fault and intent in favor of a system of "social insurance," which allocated the burden of paying for loss among the widest possible segment of society. Although this bold hypothesis did not meet with immediate acceptance, critics unanimously welcomed the challenge it presented to the traditional theory of torts.

The new edition of the treatise, updated and substantially enlarged by Professor Oscar Gray, likewise deserves recognition as an important work. The reasons, however, are not the same. The first edition promoted a new way of thinking about torts and spawned a generation of commentary and analysis. In contrast, the second edition is content to restate many of its predecessor's conclusions and fails to carry forward the inquisitive spirit of the first edition.

The great value of the second edition lies in its review and syn-

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The author wishes to thank Dean Roger I. Abrams and Professor Paul Joseph of Nova University Center for the Study of Law for their kind attention to the manuscript.

1. With a massive revision of the Restatement of Torts under way at the time of publication of the first edition, little need existed for a duplication of efforts.
thesis of contemporary developments in tort law. The massive changes in the law of torts have required a complete rewriting of several sections of the treatise and the addition of a substantial amount of new material.

Professor Gray has taken the opportunity to order the current disarray in the law of torts. Where the first edition challenged, the second clarifies; where the first cast doubt, the second defines. This Book Review first will consider the new edition's drawbacks and then will consider why it deserves recognition independent of its predecessor.

I.

The primary weakness of the second edition lies in the fact that Professor Gray does not view it as a new edition, but as a revision of the first. Unfortunately, too many of the faults of the first edition reoccur. It might be considered mere academic carping to dwell on unimproved areas, yet taken as a whole they reveal an unwillingness to root out or at least to question errors in the prior work—a problem which Professor Gray easily could have rectified and which detracts from his fine individual effort.

For instance, several reviewers criticized the treatment of intentional torts in the first edition. One would have hoped that the new edition would have questioned the basic material, looking for new applications and attempting to eliminate erroneous and misleading matter. Yet though some of the discussion needs closer editing, even these sections demonstrate thorough scholarship and careful thought.

Although the author effectively deals with many contemporary cases regarding consent to battery, he fails to take advantage of an excellent opportunity to expand this discussion to other contexts.


3. "There is room for concern, however, as to whether some of the older torts do not deserve new analysis and original treatment in the light of current developments in our society just as badly as the law of accidents needs it." Leflar, Book Review, 32 N.Y.U. L. Rev. 1156, 1157 (1957). See also Malone, Book Review, 17 LA. L. Rev. 877 (1957); Seavey, Book Review, 66 Yale L.J. 955 (1957).

4. For example, the author carefully weaves recent cases involving consent with older cases to show how the fabric of the law continues to build on its earlier foundation. Second Edition, supra note 2, § 3.10 nn.28-29 and accompanying text. Of particular interest is the juxtaposition of the early cases dealing with consent of minors to sexual intercourse with the more recent cases permitting minors to consent to abortions without consulting their parents.
His cursory treatment of recent sports cases is disappointing, particularly in light of some fine research which has appeared recently. Similarly, he relegates cases evidencing novel uses of traditional battery theories to the footnotes. The use of a cause of action in battery against a manufacturer of drugs or a health care supplier undertaking normal treatment deserves textual treatment and analysis. For the most part, however, Professor Gray has done an excellent job of updating the material in the first edition. The occasional inadequacies are the exception rather than the rule.

Of greater concern is the treatment of false imprisonment, where Professor Gray permits one of the grand "legal chestnuts" to stand unchallenged. In the first edition, the authors challenged the Restatement of Torts and proclaimed, "it must affirmatively appear that the detention or confinement is contrary to the other's will or there is no action." In other words, a court would have to dismiss a complaint in which the plaintiff failed to allege that the confinement was without his consent.

