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BASIC TORT LAW
Cases, Statutes, and Problems

Sixth Edition

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Wolters Kluwer

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EDITORIAL ADVISORS

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PREFACE

This book takes a modern approach to teaching Torts. What makes its approach modern?

Without sacrificing the best of the classic cases, we frequently use *contemporary cases* with language, fact patterns, and issues that capture the interest of today's law school students. Our cases are edited to preserve and convey the language of the law, the factual context for judicial decisions, and the logic and precedents on which those decisions are based.

Although traditionally it has been thought that common law forms the foundation of tort law, increasingly we are coming to find that tort law is greatly influenced by legislative action, reflected in *statutory law*. Our book supplements judicial opinions with statutes, clearly delineated to support student understanding of salient topics.

Rather than inundating the student with a preponderance of undifferentiated exposition, we recognize that note material ought to be supplied judiciously with the aim of facilitating a deeper understanding of the cases and theory. We have gone one step further and organized our notes according to their function:

- *Introductory and transitional notes* promote close attention and deeper insight into doctrinal themes and issues
- *"Perspective Notes"* provide a window to seminal legal scholarship, critical analysis, and legal theory

Our students have responded with great enthusiasm to the *problem exercises* that we've created as a vehicle for analyzing the policy implications of doctrine. Increasingly, problem exercises are becoming a staple of pedagogy in newer course books. Ours are drawn for the greater part from actual cases, with citations provided. We have varied their difficulty, so students have the chance to work with both relatively easy and increasingly challenging examples. Most are essay problems focused on a single topic. We have also included at least one practice-related problem for each topic.

When one looks at the interior of an older casebook, one often has difficulty discerning where a case ends and other material begins. We see no reason to add confusion to an amply challenging subject by obscuring the divisions between cases, notes, statutory material, and problem exercises. Generous use of heading levels and consistently clear design elements make it a pleasure to navigate through *Basic Tort Law*.

We have modeled our writing style for this book on the clarity and directness that have always been the hallmarks of fine legal analysis and writing. As with the appearance of our pages, we hope that our readers will find that a straightforward writing style helps set the stage for effective learning.

We have updated this edition with new cases, problems, and notes. It includes:

- a new subsection on potential strict products liability for online marketplaces like Amazon that facilitate sales by third-party vendors;

- a new subsection comparing liability under trespass and nuisance theories;
- a contemporary case on but-for causation;
- two recent cases addressing market share liability;
- two new cases and a problem on the Restatement (Third) approach to duty; and
- a new case on the economic loss doctrine.

We have, of course, updated all of the statutes.We hope that our colleagues will find these materials as stimulating to teach from as we have in our own classes. Even more important, we hope that students will enjoy our modern style of teaching, which uses clarity as a springboard for a deeper and more nuanced understanding of the law.

Arthur Best
David W. Barnes
Nicholas Kahn-Fogel

August 2021

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BASIC TORT LAW

CHAPTER 1

Introduction

A IN GENERAL

An honest introduction to this book would probably be "Jump in and see what happens." Your goal for the first year of law study is to learn how to learn and to begin to understand how lawyers analyze legal questions. You will do your best learning by observation, participation, and investigation. And as you immerse yourself in legal analysis, you will begin to develop ideas about the role of law in society and about how courts and legislatures create legal rules. You will also become familiar with typical solutions our legal system offers to various types of recurring problems.

Even though figuring things out for yourself is the essence of legal education, you might like to have some basic information about the legal world you are about to enter. This Introduction explains how this book is organized, gives you some basic background about the history of tort law, and offers excerpts from scholarly articles that will give you some points of reference as you begin your own work of finding out about tort law.

B CATEGORIES OF TORT LAW

Tort law is a collection of principles describing the legal system's civil (noncriminal) response to injuries one person inflicts on another. When one person acts in a way that causes some injury to another person, tort law sometimes requires the injurer to pay money to the victim. A plaintiff (the injured person) may win damages from a defendant by proving that the defendant intentionally injured the plaintiff. These cases are called intentional tort cases. In other cases, a plaintiff can win damages by showing that even though the defendant did not mean to do anything that the law prohibits, the defendant failed to act as carefully as the law requires. These instances are negligence cases. Finally, in some circumstances a defendant will be liable to a plaintiff even if the defendant acted carefully and had no intent to injure the plaintiff. These cases are called strict liability cases.

C ORGANIZATION OF THIS BOOK

This book begins with a discussion of intentional torts, such as assault, battery, and intentional infliction of emotional distress. These torts involve situations where one person intentionally contacts another in a harmful or offensive way, makes another fear that a harmful or offensive contact is impending, or causes another person severe emotional distress. In some circumstances, a person is entitled to (privileged to) harm another, such as when the person is acting in self-defense or with the consent of the other person. The book considers the defenses for each tort that may protect the person from liability.

Next, the book covers the basic aspects of the unintentional torts of negligent and reckless conduct, where one person's carelessness injures another. The injured person may recover damages if the careless person had an obligation of care to the injured person or failed to be reasonably careful, and the careless person's conduct caused the injured person's harm. The analysis of liability for careless conduct includes some policy limitations that define when one person owes a duty to another or when the causal connection between conduct and harm is close enough to support liability. The analysis also involves questions of how liability for damages is shared when more than one person has been careless. Finally, a defendant may avoid or reduce liability by proving a defense, such as the plaintiff's own negligence, or by showing that the defendant is entitled to immunity.

Some important elaborations of basic negligence doctrines are the book's next topics, including the special duties owed by professionals to their clients and by occupiers of land to people who enter the land. Other special issues involve the extent of a negligent person's liability to those who suffer economic or emotional harm in the absence of physical harm. A chapter on damages describes the categories of harms for which damages may be recovered and how those damages are proved and measured.

