

Neal R. Bevens

TORT LAW
FOR PARALEGALS
SEVENTH EDITION
Neal R. Bevens

Tort Law for Paralegals prepares students with practice-based assignments and a wealth of activities that reinforce the material. Students work with court forms and documents as they apply the law to a hypothetical case that unfolds throughout the text. Case excerpts in each chapter provide a basis for discussing legal theory and its applications. Ethics topics are also covered in each chapter.

Well-structured pedagogy reinforces this readable text. Each chapter features a variety of effective learning aids, including sample forms and documents as well as exercises that encourage students to apply what they have learned. The *Skills You Need in the Real World* feature in each chapter highlights specific paralegal skills, from locating expert witnesses to creating a trial notebook and billing for time.

Designed for future paralegals, *Tort Law for Paralegals* features:

- Comprehensive coverage, with a teachable mix of theory and practice.
- Presentation of tort law that is current and accessible for all readers

- Practice-based assignments and real-world examples that show how law firms function, how they assess cases for settlement value, how they investigate claims, and much more
- Lucid writing and effective pedagogy
- One continuous hypothetical case that serves as a coherent framework for understanding legal concepts in practice

Highlights of the Seventh Edition include:

- Updates throughout to reflect the most recent changes in tort law
- Issues in tort law raised by the COVID-19 virus are examined
- New cases that exemplify what paralegals see in practice
- Updated end-of-chapter questions, activities, and assignments to enrich learning

Bevens

TORT LAW FOR PARALEGALS

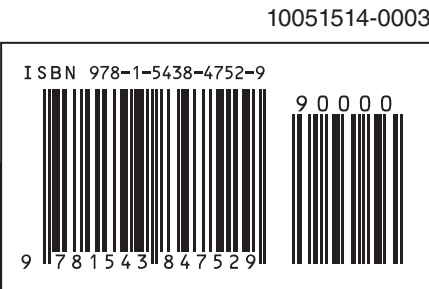
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Tort Law for Paralegals



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Seventh Edition

NEAL R. BEVANS, J.D.

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***For all those we lost in the pandemic, but especially for my brother-in-law,
the unique, talented, and charismatic Ramses Escobar Henao, who died of
COVID-19 complications on June 29, 2021. “El faraón egipcio” de Chigorodó,
Colombia, South America. Descansa en paz.***

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Preface

INTRODUCTION TO THE SEVENTH EDITION

The seventh edition of *Tort Law for Paralegals* continues a long tradition of ensuring that the topic of tort law is current and accessible for all readers. As has been true in previous editions, the author has updated the materials to reflect the most recent changes in tort law. The text begins with a general discussion of civil law and then proceeds through the concepts of intentional torts and defenses followed by an in-depth examination of negligence law. This examination spans several chapters and includes all elements of a negligence action, as well as defenses to negligence. From there, the author moves on to a discussion of product liability, business torts, and an explanation of the impact that insurance coverage has on bringing and defending tort cases. Because this book was rewritten during the global pandemic, many of the issues that the COVID-19 virus have raised in tort law also are examined.

In addition, the author has added even more material in every chapter, as well as including a feature that asks relevant questions about the featured case, while providing answers to these questions in the extensive Instructor's Manual.

FEATURES

This seventh edition continues many of the features that have made previous editions so popular. The material attempts to balance theory with practice. It is designed to appeal to various learning styles. Many of the components give the text a solid visual appeal while also delivering important information about the bases of tort law.

■ Chapter Objectives

Each chapter begins with clearly stated learning objectives to guide readers in their studies.

■ Chapter Outline

The author has added a new feature, the chapter outline at a glance to help students and instructors anticipate upcoming issues in the materials and to help track progress.

■ Tort Basics at a Glance

Scattered throughout each chapter are small synopses of the basics of tort law. Students can see a brief summary of the topic and the critical points to be gleaned from the material.

■ Definitions

As each new term is introduced, it is also defined for the student. These contemporaneous definitions help to reinforce the concept under discussion and provide an additional frame of reference for the legal term.

■ Figures, Tables, and Diagrams

Each chapter has been extensively updated with new figures, tables, and diagrams to assist students in their understanding of the concepts by presenting them in a visual format.

■ Practical Advice

The text also provides examples and advice about topics as varied as drafting a complaint to billing for time.

■ Case Excerpts

Almost every chapter in the text has been updated with new cases that reflect the most up to date changes in tort law. The only exceptions are the seminal cases that establish sub-fields in tort law, such as the famous *Palsgraf*, *MacPherson* and *Tarasoff* cases, among others. Each case also has a series of questions following it to help readers to focus on the important issues. Answers to these questions are found in the new student appendix.

■ Litigation Facts

The text also contains checklists, figures, and tables that allow students to bring the theoretical discussions into a more practical realm by showing how attorneys and paralegals prepare for a wide variety of tort cases.