In support of this statement, both the first and second editions refer the reader to *Herring v. Boyle*, a British case in which a mother arrived at a boarding school to take her son home for the holidays. The schoolmaster refused to let the child leave, claiming that the mother had an outstanding balance in her account. During the entire incident, the child had no idea that his mother had come for him. The later action for false imprisonment on behalf of the child was dismissed. On its face, *Herring* might appear to support the treatise's proposition; the child could not have expressed lack of consent when he did not know of the confinement. Accordingly, the complaint could not have alleged that the child did not consent. To the contrary, the *Herring* case demonstrates that the plaintiff must be aware of the confinement, not that the plaintiff must plead

5. See Second Edition, supra note 2, § 3.10 nn.7-10 and accompanying text.
7. See Second Edition, supra note 2, § 3.2 n.2.
8. See Second Edition, supra note 2, § 3.2 n.3.
9. F.V. Harper & F. James, Jr., THE LAW OF TORTS § 3.6 (1956) [hereinafter First Edition].
10. The Second Restatement of Torts rejects placing the burden of pleading and proving consent on the plaintiff, preferring instead to have the plaintiff demonstrate merely that he was "conscious of the confinement or [was] harmed by it." RESTATMENT (SECOND) OF TORTS § 35 (1965).
and prove what courts traditionally have considered an affirmative
defense.\textsuperscript{12} Baron Alderson's opinion, cited by the text as authority, confirms this reading.\textsuperscript{13} The reason the plaintiff merely need prove consciousness of confinement rather than a lack of consent is brought out by the very nature of the tort. False imprisonment protects against the imposition of a mental disturbance rather than against a simple dignitary affront.\textsuperscript{14} In all fairness, Professor Gray's argument does not take as strong a stance as that advocated by the first edition. At one point he even seems to treat consent as a defense when he notes: "If the plaintiff voluntarily submits there is no confinement."\textsuperscript{15} Yet since Gray has given the subject considerable thought, as demonstrated by extensive amendments to both the footnotes and text, he should have taken a bolder position and corrected the earlier text.

The same deference to the prior edition which suffuses the treatment of intentional torts is also found in the discussion of liability for negligence, the area where Harper and James most acutely demonstrated their creative genius. At the time of the first edition, critics praised the authors for their realistic perspective on the uses and function of the law of torts in rectifying the problems caused by accidents.\textsuperscript{16} Unquestionably, in the vast circus parade of plaintiffs' "rights," Harper and James drove the immense steam calliope. Their concept of "social insurance" presented a new and seductive method of looking at the function of the law, one which stimulated

\textsuperscript{12} See Second Edition, \textit{supra} note 2, § 3.10 nn.1-3 and accompanying text.

\textsuperscript{13} "There was a total absence of any proof of consciousness of restraint on the part of the plaintiff. No act of restraint was committed in his presence; and I am of the opinion that the refusal in his absence to deliver him up to his mother was not a false imprisonment." \textit{Herring}, 149 Eng. Rep. at 1127-28 (opinion of Alderson, B.).

\textsuperscript{14} Where... no harm results from a confinement and the plaintiff is not even subjected to the mental disturbance of being made aware of it at the time, his mere dignitary interest in being free from an interference with his personal liberty which he has only discovered later is not of sufficient importance to justify the recovery of the nominal damages involved.

\textit{Restatement (Second) of Torts} § 42 comment a (1965). Section 35 comment h further notes that the tort stems "from the realization that one's will to choose one's location is subordinated to the will of another...." It is the subordination itself rather than the unwillingness to succumb to another's wishes which gives rise to the plaintiff's recovery.

\textsuperscript{15} Second Edition, \textit{supra} note 2, § 3.8 n.9 and accompanying text. The cases listed in the footnote are of modern origin, evidently the product of Professor Gray's own research rather than that of the authors of the first edition.

\textsuperscript{16} "[T]his is not meant to be just a plaintiff's brief. If today's facts and judicial decisions happen to favor plaintiffs as a class, everyone should know about it and talk about it, not under the guise of 'duty' and 'proximate cause,' but in the pure light of today's conditions." Probert, Book Review, 8 \textit{West. Res. L. Rev.} 546, 547 (1957).
praise from proponents\textsuperscript{17} and deep respect from critics.\textsuperscript{18} With wit and panache\textsuperscript{19} the authors painstakingly described the problems caused by accidents,\textsuperscript{20} the means the law had adopted to solve the problems,\textsuperscript{21} and the problems the solutions themselves then created.\textsuperscript{22} They then took the extra step so rarely taken and proposed a new solution,\textsuperscript{23} one which they argued would remedy existing inequities without creating new ones.