The book's remaining chapters treat strict liability in traditional contexts, strict liability for product-related injuries, negligence-based liability for product-related injuries, and the torts of trespass and nuisance. The book concludes with a chapter on reform measures that provide substitutes for tort lawsuits.

Judicial decisions are the primary materials in this book. They show how courts have dealt with each of tort law's topics. Also, where legislatures have responded to the same topics, illustrative statutes are included. They describe how the law varies from state to state and how courts and legislatures may take different approaches to the same problems. Throughout the book, you will find problems that permit you to test your comprehension of the basic principles. In addition, special notes draw your attention to perspectives on the law to provoke thought or aid your understanding of the rationales for legal principles.

D TYPICAL STAGES OF TORT LITIGATION

Most of the cases in this book are appellate court opinions. In each of them, a party who lost in the lower court has claimed that the judge in that lower court erred in some way and that the lower court judge's decision should be reversed. Understanding these appeals requires understanding the stages of a lawsuit, so a detailed study of civil procedure is essential. Nevertheless, it helps to understand the basics at this point.

Complaints and Initial Responses. A lawsuit begins when a plaintiff files a complaint in a trial court. This document alleges that certain facts are true and that because these facts are true, the defendant should be required to pay damages to the plaintiff or give the plaintiff some other relief. A defendant has two options at this point. One is to ask the judge to dismiss the plaintiff's claim on the ground that even if the plaintiff's allegations are true, the plaintiff would have no legal right to recover damages from the defendant. The other is to file an answer to the complaint, admitting or denying the allegations. The answer may also describe defenses that the defendant believes protect the defendant from liability and facts relating to the plaintiff's conduct or the particular circumstances of the case that support a decision in favor of the defendant. After filing an answer, the defendant has another opportunity to ask that the case be dismissed. When a trial court considers a motion to dismiss made at any time, the court compares the parties' allegations and submissions with the legal principles the court believes apply to the type of case the plaintiff has described.

Summary Judgment. Usually after discovery is completed, either a plaintiff or a defendant can move for summary judgment. (Discovery is the process in which parties may obtain information from each other and third parties and develop the evidence they plan to introduce to support their positions.) A court may enter judgment in favor of the moving party if, based on the evidence that the nonmoving party could produce at trial, the applicable legal doctrines would require a judgment against the non-moving party and for the moving party. Summary judgment eliminates the need for a trial when there are no genuine disputes about the facts.

Trial. At a trial, parties present information in the form of testimony and physical things. The "trier of fact" is either a jury or, in what is called a bench trial, a judge. Once the trier of fact determines what it thinks is the truth about what happened, the trier of fact applies legal rules to those facts. The judge instructs the jury about the relevant legal rules. These jury instructions specify what result is required (judgment for the plaintiff or judgment for the defendant) according to what factual findings the trier of fact makes. If the trier of fact decides in the plaintiff's favor, ordinarily it also decides how much money the defendant should pay the plaintiff.

Judgments as a Matter of Law. At several stages during the trial, each party may ask the judge to rule in its favor on the ground that, even if the opposing party's evidence is accepted as true, the opposing party should still lose. A court might enter judgment as a matter of law (sometimes called "directing a verdict") in favor of the defendant if the plaintiff fails to offer sufficient evidence to support an essential element of the plaintiff's case, such as the fact that the defendant's conduct was a cause of the plaintiff's injury. Or a judge might enter a judgment (direct a verdict) in favor of the plaintiff if no reasonable jury, viewing all of the evidence, could find against the plaintiff.

Judgment. The trial court enters a judgment for the plaintiff, awarding damages or other relief, or for the defendant, depending on the verdict the jury has rendered. If the judge believes that no reasonable jury could have found in favor of a party, the judge may grant judgment as a matter of law (formerly called a judgment notwithstanding the verdict or judgment N.O.V.) to that party's opponent. Finally, a trial judge may decline to enter any judgment at all and may order that the case be tried again if the judge believes that there were errors in the administration of the trial, that the jury's deliberations seem to have been affected by consideration of improper factors, or that the verdict is against the weight of the evidence.

Appeal. A party who loses at any stage of the litigation may be entitled to appeal. The appellate court will consider all of the trial judge's actions about which the parties have raised and preserved objections. With regard to facts, the appellate court will treat as true all the facts that the jury may have found to be true, as long as there was any reasonable basis in the evidence for the jury's conclusion. The appellate court may affirm the trial court's action, may reverse it, or may reverse it and remand for a new trial.

E HOW TORT LAW WORKS NOW: AN EMPIRICAL VIEW

Compared with other law school courses, a torts course has the advantage or disadvantage of dealing with topics that people have already thought about a great deal before entering law school. Not too many of us have feelings about civil procedure prior to law study, but most people have lots of ideas about how the legal system treats events like automobile accidents and product-related injuries. It's helpful that tort law has an inherent interest, but it might be counterproductive to begin the study of tort law against a background of popular myths. The article below presents some basic empirical data about how tort law relates to injuries people suffer. It also compares that view of reality with a rival description composed of what the article calls anecdotal evidence.

Michael J. Saks

DO WE REALLY KNOW ANYTHING ABOUT THE BEHAVIOR OF THE TORT LITIGATION SYSTEM — AND WHY NOT?*

140 U. Pa. L. Rev. 1147 (1992)

. . . The use of anecdotal evidence has been unusually popular in discussions about the nature of the litigation system.[30] Perhaps the use of anecdotes is not entirely inappropriate or unfair, given the central role cases play in law as the device for sampling social facts, the unit of accretion of judicial authority, and the principal tool for educating new lawyers. . . .

Nevertheless, anecdotal evidence is heavily discounted in most fields, and for a perfectly good reason: such evidence permits only the loosest and weakest of inferences about matters a field is trying to understand. Anecdotes do not permit one to determine either the frequency of occurrence of something or its causes and effects. They do no better in enlightening us about the behavior of the tort litigation system. . . .