■ Skills You Need in the Real World

This feature helps create a balance between theoretical legal discussions and down-to-earth practicality by showing the reader how various activities in the real world are carried out. Whether investigating a claim, billing an account or preparing legal documents, this section—which comes at the end of each chapter—helps emphasize the day-to-day activities carried out by paralegals who work in tort law.

■ Ethics Issues for the Paralegal

Ethics is a critical concern for attorneys and paralegals, and ethical scenarios and rules are presented throughout the text to help emphasize this point. At the end of each chapter, the author discusses a particular ethical issue in great detail. Examples include how the attorney-client relationship is established to avoiding legal malpractice claims.

■ Tech Topic

The author has also expanded on the role that technology continues to play in modern legal practice. Each chapter features a discussion of modern technology and how it continues to change the day-to-day practice of law.

■ COVID-19 Concerns

Given the overall impact that the COVID-19 pandemic has had on the world, it is little wonder that it would also have had a continuing impact on the topic of tort law. Each chapter contains a separate section detailing the chapter subject and how it has been impacted by the pandemic.

■ Chapter Summary

At the conclusion of each chapter, the chapter summary presents a condensed overview of the material covered in the chapter, helping the reader focus on the key points raised.

■ Websites

The seventh edition of this book has even more broadly expanded its consideration of the Internet and its impact on the day-to-day practice of law. Each chapter has websites that direct the reader to online resources that can provide more extensive and more targeted reading on a particular topic, but the chapters have been revised to discuss the impact of the Internet on all areas of tort law.

■ Forms and Court Documents

Among the many items provided in the end-of-chapter materials are excerpts from actual court documents. These contain examples of pleadings that range from complaints and answers to interrogatories and motions. This section allows the reader to see how the various legal topics discussed in the chapter are actually put into place by attorneys and paralegals as they pursue (or defend) a civil tort case.

■ Key Terms

Each of the key terms discussed in the body of the chapter is excerpted and provided to the reader again at the conclusion of the chapter. This allows students to ensure that they have mastered the important concepts discussed throughout the text.

■ Review Questions

Extensive review questions are provided to test the student's understanding of the important concepts raised in the chapters and also serve as a way to stimulate in-class discussion of various tort law concepts. Answers to these review questions are provided in the new student appendix.

■ Applying What You Have Learned

In the author's continuing effort to provide a balance between theory and practice, this section allows students to apply the theoretical concepts from the chapters into specific, real world problems, and guides students to solve these problems.

■ Sample Quizzes in Different Formats

The text has also been revised to include new sections with sample quizzes in several formats that allow students to check their progress in their comprehension

of the materials. Answers to all of these questions are provided in the student appendix.

■ **Non-Gender Specific Language**

In recognition of the changing face of pronoun use and the impact that gender-specific language has on readers, the author has endeavored to avoid the use of gender specific pronouns whenever possible.

INSTRUCTOR'S MANUAL

The author has developed an impressive instructor's manual to accompany the text. Recognizing the needs of instructors for multiple resources, the author has provided the following features:

■ **Answers to all end-of-chapter questions**

■ **Test bank**

The test bank includes a variety of test questions, including:

- ☐ Essay questions (5 per chapter)
- ☐ Short answer (10 per chapter)
- ☐ Multiple choice (25 per chapter)
- ☐ True-false (10 per chapter)

■ **PowerPoint slides for each chapter**

■ **Additional cases**

The author has also provided additional cases in the Instructor's Manual to help supplement the material in each chapter. Each case comes with a set of questions and answers to assist the instructor.

Acknowledgments

The author would like to thank the always excellent Betsy Kenny and Lisa Connery for their assistance in creating this book.

About the Author

Neal Bevens is a former assistant district attorney and private attorney. A veteran of over 150 trials, Bevens has tried every major felony from rape, murder, and narcotics to armed robbery. One of his cases was televised nationally on Court TV. He also worked in a private firm handling primarily medical malpractice and personal injury defense. He has a Juris Doctor degree from the University of Georgia (Order of the Barrister) and has been a college instructor for over 25 years. A multiple-year honoree in *Who's Who Among America's Teachers*, Bevens is the author of 15 national textbooks, numerous magazine articles, and one novel.