The debate which they occasioned carries forward to the present day. Even since the new edition went to page proofs, articles have continued to emerge probing, approving, explaining, and questioning the concepts originally put forth by Harper and James.\textsuperscript{24} One suspects that this point-counterpoint—a pure churning of the intellectual waters—would have delighted the authors.

[James] would ask, in his teaching and in his writing, questions he was not prepared to answer. . . . He could not say; he did not know; yet the questions were consistently and courageously asked. . . . I use his casebook still because it continues to urge me to "carry the quest further" . . . and to show me how much re-

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\textsuperscript{17} "Whatever the word 'classic' means, omitting the element of age, this book will fit the definition." Leflar, \textit{supra} note 3, at 1156. \textit{See also} Davis, Book Review, 36 Tex. L. Rev. 257 (1957); Gordon, Book Review, 31 Conn. B.J. 145 (1957).

\textsuperscript{18} "Whether the trend \textit{should} be in this direction is one question. Whether the trend \textit{is} in this direction is an entirely different question. It is this reviewer's impression that the authors are over-eager to find evidence of such a trend." Plant, Book Review, 42 Minn. L. Rev. 162, 165 (1957). The review earlier called the treatise "an outstanding contribution to the literature of the torts field." \textit{Id.} at 162. \textit{See also} Keeton, Book Review, 45 Cal. L. Rev. 230, 233 (1957) (asserting that no argument could be made that such a trend was occurring); Noel, Book Review, 25 Tenn. L. Rev. 321, 322-23 (1957) (criticizing the authors for unduly minimizing the vital fault principle).

\textsuperscript{19} The style definitely is above the average in a law book, and it is pleasant to find legal writers who can use effectively a bit of verse to illustrate the subject of forcible entry . . . or a few striking lines from T. S. Eliot to bring out the slippery meaning of some commonly accepted terms.

Noel, \textit{supra} note 18, at 321.

\textsuperscript{20} First Edition, \textit{supra} note 9, ch. 11.

\textsuperscript{21} \textit{Id.}, ch. 12.

\textsuperscript{22} \textit{Id.}, ch. 13.

\textsuperscript{23} Yet Jimmy [Fleming James, Jr.] was unusual among the legal realists for he knew how to build as well as how to tear down. Much of tort law as he found it, as it had traditionally been described, made no sense because it ignored the existence of insurance. It was ripe for debunking. But Jimmy was not satisfied with pointing out the sham that many of the traditional formulations were and how courts and juries got around them. He had to develop new rules that would make sense, given insurance, for now.

Calabresi, "\textit{You Can Call It Thucydides or You Can Call It Mustard Plaster, But It's All Proximate Cause Just The Same!}" 91 Yale L.J. 1 (1981).

\textsuperscript{24} For example, see the excellent article written by Professor David C. Sobelsohn challenging the rationale underlying comparative negligence. Sobelsohn, \textit{Comparing Fault}, 60 Ind. L.J. 413 (1985).
mains obscure. Just as he remade torts law, he showed us all how much remains, always, to be remade.25

Perhaps the new edition should not expand deeply on the theories advanced in the predecessor volume. Perhaps this duty does not lie when one is updating a classic in its field. This may explain why Gray did little beyond updating the seminal chapters of the first edition. Nonetheless, given the sweeping changes in the law of torts occasioned by the original work, and given the desire of its authors for continual questioning and probing,26 one would have hoped for a revisitation of the chapters bearing on the concept of social insurance. In discussing fault as a basis for liability, for example, Professor Gray might have considered the many outstanding recent contributions of scholars reaching far beyond the simple concept of social insurance as developed in the first edition.27

The heart of the concept of social insurance is the need to compensate those injured in accidents.