Although the validity of the anecdotes themselves is the least important issue, their validity deserves mention. Some litigation system anecdotes are simply fabricated. Others are systematically distorted portrayals of the actual cases they claim to report.[34] More important than what we learn about these stories, perhaps, is what we learn about ourselves and our remarkable credulity. Even when true, anecdotes enjoy a persuasive power that far exceeds their evidentiary value.

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30. One example is the case of the burglar who fell through the skylight. According to this anecdote, the burglar sued and won damages of $206,000 plus $1,500 per month for life. Another case involved a plaintiff in a medical malpractice action who claimed that she lost her powers of extrasensory perception due to negligent treatment with a CAT scan. She won the case and was awarded $1 million in damages. A third example involved "[a]n overweight man with a history of coronary disease [who] suffered a heart attack trying to start a Sears lawnmower. He sued Sears, charging that too much force was required to yank the mower's pull rope. A jury in Pennsylvania awarded him $1.2 million, plus damages of $550,000 for delays in settling the claim."

34. Consider the three anecdotes presented supra note 30. The "burglar" who fell through the skylight was a teenager who climbed onto the roof of his former high school to get a floodlight. See Bodeine v. Enterprise High Sch., 73225, Shasta County Superior Court (1982), reported in Fred Strasser, *Tort Tales: Old Stories Never Die*, Nat'l L.J., Feb. 16, 1987, at 39. The fall rendered him a quadriplegic. See id. A similar accident at a neighboring school killed a student eight months earlier. See id. School officials already had contracted to have the skylights boarded over so as to "solve a . . . safety problem." Id. The payments were the result of a settlement; the case did not go to trial. See id. In the CAT scan/ESP case, the woman did claim economic loss due to her inability to perform her job as a psychic. But her claimed permanent injuries were due to a severe allergic reaction to a pre-scan drug injection. The judge instructed the jury not to consider the claim for loss of ESP and associated economic damages. The judge also set aside the million dollar award as either excessive or inconsistent with his instructions, and a new trial was ordered. See Haimes v. Hart, 81-4408, Philadelphia Court of Common Pleas, reported in Strasser, supra, at 39. In the third case, the man who suffered the heart attack was a 32-year-old doctor with no history of heart disease, and the lawnmower was shown to be defective. See Daniels & Martin, . . . at 325. Daniels and Martin also note that only the Time magazine version of the case gave accurate details. See id.; George J. Church, *Sorry, Your Policy Is Canceled*, Time, Mar. 24, 1986, at 20, 20.

. . . Anecdotes about undeserving plaintiffs are intriguing or outrageous and have been repeated often in the media. Consequently, people readily believe that the category of undeserving plaintiffs dominates the system. . . .

The first thing to determine is how many actionable injuries occur. . . .

The most interesting and legally useful studies of base rates have been done in relation to medical malpractice. In these studies, medical experts evaluate a large sample of hospital records to indentify iatrogenic injuries [harm caused by medical treatment] and determine which were negligently produced. Perhaps the best known study was conducted jointly by the California Hospital Association and the California Medical Association and published in 1977. This study found that 79 per 10,000 patients had suffered negligent injuries. The most recent such study, conducted in 1990 by researchers based at the Harvard School of Public Health, found that 100 of 10,000 New York hospital discharges suffered from negligent iatrogenic injuries. . . .

One of the most remarkable features of the tort system is how few plaintiffs there are. A great many potential plaintiffs are never heard from by the injurers or their insurers. The first and most dramatic step in this process of nonsuits is the failure of so many of the injury victims to take measures to obtain compensation from those who injured them.

By comparing the cases determined to be instances of negligent injury with insurance company records, the study of California medical malpractice found that at most only 10% of negligently injured patients sought compensation for their injuries. Even for those who suffered major, permanent injuries (the group with the highest probability of seeking compensation) only one in six filed. . . . The Harvard Medical Practice Study found that in New York State "eight times as many patients suffer an injury from medical negligence as there are malpractice claims. Because only about half the claimants receive compensation, there are about sixteen times as many patients who suffer an injury from negligence as there are persons who receive compensation through the tort system." . . .

Although trials are the legal system's iconographic center, they also are its chief aberration. Fewer than ten cases in one hundred proceed to trial. The great majority are resolved through negotiated settlements. . . . Out of 10,000 actionable negligent injuries, approximately 9600 disappeared when injury victims did not pursue a claim. Half of those that were presented to attorneys never became filed lawsuits. Of the 200 cases filed (2% of those negligently injured), 170 will be settled, paying most plaintiffs less than their actual losses. Trials will commence for about thirty of these cases. Of the 1,000,000 patients who were not negligently injured, an estimated 2400 will mistakenly regard their injuries as resulting from negligence, and about one third of those become filed lawsuits. . . .

Of the cases that finally arrive at trial for the judge or jury to take their turn at sorting, in which ones is liability found and why? Can we explain and predict trial outcomes? Or are they random and unpredictable? If patterns exist, have they changed over time? . . .

The best known research on juries, conducted by Kalven and Zeisel, found a rate of agreement of about 80% between the liability decisions of judges and juries in both criminal and civil trials.[310] Recall that these findings derived from the process of having hundreds of judges in thousands of jury trials provide their own assessment of the case while the jury was deliberating so the judges' views could be compared with those of the jury.

Of the basic level of agreement between judges and juries, Kalven observed that "the jury agrees with the judge often enough to be reassuring, yet disagrees often enough to keep it interesting." More refined analyses of the data strengthened the conclusion that the jury understood the evidence (as well as the judge did). . . .

A considerable body of research both on actual juries and in well controlled trial simulations supports the conclusion that juries make reasonable and rational decisions. . . .