An Introduction to Tort Law

Chapter Objectives

- Explain the foundations of tort law
- Show the distinction between tort law and other branches of law
- Describe the differences between tort law and criminal law
- Explain the basic steps involved in a civil trial
- Describe the basic court system, including appellate court structure

Chapter Outline

- | | |
|-------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------|--------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------|
| <p>I. Introduction to a Torts Case</p> <ul style="list-style-type: none">A. “Can I Sue?”B. Torts Are Legal WrongsC. Cause of ActionD. The Basis of a Lawsuit Is a Cause of Action <p>II. Tort Law Compared to Criminal Law</p> <ul style="list-style-type: none">A. Who Brings the Case?B. The PleadingsC. Civil and Criminal Cases Operate Independently of One AnotherD. Proof in a Civil Case Is Preponderance of EvidenceE. Terms Are Different <p>III. Tort Law Compared to Other Areas of Law</p> | <p>IV. A Short History of Tort Law</p> <ul style="list-style-type: none">A. An Eye for an EyeB. Money for an EyeC. The Development of Tort Law in the United States <p>V. Bringing a Tort Case</p> <ul style="list-style-type: none">A. Investigating the Cause of Action: Rule 11B. Litigation ChartC. Sources of ProofD. Filing a Complaint <p>VI. Discovery in Civil Cases</p> <ul style="list-style-type: none">A. InterrogatoriesB. DepositionsC. Request for Production of Documents |
|-------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------|--------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------|

- D. Request to Admit Facts
- E. Request for Physical and/or Mental Examination of a Party
- VII. The Trial of a Civil Case**
 - A. Jury Selection
 - B. Opening Statement
 - C. Presentation of the Plaintiff's Case
 - D. Motion for Directed Verdict
 - E. Presentation of the Defense Case
 - F. Closing Argument
- G. The Jury Charge
- H. The Verdict
- VIII. Alternative Dispute Resolution**
 - A. What Is Alternative Dispute Resolution?
 - B. Arbitration Versus Mediation
- IX. Appeals**
 - A. The Importance of Case Law
 - B. Stare Decisis
 - C. Higher Courts of Appeal
 - D. An Example of Case Law

I

INTRODUCTION TO A TORTS CASE

They had spent the day shopping. Charles Chumley, 60 years old, was driving while Julia, his wife of 35 years, was in the passenger seat beside him. They had visited a larger town about 30 miles away and had spent the day at the mall. Now they were heading home. They had lived in the town of Cling for almost 20 years. Charles had a job nearby as a shift supervisor at a plant that made wooden chairs and tables. Julia had worked at city hall as a secretary until she retired last year. For the past few months, they had enjoyed taking little shopping trips together on the weekends. Charles was looking forward to his retirement. He used to joke to her that they would get a camper and drive all over the country. Julia didn't like driving, especially long trips, but she would play along with him. Around 4:30 that Saturday afternoon, they reached the outskirts of town and turned down their street. Morgan Street hadn't changed much in 20 years. Just short of their house, a railroad track crossed Morgan Street. There wasn't a stop sign or a mechanical gate, just one "cross-buck" sign that read "Rail Road Crossing." Charles had driven across that track at least twice a day, five days a week for 20 years. The thick ever-green trees that grew near the intersection made it hard for him to see down the track.

What happened next has been pieced together from the facts. There is no dispute that when the Chumley car crossed the tracks, it was struck broadside by a 32-ton train, owned by National Railroad Company. The impact sounded like a small bomb going off, as some neighborhood people said later. The car was impaled on the front of the locomotive engine and pushed about 100 yards down the track, before the car finally rolled off the front of the railroad engine and slid into a ditch. Charles was severely injured, and Julia was killed instantly.

Fortunately for Charles, a fire station was only two blocks away and it was equipped with an ambulance. Fire and rescue got to the scene in less than three minutes. They cut Charles out of the car, but there wasn't anything they could do for Julia. Charles was airlifted from the scene to a nearby city and spent several months in the hospital there. Although he almost died in intensive care, he managed to pull through. He has no memory of the collision. He walks with a cane now. He has severe, permanent injuries

that prevent him from ever returning to work or even driving a car again. His wife is dead. His life has been devastated.

Charles Chumley has just walked into your law office. He wants to sue the railroad. This is a torts case.

The term *tort* refers to any case involving a physical, financial, or emotional injury. Many states have gradually phased out this term, replacing it with the more general term *civil injury*.



TORT
BASICS
AT A
GLANCE

Throughout this book, we will discuss the many fascinating aspects of tort law, but we never stray far from this case — because no matter how interesting a particular point of law may be, tort law in its final analysis is always about people. People get injured; people bring lawsuits; people win or lose at trial. People, like Charles Chumley, want to know what their legal options are.

A. “CAN I SUE?”

Clients always want an answer to that question. That’s what Charles Chumley asks the day he walks into the law office. Mr. Chumley doesn’t have any legal training, so he doesn’t realize that he is asking the wrong question. The real question is this: Has Mr. Chumley suffered a legal wrong for which he can receive damages? See Figure 1-1 for a list of the various types of civil trials, including tort cases.