[H]uman losses remain. It is the principal job of tort law today to deal with these losses. They fall initially on people who as a class can ill afford them, and this fact brings great hardship upon the victims themselves and causes unfortunate repercussions to society as a whole. The best and most efficient way to deal with accident loss, therefore, is to assure accident victims of substantial compensation, and to distribute the losses involved over society as a whole or some very large segment of it. Such a basis for administering losses is what we have called social insurance.28

While most contemporary authors accept this thesis, they do not stop at merely reallocating the costs a jury will assess. Neither Gray, nor Harper and James, considered the fact that personal in-

27. Although other examples abound, this review will concentrate primarily on the recent work of Professor Jeffrey O'Connell. See, e.g., Symposium: Alternative Compensation Schemes and Tort Theory, 73 CALIF. L. REV. 548 (1985).
28. First Edition, supra note 9, § 13.2. This is repeated without significant change in the Second Edition at the same section and notes. This book review assumes for the most part that the concept of social insurance is both desirable and feasible. Time may prove neither of these conclusions to be true. Serious questions exist over whether, in the face of seven-figure verdicts, the insurance industry can adapt itself to meet the demands of recovery increased both in amount and frequency. Without joining in the very real battle which rages in scholarly journals, legislative halls, and the media, this book review only recognizes that substantial doubt exists over whether the insurance industry can continue to survive in any semblance of its present form. If it cannot, the question is entirely open as to what will replace it. See Business Struggles to Adapt as Insurance Crisis Spreads, Wall St. J., Jan. 21, 1986, at 31.
jury litigation involves elements of damages beyond compensating injured parties for their economic losses. In many cases, much of the plaintiff's award is in the form of intangible damages for pain and suffering. One hardly can term these payments "compensatory" or view them as a part of the total loss occasioned to society by an accident. They stem from the reaction of juries to the pain suffered by a fellow human being, pain described by counsel skilled in manipulating human heartstrings. Tort cases do occasion a net loss to the economy of a society; Harper, James and Gray properly identify the allocation of this loss as the principal issue of tort theory. The sad fact remains that damages awarded for intangible harm simply add to the overall loss society must suffer.

Backed by a battery of economic "expert witnesses," counsel for both plaintiffs and defendants often make assessing the unassessible the primary battleground of tort litigation. Litigants expend countless hours of court time and productivity to win the hearts of a handful of men and women charged with determining not how to protect an accident victim against a serious economic

29. Professor Gray's cavalier statement, echoing one in the first edition, that "[e]ven where fault causes the injury... damages are for the most part compensatory," needs far more support than a vague reference to the Restatement and an isolated California case. Second Edition, supra note 2, § 25.19. O'Connell, for example, argues strongly to the contrary and cites at least one study supporting his position. See generally O'Connell, A Proposal to Abolish Defendants' Payment for Pain and Suffering in Return for Payment of Claimants' Attorneys' Fees, 1981 U. ILL. L.F. 333, 334-40.

30. Societal assets include both tangible property and the combined ability of members of society to contribute productively for the common good. When property is destroyed or when a member cannot continue to contribute as in the past, society has suffered a loss. For this reason, property damage and medical expenses fall into the same category of damages as loss of earnings and permanent disabilities.

To the contrary, the pain an individual suffers from incurring an injury—whether mental or physical—does not harm society as a whole except to the extent it renders the victim unable to continue to produce at the rate he or she did in the past. Pain and suffering which do not affect the contribution a victim would normally make to society are thus personal issues and not truly compensable under the concept of social insurance. Indeed, any payments made to an individual for pain which does not decrease his or her social utility represent losses to society over and above those which can be assigned to the accident itself.