. . . On average, awards undercompensate losses. A recent study of medical malpractice awards found that each one percent increase in loss resulted in an additional one-tenth to one-twentieth of a percent increase in award.

The benchmarks most often used to assess jury awards have been decisions of other decision-makers in comparable circumstances. We previously discussed the research of Kalven and Zeisel in regard to the rate of judge-jury agreement on liability verdicts. When judge and jury both decided for the plaintiff, juries awarded more damages than judges would have 52% of the time, while judges awarded more 39% of the time and they were in approximate agreement 9% of the time. Overall, juries awarded 20% more money than judges would have. Similarly, recent findings by the National Center for State Courts found that jury awards in tort trials were higher than judges' awards. Who came closer to the "correct" amount? We cannot say. . . .

At nearly every stage, the tort litigation system operates to diminish the likelihood that injurers will have to compensate their victims. . . . At the same time that it provides such infrequent and partial compensation, it succeeds in generating huge overestimates of its potency in the minds of potential defendants. . . .

The absence of empirically validated models of the behavior of the litigation system, incorporating data about both system and the environment which produces its cases, leads to a panoply of problems. Reform efforts must guess at which problems are real and which are mythical. Being the product of guesswork, some reforms will produce effects contrary to the intentions of their makers; indeed, some already have. We will fail to anticipate future changes in litigation activity caused by changes in the law or the legal system or the social, economic, or technological environment of the litigation system. Because they will arrive unexpectedly and their causes will be poorly understood, the effects of those changes will repeatedly arrive as new "crises." . . .

310. [Harry Kalven, Jr. & Hans Zeisel, The American Jury at 58 (1966). — Eds.]

NOTES TO "DO WE REALLY KNOW ANYTHING ABOUT THE BEHAVIOR OF THE TORT LITIGATION SYSTEM — AND WHY NOT?"

1. ***Another Famous Case: Hot Coffee.*** A lawsuit involving McDonald's and its coffee has become very well known. The plaintiff bought a cup of coffee at a drive-thru window. She suffered serious burns when some of the coffee spilled in her lap. At trial, she showed that McDonald's served its coffee at temperatures significantly hotter than the temperatures used by other fast food outlets, and that the company had maintained that practice despite knowledge of many other serious burns over a ten-year period. A jury awarded the victim $160,000 in compensatory damages and $2.7 million in punitive damages. The trial court modified the award to a total of $640,000, and the parties later settled the case for an undisclosed amount. See *McDonald's Settles Lawsuit over Burn from Coffee*, Wall St. J., Dec. 2, 1994, at B6.

2. ***Statistical Information About Possible Claims.*** The Saks article states that many potential plaintiffs never seek compensation. One reason for this in the medical malpractice field may be that the victims know about an unwanted outcome but never learn that a medical mistake was made. The Harvard School of Public Health finding that one out of every hundred hospital cases involved harm produced by medical treatment was based on analysis of hospital records by researchers who had no connections with the hospitals or the patients. While the researchers identified cases that involved mistakes, the patients in those cases were not necessarily aware of those mistakes.

3. ***Gaps Between Perception and Reality.*** The article suggests that the tort system makes it unlikely that injurers will be required to compensate victims, that the victims who do receive compensation are usually undercompensated, and that many victims never seek compensation at all. The article also suggests that potential defendants overestimate the power of the tort system. Despite these facts, the tort system continues to be our society's main method of resolving disputes about injuries. Understanding the reasons for its continued prominence may be an underlying inquiry in the torts course.

F HOW TORT LAW SERVES SOCIETY

Tort law has developed over time through the adjudication of a huge number of cases. While courts seek to do justice in these individual cases, they usually do not attempt to describe the overall role of tort law in society. Scholars, on the other hand, often try to find patterns and broad rationales in the courts' output of articulated doctrines and decided cases. This section describes various

goals tort law may serve, including compensating injured people, deterring risky behavior, punishing wrongdoers, and resolving disputes.

Compensation and Deterrence. The classic tort law treatise describes compensation and deterrence as two primary factors that explain tort doctrines:

> A Recognized Need for Compensation. It is sometimes said that compensation for losses is the primary function of tort law and the primary factor influencing its development. It is perhaps more accurate to describe the primary function as one of determining when compensation is to be required. Courts leave a loss where it is unless they find a good reason to shift it. A recognized need for compensation is, however, a powerful factor influencing tort law. Even though, like other factors, it is not alone decisive, it nevertheless lends weight and cogency to an argument for liability that is supported also by an array of other factors. . . .
>
> Prevention and Punishment. The "prophylactic" factor of preventing future harm has been quite important in the field of torts. The courts are concerned not only with compensation of the victim, but with admonition of the wrongdoer. When the decisions of the courts become known and defendants realize that they may be held liable, there is of course a strong incentive to prevent the occurrence of the harm. Not infrequently one reason for imposing liability is the deliberate purpose of providing that incentive.

Prosser & Keeton on Torts §4 (5th ed.).

A Legal Realist Perspective. Professor J. Clark Kelso, in an article titled "Sixty Years of Torts: Lessons for the Future," 29 Torts & Ins. L.J. 1 (1993), described the interest in how tort law serves society as having arisen from the legal realism movement in the first half of the twentieth century. Legal realism views law as a set of formal rules that provide little guidance as to what behavior would be tolerated by society. According to Professor Kelso, legal realism viewed law as being "conceptually empty" and as having "little predictive value." People subscribing to this point of view are called "realists" because they believe that legal rules are so easy to manipulate that courts can come to any results they want based on considerations such as their political viewpoints or, as is famously said, "what the judge had for breakfast." Lawyers have no trouble manipulating rules. You will find that part of a law school education is learning to interpret rules to favor a client's interests.