B. TORTS ARE LEGAL WRONGS

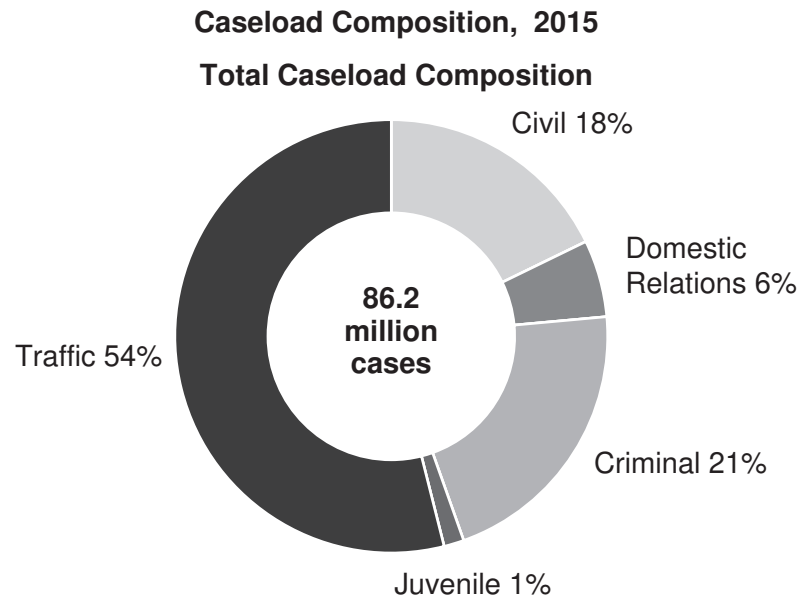
A tort is a legal wrong or legal injury that entitles the victim to compensation. Later we discuss how a torts case is different from a criminal case and other types of law, but there is one major element to a torts case: If a person has suffered a legally recognized wrong, then she may be entitled to compensation from the person who injured her. A tort, or a civil injury, gives the injured party a legal right. Having said that, however, not every injury entitles a person to compensation.

C. CAUSE OF ACTION

Before a person can sue, he or she must have a **cause of action**. Simply put, this is an injury that is recognized at law. Say, for instance, that you are going out to your car in the parking lot. It’s been a long day, and you’re looking forward to getting home and relaxing a bit. However, a strange man is standing close to your car. As you walk up, you begin to feel a little apprehensive. You nod at the man, but he doesn’t nod back. Feeling even more apprehensive, you reach for your car keys to unlock your door and you realize that the man is actually glaring at you. He has a very angry look on his face.

Cause of action

A legal injury on which a lawsuit can be based.

FIGURE 1.1**Caseload
Composition 2015**

Examining the Work of State Courts, An Overview of 2015 State Court Caseloads, Court Statistics Project, National Center for State Courts

You consider asking him a question, but instead you wisely get into your car. The man continues to stare at you as you start your car. You can feel his eyes on you as you back up and leave the area. Throughout this situation, the man has neither said anything nor moved, but you can *feel* his maliciousness. You drive home, and although you never see the man again, you suffer from nightmares that he is coming after you.

Do you have a cause of action? Or, put another way, does the law of your state authorize a lawsuit based on these facts?

The answer, barring any additional facts, is no. Because the man didn't actually do anything and you never saw him again, there is no legally recognized claim you could bring against him. There are some things in life that people simply have to put up with. A glaring stranger is one of them. The law only permits people to bring lawsuits against others when the victim has suffered some legally recognized wrong. The fact that you felt that the man had an evil purpose, or that he gave you a mean look, does not mean that his actions rise to a legally recognized wrong. Without a wrong, or a cause of action, there can be no case. This is as true with evil looks as it is for multimillion-dollar losses. If there is no legal wrong, there is no tort.

Now take the same scenario and change one fact: As you get into your car, the man takes a swing at you and misses, then runs away. Do you have a legally recognized cause of action against him? Yes, absolutely. The man has just committed the tort of assault (discussed in Chapter 2). The important point is that the man did something that the law recognizes as a legal wrong. In some cases, as we see in later chapters, when the

man fails to act, or fails to act in a reasonable manner, you may also have a cause of action against him for negligence.

D. THE BASIS OF A LAWSUIT IS A CAUSE OF ACTION

Does Charles Chumley have the basis for a lawsuit? On the face of it, the answer would seem to be yes. The state where he was injured, like all states, allows a person injured in a car wreck to sue the person who caused the wreck. The basis of the cause of action is the other person's negligence. In this case, Mr. Chumley claims that a train caused his injuries by acting in a negligent manner. Mr. Chumley is not saying that the railroad engineer deliberately or intentionally set out to hurt him. Instead, Mr. Chumley is saying that he was hurt through the carelessness of the engineer and, through him, the railroad company that he works for. The first answer we can give Mr. Chumley, at this stage, is yes, a lawsuit can be brought on these facts. That doesn't necessarily mean that the lawsuit *should* be brought. That's a different question. First, we must answer this question: How is a torts case different from other kinds of cases? Then we can outline the steps that a torts case follows.