Social insurance protects society by placing economic losses where they will cause the least disruption to the normal functioning of society. The reason for protecting the individual least capable of bearing the loss is in large part the need for society to have its members at their maximum level of productivity, not fighting to come back from devastating economic hardship. See generally O'Connell, Offers That Can't Be Refused: Foreclosure of Personal Injury Claims by Defendant's Prompt Tender of Claimant's Net Economic Losses, 77 NW. U.L. REV. 589 (1982).

setback, but rather how much to pay a victim over and above sim-
ple economic loss. Weeks turn into months and multiply into years
while litigants await the result of legal wrangling over an issue
which has no place in the calculus of social insurance. Accepting
the hypothesis that to best serve society we must spread the cost of
losses across the widest possible segment available, we still must
encounter the hard reality that many of the payments made even
under the theory of strict products liability (which in doctrine and
practice most closely approaches the realization of social insurance)
go to "compensate" for intangible harm. Today, the tort system
functions, therefore, to add to the overall loss suffered by society
rather than to minimize it.32

We should seek to rapidly compensate victims of accidents in
order to facilitate their return to the work force, much as we have
done with workers' compensation statutes.33 The accident victim
has the greatest need for compensation when medical bills become
due, rather than many years later. Our present system encourages
defendants to delay settlement as long as possible, hoping that the
monetary bite on the plaintiff will force a lower settlement—one
which does little more than cover the doctor's bills after the plain-
tiff's attorney has accepted a percentage of the settlement as a fee.34
In contrast, the optimal system should compensate the compensa-
ble, including potential loss of earnings and diminution of working
power. Both of these represent losses to society of a contribution by
an otherwise productive member. Such a method would function
without imposing on an overburdened court system additional
transactional costs as higher legal fees, increased insurance premi-
ums and undue court costs.

In a series of articles, Professor Jeffrey O'Connell has outlined a

32. Ironically, both editions note that the British prefer tort liability over social insur-
ance for automobile accidents "because of [the] unwillingness to deprive injured people of the
Great Britain does not permit full assessment of damages for pain and suffering. Abraham,

33. See generally A. LARSON, THE LAW OF WORKMEN'S COMPENSATION § 2.20
(1985).

34. Contingent fees have come under heavy criticism lately. Several states have begun
to limit their amount in light of perceived public pressure. For example, the Florida Supreme
Court recently adopted a schedule limiting the percentages and amounts of contingent fees.
The Florida Bar re Amendment to the Code of Professional Responsibility (Contingent Fees),
No. 68, 417, slip op. (June 30, 1986). A vice-president of G. D. Searle & Co., a company
presently involved in numerous lawsuits regarding its intrauterine device, commented that
thus far, "[t]he financial burden is not created by payments to the plaintiffs but by payments
to lawyers." Searle: Staring at Some Long Days in Court, Bus. Week, Feb. 17, 1986, at 35. A
discussion of the need to limit contingent fees is beyond the scope of this book review.
proposal for tort system reform in which he envisions a sequence of trade-offs with plaintiffs and defendants each relinquishing economically wasteful advantages they presently enjoy in litigation.\textsuperscript{35} He proposes that the defendant forego the defense of comparative or contributory fault in exchange for the plaintiff’s agreement not to invoke the collateral source rule.\textsuperscript{36} Further, the defendant would pay the plaintiff’s attorney’s fees as a direct element of damages but would not have to pay damages for pain and suffering.\textsuperscript{37} The defendant would settle the claim promptly by reimbursing the plaintiff for all economic harm suffered, and in return the plaintiff would relinquish procedural advantages.\textsuperscript{38} Most recently, Professor O’Connell has advocated preventive measures in the form of contracts between parties relating to potential damages where tort liability resulting from the relationship is a distinct possibility.\textsuperscript{39}

This issue does not revolve around the propriety of the plan envisioned by Professor O’Connell. Indeed, some of his procedural methods seem a bit heavy-handed, although in the main his proposal has the solid ring of common sense. There is serious and complex thinking taking place around the country, resulting in sophisticated and sensible alternatives not only to traditional fault liability but also to the system of “social insurance” envisioned thirty-two years ago by Harper and James. As a result, the brave initiatives of the first edition appear simplistic in light of the flurry of such recent, more extensive proposals. Given the degree of sophistication shown by Professor O’Connell and others, combined with the trailblazing nature of the first edition, one would have looked for Professor Gray to grasp the opportunity to build upon the earlier thought and to bring it into the context of the modern proposals. By clinging too closely to the groundwork laid by Harper and James, Gray bypasses an opportunity which the spirit of the first edition demanded he seize.