If legal rules are just a formality, then how should they be evaluated? Legal realists looked at the consequences of legal rules and court decisions applying those rules. For instance, did a federal law requiring all states to set a 55 mph speed limit on interstate highways really reduce speeds? Are laws prohibiting bigamy or extramarital sex really enforced? Do people who are harmed by the negligence of doctors usually sue, or do they just let it go? Do big corporations usually win or lose? Are juries more generous than judges?

Evaluating the consequences of legal rules caused legal scholars to ask what purposes we want legal rules to serve. What goals should tort law serve? Can tort law and the legal procedures used to apply it be refined to promote those

goals? It is not easy to get people to agree on goals. Scholars, lawmakers, and judges have different political views and favor different interests. Plaintiffs and defendants argue for conflicting outcomes. When a defendant argues that he or she should not be obliged to pay for the harm suffered by the plaintiff, the defendant is implicitly arguing that his or her conduct was acceptable.

The different perspectives of plaintiffs and defendants illustrate two obvious consequences of a torts case. A court decides whether a defendant should pay money to an injured plaintiff, so one consequence is that the power of the state is used to compensate one party at the expense of another. Compensation of plaintiffs is usually viewed as one consequence and goal of tort law. From the point of view of the defendant and people like the defendant who create similar risks of harming others, the court's decision gives them notice that future acts like the defendant's may subject them to liability. Facing potential liability, those potential defendants may be discouraged from acting in ways that create risks for others. Prophylactic deterrence, or prevention, is usually viewed as a second consequence and goal of tort law. Compensation and deterrence are identified in the Prosser and Keaton treatise as key concepts for understanding tort law. Professor Kelso described them as the "twin pillars of tort law."

Conflicts Between Compensation and Deterrence. Compensation and deterrence seem like clear and acceptable goals, but they may conflict. For example, A might start to attack B and then B might act in self-defense and harm A. If our only interest were compensation, tort law could require someone like B to pay A for the costs of A's harm. But we probably want to encourage people to protect themselves from harm, so making someone like B pay for harm to an attacker like A is unappealing. And making every defendant pay would interfere with the goal of using tort law to discourage some types of behavior (such as careless conduct) and encourage other types (such as careful conduct).

While an exclusive focus on compensation would lead to too much compensation, an exclusive focus on deterrence could lead to other undesirable results. Deterrence focuses on discouraging only some kinds of conduct, such as unjustifiably risky conduct. Thus, people who are harmed by other kinds of conduct might not be compensated even though it might be nice to compensate everyone who suffers harm. And full-fledged deterrence might restrain even careful conduct that results in harm. If society wished to avoid all harms, it might have to outlaw automobiles — or at least surround every car with huge bumpers and line the highways with rubber padding. That would not be very sensible, and it is clearly not the choice our society has made.

The effects of compensation are easy to see: victorious tort plaintiffs get paid. But it is not so easy to see how or whether defendants may be deterred. To begin with, many defendants have liability insurance that pays for their damages. While this may result in higher future premiums and insurers insisting on changes in behavior, the deterrent effect is less obvious than the compensation effect of a judicial decision. Professor Kelso thought that this could cause courts typically to err on the side of giving too much compensation even it results in

deterring desirable conduct, particularly if the defendant is a big corporation or is backed by a big insurance company.

One challenge of tort law is to find the right balance of compensation and deterrence. In most situations, to recover damages a plaintiff must show that the defendant's actions involved some degree of fault. In some unusual situations, a defendant whose conduct causes an injury must pay for the injury even if the defendant's conduct was free from fault. These are usually situations in which the business itself is inherently risky and cannot be made safe even with careful conduct.

Shifting Views of the Social Function of Tort Law. Professor Kelso also argued that the balance between compensation and deterrence shifts in times of economic prosperity and hardship. He described the period from World War II to the early 1970s as a period of prosperity in which arguments in favor of greater compensation prevailed over arguments opposing increases in tort liability. Parties who were more likely to be tort defendants (corporations and insurance companies) complained that tort law was expanding in a way that increased the likelihood that they would be held liable for injuries they caused. Parties who were more likely to be or to represent individual tort plaintiffs argued that making businesses and insurance companies liable for more injuries was fair and beneficial to society. Making businesses liable was fair because businesses should bear the costs associated with their profit-making activities. Increased liability was also viewed as beneficial to society because it spread the risk. "Spreading the risk" means that instead of one person bearing the cost of an injury personally, businesses or insurance companies would pass on those costs to all of their consumers and policy holders in the form of higher prices. Professor Kelso argued that when times are good, tort law is more likely to increase compensation.

According to this view, there is pressure to protect business during tough economic times. Professor Kelso observed:

> In times of plenty it was somewhat easier for courts to ignore complaints from business that tort liability was too burdensome. After all, one additional lawsuit usually will not damage a company irreparably, especially when the theory is that tort liabilities ultimately will be distributed widely through the insurance industry and slight increases in prices. But when times are hard, expansive tort liability can drive companies over the edge. The insurance industry itself may be imperiled, and it may be impossible for a company to raise prices in light of world competition. These realities bring to the surface some of the negative consequences of expansive tort liability. Thus, during periods of recession or very slow growth, courts are more likely to focus their attention upon the deterrence goal of tort law (rather than the compensation goal), and are more likely to restrict tort liability in order to ensure that an optimal level of deterrence is attained (and a destructive over-deterrence is avoided).

A long period of slower economic growth in the United States began in the 1970s, due in part to oil shortages and fear of inflation. Conservative Ronald Reagan

was president during the 1980s and favored business interests. In the scholarly community, the law and economics movement began to articulate arguments promoting concern for deterrence over compensation. Modern arguments for putting strict limits on recovery of damages for pain and suffering and making it harder for people to recover for harms resulting from defective products — in addition to many other tort doctrines you will study in this book — reflect this shift in focus from compensation to deterrence.