TORT LAW COMPARED TO CRIMINAL LAW

Tort law is a field of law that is as specialized in its own way as criminal law, tax law, or divorce law. Let's explore the basic differences between a torts case and a criminal case, using the scenario of the glaring stranger that we mentioned earlier.

A. WHO BRINGS THE CASE?

A torts case is brought by the individual who has suffered some legally recognized wrong. In a criminal case, for example, a prosecutor would bring the case. Prosecutors are the representatives of the government and seek criminal indictments against people who break the law. The prosecutor does not represent the victims; the prosecutor represents society. Although a prosecutor may work closely with the victims, the victims do not have any authority over the prosecutor. On the other hand, when a victim brings a civil suit, she often hires a lawyer to represent her interests. This lawyer works directly for the victim and must follow her instructions. See Figures 1-2 and 1-3 for an overview of the differences between torts and criminal cases.

In addition to the differences outlined above, the terminology we use to describe these parties is also different. When a person brings a civil suit, he or she is called a *plaintiff*. When the government brings a criminal case, it is usually referred to as the *state*, or the *people*. One thing that often contributes to confusion about these terms is that we use the same term to refer to the other side in civil and criminal cases. That person is called the *defendant*.

FIGURE 1.2

Who Brings the Case?

Tort case	Criminal case
Individual	Prosecutor

FIGURE 1.3

Who Represents the Parties?

Tort case	Criminal case
Civil Attorney	Prosecutor

Pleadings
Documents that describe the legal injuries and counterclaims raised by the parties in a civil case.

Complaint
Document drafted by the plaintiff’s attorney and served on the defendant. It details the personal or financial injury suffered by plaintiff.

B. THE PLEADINGS

Another important difference between torts cases and criminal cases has to do with the documents that begin the suit, commonly referred to as the **pleadings**. In a civil case, the plaintiff files a **complaint**. This document sets out the legal wrong that the plaintiff suffered. It also requests that the defendant pay the plaintiff monetary damages. See Figure 1-4 for an overview of the differences between torts and criminal pleadings.

FIGURE 1.4

Bringing the Charges

Torts case	Criminal case
Complaint ↓ Details plaintiff’s injury	Indictment ↓ Details defendant’s crime

Indictment
Official document issued by the grand jury, accusing the defendant of a criminal act.

A criminal case usually begins with a warrant, often followed by an **indictment** issued by a grand jury. The indictment details the defendant’s actions and how these actions violate the law. The indictment doesn’t ask for monetary damages. In fact, if the defendant loses the criminal case, she will usually go to prison.

C. CIVIL AND CRIMINAL CASES OPERATE INDEPENDENTLY OF ONE ANOTHER

Sidebar
When a person chooses to represent himself without an attorney, it is referred to as proceeding pro se (by oneself). Less than 3 percent of litigants in tort cases represent themselves.¹

When the strange man waiting by the car took a swing at you and missed, he committed the tort of assault. He may also have committed a crime. For example, if you got into your car and called the police, criminal law would be triggered and the man might get arrested. Does this mean that you cannot also sue him? Absolutely not. You can bring your lawsuit whether or not a criminal case has also been brought against the man. Civil cases and criminal cases operate independently of one another. The plaintiff’s attorney doesn’t work with the prosecutor. The plaintiff’s attorney doesn’t have to wait until the criminal case is over before bringing a civil suit. A civil suit can be brought before, during, or after a criminal case. One reason why these two cases can proceed independently of one another is that the burden of proof is different in both cases.

D. PROOF IN A CIVIL CASE IS PREPONDERANCE OF EVIDENCE

When a plaintiff brings a complaint against a defendant, she must prove her case by a preponderance of evidence. This means that the plaintiff has to prove that her allegations are “more likely than not” true. Another way of thinking about this standard is to imagine an old-fashioned, two-sided scale. If the plaintiff presents enough evidence to tilt the scales in her favor, she is entitled to win. However, the proof required in a criminal case is very different.

The burden of proof in a civil case is preponderance of the evidence, which means that the plaintiff must prove that his version of the facts is true “more likely than not.”



TORT
BASICS
AT A
GLANCE

In a criminal case, the government must prove its case “beyond a reasonable doubt.” The problem with this standard is that it is hard to explain. It is certainly higher than the civil requirement of preponderance of evidence, but how much more? Most commentators explain “beyond a reasonable doubt” as the requirement that the government prove its case to the point where the jury would have no commonsense objections to the government’s version of what occurred.