\textsuperscript{36} See O’Connell, \textit{A Proposal to Abolish Contributory and Comparative Fault, With Compensatory Savings by Also Abolishing the Collateral Source Rule}, 1979 U. Ill. L.F. 591.

\textsuperscript{37} See O’Connell, supra note 29.

\textsuperscript{38} See O’Connell, supra note 30. For an expansion by O’Connell of his discussion of medical malpractice claims, see Moore & O’Connell, \textit{Foreclosing Medical Malpractice Claims by Prompt Tender of Economic Loss}, 44 La. L. Rev. 1267 (1984).

II.

The weaknesses in the second edition are those of omission rather than commission. Deferring to the prior authors as greatly as Gray did created problems, but such deference also lent a certain strength to the work. Purchasers of the second edition will still benefit from the text of the first, to which Gray frequently refers. Further, the consistency of format from the first to second editions (a consistency deliberately adopted by Gray) is sensible in that it enables those familiar with the first to locate the new research embodied in the second and also allows those using the second to refer back to the first.

The strongest segments of the second edition are those areas which Professor Gray wrote himself. They do not strike us with the challenge of the first edition, but they serve an equally valid purpose. Gray clarifies the most muddied legal waters, making order and sense out of what may seem a hopelessly jumbled array of theories and cases. Although this is evident in the material on products liability, it appears most clearly in the area of defamation.

The opening section of the chapter on defamation provides an excellent exposition on the development and state of the law. Gray provides clear and precise descriptions of key cases, gives new insight into underlying reasons for the law, analyzes the competing theories in problem areas, and predicts future trends while suggesting new paths to pursue. Of particular note, Gray’s lucid discussion of New York Times v. Sullivan not only describes the opinion itself but also sets the case in proper historic context. He shows how the landmark to all contemporary media libel decisions grew not merely as a creature of the law, but as a response to external social pressures as well. Gray’s talent to clarify and order reveals itself in his discussion of the diverse and inconsistent cases which attempt to distinguish between fact and opinion, and in the exceptional way he rejects the need to draw the “per se” and “per quod” distinction.

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41. The first edition’s material on defamation elicited criticism from several sources. See Heuston, Book Review, 9 STAN. L. REV. 840, 842 (1957); Malone, supra note 3, at 879. This earlier criticism, combined with massive changes in the law since the first edition, makes the defamation chapter a particularly good testing point.
42. 376 U.S. 254 (1964).
44. Id. § 5.8.
45. Id. § 5.9A.
Gray's treatment of the recent Supreme Court decision in *Dun & Bradstreet v. Greenmoss Builders, Inc.*\(^46\) goes beyond simple exposition and considers the precedential impact of this complex decision. He alerts us to three likely effects of *Greenmoss*: (1) states will avoid imposing strict liability where private plaintiffs have been defamed, (2) the Court will extend the provisions of its earlier opinion in *Gertz v. Robert Welch, Inc.*\(^47\) to protect nonmedia defendants commenting on matters of public concern,\(^48\) and (3) media defendants who have made comments on matters not of public concern may be entitled to *Gertz* protection.\(^49\) To the practitioner or scholar working in the area, these comments are most welcome, as is the considered and lucid treatment of the puzzling *Greenmoss* case itself.