Criticism of Compensation and Deterrence as Goals. Criticism of the compensation and deterrence goals focuses on the inability of courts to measure accurately the appropriate amount of money an injured person should receive and of tort law generally to establish incentives so that people creating risks will take enough care without investing too much in accident prevention. The following excerpt describes common critiques of the goals of compensation and deterrence and introduces two additional functions of tort law: punishing wrongdoers and providing a process for resolving disputes and propounding social norms.

Steven D. Smith

THE CRITICS AND THE "CRISIS": A REASSESSMENT OF CURRENT CONCEPTIONS OF TORT LAW

72 Cornell L. Rev. 765 (1987)

. . . Critics argue that tort law employs irrational criteria in deciding which injury victims should be compensated and which should not.* If tort law's function is to compensate persons who have suffered loss as a result of accidental injury, the critics argue, it makes little sense to compensate persons injured by another's negligence while denying compensation to those injured by non-negligent human activities, illnesses, natural catastrophes, or physical and mental disabilities. Such injuries may certainly be as severe as in the case of a negligently inflicted harm. Moreover, in each instance the injuries result from accidental or fortuitous causes. If a policy compensating for accidental injuries is justified, the critics assert, then the system should compensate all such victims. . . .

After deciding which claimants to compensate, tort law faces the daunting task of determining how much these claimants should receive. Critics argue that here too the system fails dismally. Compensation's cardinal principle prescribes that injured plaintiffs should receive an amount necessary to make them "whole," that is, to restore them to the position they would have occupied but for the defendant's tortious conduct. This "make whole" principle is difficult enough to apply to a plaintiff's purely monetary loss, such as medical expenses or future

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lost earnings. However, when we apply the standard to nonpecuniary intangible losses such as pain and suffering, psychic injury, or distress from the loss of a loved one, quantifying such losses in monetary terms becomes not merely difficult but conceptually impossible. . . .

Critics of the system respond to the deterrence rationale in two ways. Some broadly assert that tort law has no substantial deterrent effects. The deterrence view of tort law, these critics argue, rests upon wildly unrealistic assumptions about human knowledge, decision making, and conduct. To believe that tort law deters inefficient behavior, one must accept that (1) human beings know what the law is; (2) they have the information and ability to perform the sophisticated cost/benefit calculus upon which the deterrence rationale relies; and (3) humans are rational creatures who actually make and act upon such cost/benefit calculations. Critics claim that such assumptions contradict not only ordinary experience and observation, but psychological research as well.

The second objection to the deterrence rationale suggests that even if the psychological assumptions of the deterrence view were sound, tort law still would not produce optimal levels of safety investment. Optimal levels would be achieved only if all actual injury costs — and no more than actual costs — were allocated to the injury-causing activities. If injurers are liable for less than actual costs, their incentive to adopt safety measures is insufficient; if they are liable for more than the actual costs of injuries, they overinvest in safety. . . .

A third objective often attributed to the tort law system is the punishment of wrongdoers. Critics of this ostensible function assert two principal objections. One holds simply that punishment is not a legitimate state function. This objection equates punishment with simple vengeance — a relic of the primitive need to "get even." . . .

A second objection to the punishment function asserts that even if punishment is an appropriate state function, tort law is a poor instrument for the task. Tort rules often impose liability upon persons or institutions for conduct that cannot be considered blameworthy. Strict liability doctrines expressly renounce "fault" as a requisite for liability. Even negligence principles employ an "objective" standard of reasonable conduct that may impose liability upon persons who lack the subjective ability to understand or conform to objective standards and who thus cannot be considered culpable. . . .

The criticisms considered [above] are powerful ones. In fact, they may be too powerful. The cogency of those criticisms rests, after all, upon the assumption that compensation, deterrence, and punishment are the objectives of tort law. If tort law is as ill-suited to accomplishing compensation, deterrence, and punishment as critics suggest, then we must question whether it is at all proper to attribute those goals to tort law. If tort law instead has a primary function different than compensation, deterrence, and punishment, then it is hardly pertinent to attack tort law for failing to achieve those ends. The very incompatibility of the tort law system with such objectives suggests that critics, as well as many proponents, have misconceived the proper function of that system. . . .

[This article proposes that tort law's primary function is simply to resolve disputes.] Dispute resolution's full significance becomes apparent only when viewed in the broader context of the social universe which human beings inhabit. That universe is composed, in large part, of a system of social norms — "shared expectations and guidelines for belief and behavior." In much the same way that gravitational and kinetic laws give order to the physical universe, social norms give order to the social universe: all of us rely constantly upon norms in deciding how we should think, speak, and behave and in anticipating how others in society will think, speak, and behave. Without such norms, social intercourse would be unpredictable and chaotic. Recognized norms are thus an essential condition of rational social life. . . .

In sum, society must enforce its norms, but it must not enforce them too rigorously or mechanically. Although no single test or criterion can wholly reconcile these competing needs, one factor which powerfully influences the response to norm violation is the resulting harm or lack of harm. A trivial norm violation, such as a breach of table etiquette, usually harms no one; such a violation therefore results at most in social disapproval. At the other extreme, criminal law enforces norms, such as the norm against taking human life, whose violation consistently results in serious harm. Between these extremes lies a set of norms that, although important, are not as imperative as those enacted into criminal law. Such middle level norms constitute the essence of tort law, which seeks to capture such norms with formulas that often amount to little more than open-ended, incorporative allusions to whatever pertinent social norms may exist. Thus, when people act in ways that affect others, tort law requires them to use the care expected of "the reasonable person." Similarly, manufacturers must produce goods that conform to "consumer expectation."

Tort law imposes sanctions for violations of these norms only when such violations result in injuries that in turn generate disputes among members of society. By limiting itself to dispute resolution, tort law avoids overly rigid enforcement of norms and directs its efforts to maintaining those norms which society most clearly wants reinforced. . . .