E. TERMS ARE DIFFERENT

In addition to a different standard of proof, the terms that we use in a torts case are different from what we use in criminal cases. At the end of a civil case, if the jury decides that the defendant should pay **damages** to the plaintiff, the defendant is held to be **liable**. At the end of a criminal case, if the jury decides that the government has proven its case against the defendant, the defendant is **guilty**. In the case of the man who took a swing at you, he could be prosecuted by the government and sued by you at the same time. Civil torts and criminal cases, although based on the same facts, actually have very little to do with one another.

Damages

Money that a court orders the losing side in a civil case to pay to the other side.

Liable

A finding that one of the parties in a civil case is obligated to pay damages to the other party.

Guilt

The jury’s determination that the defendant in a criminal case is responsible for committing a crime.



TORT LAW COMPARED TO OTHER AREAS OF LAW

Obviously, tort law has many differences from (and similarities to) criminal law. How does tort law compare to other forms of civil law—for instance, business law, corporate law, and patent law, to name a few other subspecialties? Tort law is actually quite different from these other areas of law, as well. When parties to a contract sue one another, the cause of action is usually based on some unfulfilled promise

contained in the contract. People who are parties to a contract have a relationship with one another, and it is that relationship that gives rise to the suit. In a torts case, on the other hand, there is usually no requirement of relationship. A plaintiff is not even required to know the defendant. The important issue is whether the defendant's actions injured the plaintiff. In corporate law, for example, the focus is on the creation and legal obligations of various forms of businesses, from sole proprietorships to major corporations. In this book, we address the topic of business torts, but other than that small overlap, there are few similarities between tort law and corporate law. As you can see, tort law is a distinct subspecialty of law and has its own rules, concepts, and historical roots.

Tort law is often referred to by the more descriptive title of "civil injuries." Actually, that title makes a great deal of sense. Torts involve physical, emotional, or financial injuries. The civil courts provide a framework for victims to attempt to receive compensation for these various injuries. Just as there are various kinds of crimes, there are various kinds of torts. This book focuses on one of the largest areas of tort law: personal injury cases. The reason for this is simple—personal injury cases are common. A paralegal is far more likely to become involved in a car wreck case than a class action product liability case. In fact, many firms limit their entire practice to car wreck cases. There is never a shortage of business.

However, this is not to say that the other kinds of torts are not important. One of the largest jury verdict awards came in a torts case that did not involve a car wreck. That verdict resulted from the foundering of the Exxon *Valdez* off the coast of Alaska. The resulting oil spill ruined miles of beaches and killed untold thousands of fish and animals. The jury that heard the negligence suit awarded punitive damages against Exxon of over \$9 billion. To date, that remains one of the largest jury verdicts in history.



A SHORT HISTORY OF TORT LAW

Although the development of tort law over the past 2,000 years makes an interesting treatise on its own, we dispense with a great deal of it in this book. However, we will focus attention on certain historical developments in tort law, if for no other reason than some of these legal concepts are still around today and continue to have an impact on modern lawsuits.

A. AN EYE FOR AN EYE

One of the ancient concepts in tort law had to do with the legal principle of "an eye for an eye." Under this principle, if a person intentionally cut off another person's hand, the injured man would be entitled to require amputation of the offender's hand. The practical difficulties of such a system seem apparent to us and probably became readily apparent to the participants. Such a system does not promote a peaceful society. It also does not encourage people to use the court system to work out their differences.

B. MONEY FOR AN EYE

The concept of “an eye for an eye” quickly changed to a more modern concept of legal payment for injuries. Under this system, the various parts of a person’s body were given monetary value, and damage (or loss of use) of any of these parts would require a monetary payment by the offender. Eyes and hands had the greatest value, while toes had the least. Facial scars carried more monetary value than scars on other parts of the body. Although this system seems terribly outdated, it is in fact the system that is in use today in most workers’ compensation statutes. Today, when a worker is injured on the job, a dollar amount is set for damage or loss of use of a hand, an arm, or an eye, just as was done over a thousand years ago. In other states, a percentage of the worker’s weekly or monthly income is used as the basis for a monetary award.

This system of assigning monetary value to parts of the body also applies to negligence cases. Although there is no printed schedule stating exact amounts for body parts, the idea remains the same. One of the things that the jury will determine during the course of its deliberations is how much value to attach to the plaintiff’s injuries caused by the defendant’s negligence. This determination is one of the main duties of the jurors when they retire to the jury room to deliberate. First they determine if the defendant should be found liable; then they determine how much the plaintiff should receive.