Perhaps the chapter's most outstanding (albeit ill-fated) section is that which deals with truth.\(^50\) The role of truth in the delicate ebb and flow of the defamation trial has always been perplexing. Many courts paradoxically require the plaintiff to bear the burden of pleading the negative by alleging falsity in the complaint, while immediately shifting the burden of proving truth to the defendant through the artifice of presumptions. As with his treatment of *New York Times v. Sullivan*, Gray understands that the road to comprehension of a confusing doctrine lies through a keen awareness of the past. Accordingly, he introduces the area with a complete discussion of how civil libel sprang from the now-defunct root of criminal libel.\(^51\) He then asserts that the law prefers that truth remain for the defendant to prove. His prophecy that despite some readings of *New York Times v. Sullivan* and its progeny, the Supreme Court will ultimately rely on this strong policy to prevent falsity from working its way into the plaintiff's case,\(^52\) has regrettably proven

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\(^{46}\) 105 S. Ct. 2939 (1985).


\(^{48}\) Most recently, the Supreme Court indicated its willingness to address this issue at a future point. Philadelphia Newspapers, Inc. v. Hepps, 106 S. Ct. 1558 (1986). See infra note 53 and accompanying text.

\(^{49}\) Second Edition, *supra* note 2, § 5.0 nn.54-60 and accompanying text. As to the third point, one wonders how the media can claim that any event on which it may choose to comment is *not* a matter of public interest. In an analogous situation, the Second Circuit held that disclosure of information about the present status of a person who had been a child prodigy 27 years prior to publication was a matter of sufficient public interest to avoid a lawsuit based on a violation of the individual's right to privacy. *Sidis v. F-R Publishing Co.*, 113 F.2d 806 (2d Cir. 1940). Justices continue to draw the public-private distinction in media cases, however. *Hepps*, 106 S. Ct. at 1566 (Brennan, J., concurring).


\(^{51}\) *Id.* § 5.20 nn.2-19 and accompanying text.

\(^{52}\) *Id.* nn.50-51 and accompanying text.
false. Almost simultaneously with the publication of the treatise, the Supreme Court decided *Philadelphia Newspapers, Inc. v. Hepps*. A private figure plaintiff suing a media defendant now bears the burden of pleading and proving falsity.

The insight and depth of argument which Professor Gray brings to this discussion is typical of the original work he has added to this set of volumes. Combined with his organizational talents and thorough research in updating the sections of the first edition, this will prove to be Gray's greatest contribution and will cause this treatise to retain its influence and authority within the profession.

III.

"One cannot hope by a quick reading of a text of this magnitude to do much more than arrive at a general feeling about it." With these words, Dean Page Keeton approached his review of the first edition. The task of the reviewer today looms much larger, for now there are six volumes rather than three. Another ironic twist is the price. In reviewing the first edition, Professor Wex Malone commented: "This set of books is expensive. . . . If I had to decide whether to part with my $60.00 or to do without Harper and James' treatment of accident liability, I am sure I would pass my money over to the publishers." Today, the six-volume set costs $450.00.

The publishers claim that the new set will receive regular supplementation, as promised with the first edition. Unfortunately, the only supplementation of note to the first edition was a single hardbound volume. The changes in the law of torts since the first edition show every likelihood of continuing, thus making supplementation critical. As one reviewer noted, the authors themselves recognize that the treatise can present "only a single moment in the constant and inevitable flow of an ever-changing stream of legal liability." Perhaps this time the publishers will supplement the work regularly and often, as promised.

The first edition also met with some surprising criticism for its addition of a third volume which contained invaluable bibliographic

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54. Consider, as one of countless examples, Gray's excellent primary and secondary research into the key materials reflecting the change in the law of defamation in the past 20 years. Second Edition, supra note 2, § 5.20 n.1.
55. Keeton, supra note 18, at 230.
57. Id. at 877.
The second edition does the same. This decision will prove wise beyond any doubt, for the value of bibliographies as sources for further research and reading more than compensates for any additional cost that the volume will add to the treatise set.

No attorney dealing with torts should fail to purchase this treatise. No law library should omit it from its collection. The first edition stood out for its leadership and provocative theoretical development; the profession will remember Professor Gray's addition for its structuring and clarifying. His contribution is more immediate, and at the same time equally important. Like the first edition, this is truly an important work.

58. Keeton, supra note 18, at 230; Gordon, supra note 17, at 145-46.