From a societal perspective, therefore, tort law's dispute resolution function is vital not merely because it prevents private violence, but more importantly because it reinforces the normative order upon which society depends. . . .

The narrow view of personal "injury" likely derives from the typical computation of tort damages, which generally enumerates the kinds of injuries for which the victim may recover damages in tort cases. The resulting list usually includes lost income, medical expenses, pain and suffering, and emotional distress or psychic injury. To be sure, a tort victim often suffers all of these kinds of injury, which this essay will refer to collectively as "actual loss." However, the list typically omits an important element of the tort victim's injury: it fails to recognize the victim's consciousness of having been wronged by the violation of a social norm. This aspect of injury — the sense of having been wronged — might be termed the "sense of injustice." . . .

Recognition of the full character of a tort injury leads to a deeper understanding of tort law's remedial function. Tort law's treatment of injury is not confined to payment of monetary damages. Although responsive to the victim's "actual loss," monetary damages do not specifically treat the victim's sense of injustice, an essential part of her injury. Rather, the tort process's response to injury includes the liability determination and the assessment of damages against the tortfeasor. A system of social insurance would go only halfway: although it would address the victim's "actual loss," it would lack the tort process's comprehensiveness and sensitivity to the full scope of the victim's injury. . . .

This essay does not pretend to make the case for preserving the tort law system. Its aim has been more modest. The essay simply claims that tort law should be understood — and hence evaluated — as a system for resolving disputes generated by the violation of social norms. Whether the system adequately performs its dispute resolution function remains an open question and is a question that can be answered not in the abstract, but only through experience and continuing practical evaluation. . . .

NOTES TO "THE CRITICS AND THE 'CRISIS': A REASSESSMENT OF CURRENT CONCEPTIONS OF TORT LAW"

1. ***Observing Compensation and Deterrence.*** Professor Kelso pointed out that the compensation effects of tort doctrines are typically easier to observe than the deterrent effects of those doctrines. Compensation is easy to observe, because it consists of court orders that defendants pay money to plaintiffs. Changes in people's conduct may be difficult to link to deterrent effects of tort law, because changes in conduct may be the result of many influences.

It is easier to see the political pressures for expanding and contracting tort liability. As you study tort law, you will see how legal rules affect people who are likely to create risks and people who are likely to receive injuries. You will also see how changes in legal rules reflect different views of the appropriate amounts of compensation and deterrence.

2. ***Additional Rationales for Tort Law.*** Professor Smith's article proposes that tort law may serve values in addition to compensation, deterrence, and punishment. He proposes that identifying injustice, even if it occurs only in a minority of instances of unjustly inflicted injuries, may be of great value to an individual who has felt wronged. He suggests that deterrence may come about indirectly through the institution of tort law, because the social norms that people learn are probably influenced by tort doctrines. Also, punishment through the tort system may be sensible if it is viewed as a type of restorative justice, because it can reinforce social norms to the victim and also to society as a whole.

CHAPTER 2

Intentional Torts

A INTRODUCTION

Functions of tort law. Tort law allows plaintiffs to obtain compensation for injuries inflicted on them by defendants or to obtain court orders that stop ongoing or anticipated injuries. As a whole, tort doctrines express society's standards for what types of conduct are acceptable and what kinds of effects one actor may impose on another. Tort law can direct compensation to victims of prohibited conduct and may also deter people from acting in those forbidden ways.

Categories of tort law. Tort law allows plaintiffs to recover for a wide variety of harms. For some types of harm, in order to recover damages a plaintiff must prove that the defendant intended to affect the plaintiff in some way that the law forbids — these are called *intentional tort* cases. For some other types of injury, a plaintiff may recover without proof that the defendant meant to cause a prohibited effect if the plaintiff proves that the defendant's conduct was less careful than the law requires — these are *unintentional tort* cases. *Negligence* and *recklessness* are the two main types of unintentional tort cases. Finally, a plaintiff may sometimes recover for an injury without proving either that the defendant meant to cause harm or that the defendant's conduct lacked some required degree of carefulness — these are *strict liability* cases.

Types of intentional torts. Tort law treats many types of conduct as intentional torts. This chapter covers *battery, assault*, *false imprisonment*, and *intentional infliction of emotional distress*. These tort actions represent one societal response to types of conduct that are highly reprehensible. They also illustrate a framework that applies to other types of intentional torts and to most other types of tort actions as well.

B BATTERY

Intentional tort doctrines protect a person from having someone interfere with that person's recognized *legal interests*. A legal interest is a right or privilege that

the law protects. The intentional tort of battery protects a person's bodily integrity, the right to be free from intentionally inflicted contact that is harmful or offensive.

1. Intent to Contact

Waters v. Blackshear introduces some important battery concepts. Be sure to note: (1) what the defendant did that interfered with the plaintiff's bodily integrity (the defendant's conduct); (2) what the law requires for the conduct to be characterized as a battery; and (3) why the court thought this defendant's conduct fit those requirements.

If someone picked you up and threw you at another person, thereby injuring that person, the law would not treat *you* as having committed an intentional tort. In a tort case, the plaintiff must satisfy an *act requirement* by showing that the defendant committed a voluntary act. Polmatier v. Russ examines this issue as well as the range of definitions of "intent" that may be used in intentional tort cases. The decision also elaborates on the rules for categorizing an intentional tort as a battery and illustrates some differences between tort and criminal law rules.

WATERS v. BLACKSHEAR

591 N.E.2d 184 (Mass. 1992)

WILKINS, J.

On June 6, 1987, the minor defendant placed a firecracker in the left sneaker of the unsuspecting minor plaintiff Maurice Waters and lit the firecracker. Maurice, who was then seven years old, sustained burn injuries. The defendant, also a minor, was somewhat older than Maurice. The defendant had been lighting firecrackers for about ten minutes before the incident, not holding them but tossing them on the ground and watching them ignite, jump, and spin.