C. THE DEVELOPMENT OF TORT LAW IN THE UNITED STATES

Tort law developed very slowly in the United States. Early legal treatises either neglect it entirely or mention tort law only as a minor consideration. This situation changed dramatically with the coming of the Industrial Revolution to both England and the United States. Suddenly, there were dangerous machines operating everywhere, and they were injuring people. One particular machine, the railroad locomotive, generated more lawsuits than anyone could have imagined. The law of negligence suddenly took center stage, with workers and passengers bringing suits against negligently operated railroad engines. The courts, always slow to recognize massive changes in social institutions, at first sided with the railroad companies. Recoveries were denied in the face of obvious negligence. However, this situation slowly changed over the decades, until the courts developed new theories of negligence to take into account the negligence of a public carrier. In these days of ubiquitous lawsuits brought against airline companies and others for accidents, it is difficult to comprehend that similar railroad disasters of 150 years ago spawned few cases and even fewer recoveries. Today, of course, those bringing a tort case have a much greater chance of receiving a fair verdict.

Sidebar

The survivors of the sinking of the RMS Titanic had little success in negligence suits brought against the White Star Line for the disaster that occurred in 1912.



BRINGING A TORT CASE

The person or corporation who files a lawsuit is called the **plaintiff**. The person or corporation who is sued is called the **defendant**. Sometimes both parties have claims

Plaintiff

The legal title of the person who brings a complaint.

Defendant

The legal title of the person who is served with the complaint.

against one another. How do we determine who is the plaintiff and who is the defendant? The answer is simple: Whoever files a complaint first is the plaintiff. But there is a lot more to a civil case than simply filing a complaint. In our case, before a complaint can be filed, the lawyer representing the plaintiff, Charles Chumley, has to launch an investigation to make sure that the claim Mr. Chumley is raising is valid.

A. INVESTIGATING THE CAUSE OF ACTION: RULE 11

Not only is investigating a claim prior to filing a lawsuit a good idea, the rules of civil procedure may require it. For instance, Rule 11 of the Federal Rules of Civil Procedure (a rule that is closely followed in most states) requires that a reasonable inquiry be made into the factual basis of the lawsuit before a complaint is filed. The rule was developed as a way to attempt to reduce the number of frivolous lawsuits. Investigation can take many forms but always focuses on discovering the facts of a claim. See Figure 1-5 for the full text of Rule 11.

FIGURE 1-5

Rule 11, Federal Rules of Civil Procedure

(a) Signature. Every pleading, written motion, and other paper must be signed by at least one attorney of record in the attorney's name — or by a party personally if the party is unrepresented. The paper must state the signer's address, e-mail address, and telephone number. Unless a rule or statute specifically states otherwise, a pleading need not be verified or accompanied by an affidavit. The court must strike an unsigned paper unless the omission is promptly corrected after being called to the attorney's or party's attention.

(b) Representations to the Court. By presenting to the court a pleading, written motion, or other paper — whether by signing, filing, submitting, or later advocating it — an attorney or unrepresented party certifies that to the best of the person's knowledge, information, and belief, formed after an inquiry reasonable under the circumstances:

(1) it is not being presented for any improper purpose, such as to harass, cause unnecessary delay, or needlessly increase the cost of litigation;

(2) the claims, defenses, and other legal contentions are warranted by existing law or by a nonfrivolous argument for extending, modifying, or reversing existing law or for establishing new law;

(3) the factual contentions have evidentiary support or, if specifically so identified, will likely have evidentiary support after a reasonable opportunity for further investigation or discovery; and

(4) the denials of factual contentions are warranted on the evidence or, if specifically so identified, are reasonably based on belief or a lack of information.

B. LITIGATION CHART

One item that helps in investigating a case is a litigation chart. This chart shows all of the essential elements of the lawsuit. Prepared for either the plaintiff or the defense, this chart shows all the elements of the claim, the evidence necessary to support that claim, and the identity of the witness or evidence that will prove the claim.

Obviously the litigation chart will look different depending on which side prepares it. When the plaintiff prepares a litigation chart, the essential elements include all of the basic claims of the complaint. When the defense side prepares a litigation chart,

it focuses on disproving the essential elements of the plaintiff's claim and whatever defenses will be raised at trial. See Figure 1-6 for a sample litigation chart.

C. SOURCES OF PROOF

As the legal team investigates a claim to develop a case for trial, one aspect of the case remains paramount: evidence. Because an attorney cannot testify at trial, the only way to prove or disprove a claim is through testimony or evidence. A witness will testify either through deposition or on the witness stand about the facts of the case. Exhibits will be used to bolster or support this evidence. In other situations, evidence may be presented to disprove a claim. In either event, it is important to know who the witnesses are, what they are going to say, and what type of evidence the attorney intends to introduce at trial. Much of this evidence and witness testimony can be discovered long before a complaint is ever filed. We will explore the types of investigations and other trial preparation issues throughout this book.