Maurice and his mother now seek recovery in this action solely on the theory that the minor defendant was negligent. The judge instructed the jury, in terms that are not challenged on appeal, that the plaintiffs could recover only if the defendant's act was not intentional or purposeful and was negligent. The jury found for the plaintiffs, and judgment was entered accordingly. The trial judge then allowed the defendant's motion for judgment notwithstanding the verdict on the ground that the evidence showed intentional and not negligent conduct. We allowed the plaintiffs' application for direct appellate review and now affirm the judgment for the defendant.

We start with the established principle that intentional conduct cannot be negligent conduct and that negligent conduct cannot be intentional conduct. The only evidence of any conduct of the defendant on which liability could be

based, on any theory, is that the defendant intentionally put a firecracker in one of Maurice's sneakers and lit the firecracker.

The defendant's conduct was a battery, an intentional tort. See Restatement (Second) of Torts §13 (1965) ("An actor is subject to liability to another for battery if [a] he acts intending to cause a harmful or offensive contact with the person of the other or a third person, or an imminent apprehension of such a contact, and [b] a harmful contact with the person of the other directly or indirectly results"); 1 F.V. Harper, F. James, Jr., O.S. Gray, Torts §3.3, at 272-273 (2d ed. 1986) ("to constitute a battery, the actor must have intended to bring about a harmful or offensive contact or to put the other party in apprehension thereof. A result is intended if the act is done for the purpose of accomplishing the result or with knowledge that to a substantial certainty such a result will ensue" [footnote omitted]); W.L. Prosser & W.P. Keeton, Torts, §9, at 41 (5th ed. 1984) ("The act [of the defendant] must cause, and must be intended to cause, an unpermitted contact").

The intentional placing of the firecracker in Maurice's sneaker and the intentional lighting of the firecracker brought about a harmful contact that the defendant intended. The defendant may not have intended to cause the injuries that Maurice sustained. The defendant may not have understood the seriousness of his conduct and all the harm that might result from it. These facts are not significant, however, in determining whether the defendant committed a battery. See Horton v. Reaves, 186 Colo. 149, 155, 526 P.2d 304 (1974) ("the extent of the resulting harm need not be intended, nor even foreseen"). The only permissible conclusion on the uncontroverted facts is that the defendant intended an unpermitted contact. . . .

NOTES TO WATERS v. BLACKSHEAR

1. ***Parties and Pleadings.*** The person who brings an issue to a court's attention in a tort case is usually called the *plaintiff* or *complainant*. The person whose conduct a plaintiff believes has caused or is about to cause an injury is usually called a *defendant*. A lawsuit begins with written documents called *pleadings*. A plaintiff files a formal written document called a *complaint*, stating that a defendant has done (or is doing) something for which tort law provides a remedy. The defendant responds to the complaint in a formal written *answer*. The answer may dispute the plaintiff's description of the defendant's actions. On the other hand, a defendant's answer may agree with the plaintiff's description of the defendant's actions but argue either that: (1) tort law allows those actions; or (2) tort law ordinarily forbids those actions but that something about the plaintiff's conduct or some other aspect of the case should prevent the court from ruling in the plaintiff's favor.

2. ***Plaintiff's Characterizations of Facts and Legal Doctrines.*** Every tort case must have a *legal theory* and a *factual theory*. A legal theory is a statement of the type of tort that the plaintiff claims the defendant committed.

A legal theory determines what the plaintiff must prove to obtain the remedy he or she seeks. The plaintiff's choice of legal theory determines what facts are relevant. A factual theory is a statement of what caused the plaintiff's injury, including a statement of what the defendant did or did not do in the context of the significant circumstances related to the injury. A plaintiff will win a tort case if: (1) the plaintiff can persuade the trier of fact (the jury, or the judge in a case tried without a jury) that, as a matter of historical fact, some events occurred; and (2) the jurisdiction's legal doctrines support the conclusion that when events of the type the plaintiff described have occurred, a plaintiff is entitled to a remedy.

In *Waters*, the legal theory at stake on appeal involved the tort of battery. The plaintiff had sought recovery on another theory, negligence, probably because the defendant was covered by an insurance policy that would pay damages for negligent conduct but not for intentional torts. If the defendant's conduct satisfied the requirements for battery, then the plaintiff's negligence claim had to fail. What facts and/or events must a party prove to have occurred to support a finding that a battery occurred? What was the factual theory (presented by the defendant) to support a finding of battery? What facts did the defendant claim were true and sufficient to support a finding that the defendant's conduct was a battery?

3. *Variety of Legal Theories.* A person may act without intending to invade the legally protected interests of another. If the defendant carelessly dropped the firecracker and it happened to fall into Waters's shoe, there would be no battery. There might, however, be a tort in these situations based on another legal theory such as recklessness or negligence. Learning tort law involves learning which legal theory fits the facts of a case.

4. *Variety of Sources of Law.* The *Waters* court relied on several types of authority in reaching its conclusion: the Restatement (Second) of Torts, two treatises on tort law, and a decision from another court. Judges and lawyers (and law students) regularly rely on all of these resources to find accurate statements of the law. Statutes and regulations are additional sources of law discussed in this book.

5. *Restatements of Tort Law.* The Restatement (Second) of Torts is a publication of a private organization called the American Law Institute (ALI). Members of the ALI are prominent judges, lawyers, and law professors. The ALI has prepared a large number of Restatements of the law for different fields of law. The Restatements are intended to codify common law doctrines as developed in state courts; where state court doctrines are not uniform, the authors of the Restatements either incorporate the doctrine they consider best or state that there are rival points of view on an issue. Restatement provisions are not binding authority in a state unless they have been adopted by that state's courts. The Restatements usually have had great persuasive power, though, because of