D. FILING A COMPLAINT

Once the investigation is complete, the next step in a civil suit is drafting the complaint and serving it on the defendant. Keep in mind that not all states use the same terminology. In fact, this is a good place to point out that the law in each state is unique, with its own rules, terminology, and procedures. We address the basic law of torts that can be found in all states, but always remember to check the laws of your state for differences. These differences apply to everything from the names of courts to the titles of documents in a lawsuit. For simplicity's sake, we will use the same terminology throughout. We will refer to the document that sets out the plaintiff's cause of action — and begins the lawsuit — as the *complaint*. When the defendant responds to the complaint, he or she files a document that is usually called an **answer**.

Answer

The name of the document that the defendant serves on the plaintiff, outlining his defenses and any claims he may have against the plaintiff.



DISCOVERY IN CIVIL CASES

Once the pleadings have been filed and served on the opposing parties, the case moves into a new phase: discovery. During the discovery phase, both sides are encouraged to learn as much about the claim in the case as possible. Courts have gradually liberalized the rules surrounding civil discovery under the theory that the more that both sides know about the case prior to trial, the more likely they are to settle the case before taking it to a jury. To that end, parties may do any or all of the following:

- Issue interrogatories
- Depose witnesses
- Request the production of documents
- Request that the other side admit to certain facts
- Request a physical and/or mental examination of a party

FIGURE 1.6
Litigation Chart

This is a sample litigation chart from a car wreck case. The allegations come directly from the complaint.			
Allegation	Witness	Testimony (summary)	Physical evidence
That on or about the 19th day of October 2000, at approximately 9:40 A.M., plaintiff was operating a motor vehicle traveling west on Maple Street in Anytown, Mason County, North Carolina	Plaintiff: Jane Smith	That she was driving that day, on that street	None
The defendant driver admitted at the scene that she did not see plaintiff's vehicle before pulling out into the intersection	Officer: John Doe	Taking the statement from defendant after being called to the scene	None
That plaintiff was operating her vehicle below the posted speed limit of 35 mph	Plaintiff: Jane Smith	Ms. Smith's testimony	None
	Accident reconstructionist: Dave Jones	His study of the scene; skid marks, point of impact from glass shards	Photographs, diagrams made by Dr. Jones

A. INTERROGATORIES

Interrogatories are written questions posed by one side to the other. These questions can cover a wide range of issues concerning the case and other matters. For instance, a party is permitted to ask the other side for the names, addresses, and telephone numbers of the witnesses the other side plans to call at trial, and about the general nature of the testimony, the existence of written reports about the incident, and the like. As is true with all discovery requests, courts are very liberal in permitting questions and ordering the other side to provide answers.

B. DEPOSITIONS

Unlike interrogatories, depositions are oral questions of a witness. A deposition occurs weeks or even months prior to trial. At the beginning of the deposition, the witness is sworn in and is then asked questions by the attorneys. The entire deposition is

conducted before a court reporter, who takes down everything that is said by the witness and the attorneys. Later, the court reporter produces a typed transcript of the questions and answers that the attorneys may review prior to trial.

C. REQUEST FOR PRODUCTION OF DOCUMENTS

Discovery rules also permit both sides to request the other side produce documents. These requests for documents can include reports or almost any other written material relating to the incident that forms the basis of the suit.

D. REQUEST TO ADMIT FACTS

In addition to permitting either side to a suit to ask questions of the opposition, the discovery rules also allow one side to request that the other side admit to the truth of certain matters. For instance, the firm representing Mr. Chumley might serve a request to admit on the defendant railroad company requesting that it admit that it is a duly authorized corporation in the state of Placid. When a party admits to certain facts, it means that further proof is no longer required. An admitted fact is taken as true.

E. REQUEST FOR PHYSICAL AND/OR MENTAL EXAMINATION OF A PARTY

When the plaintiff's physical injuries are in dispute in a case, as they usually are in personal injury (tort) cases, the defendant is permitted to request that the plaintiff submit to a physical examination performed by a doctor chosen by the defense. In the case of Mr. Chumley, his extensive injuries are the basis of a substantial monetary claim. In this case, the defendants may very well request a physical examination by their doctor to help them determine Mr. Chumley's health.



THE TRIAL OF A CIVIL CASE

When it comes to the actual trial of a civil case, there are remarkably few differences between how that type of trial is conducted and the way that any other trial, including a criminal case, is carried out. In fact, if you happened to enter a courtroom on any given day of the week, it might take you several minutes before you could figure out if you were watching a criminal case or a civil case. The reason for this is simple: All jury trials proceed in much the same way. The first phase of a jury trial is the selection of a jury.

A. JURY SELECTION

The parties to a civil case select a jury from a panel of citizens who have been summoned to the court for jury duty. This panel, also called the *venire*, is filled with people



Tech Topic

SOCIAL MEDIA AND THEIR EFFECT ON TORTS CASES

Facebook, Twitter, Instagram, Snapchat, Google Plus . . . what relevance do social media sites have in today's tort actions? Plenty! While users see social media as a harmless way to share every mundane detail of their lives, attorneys and paralegals see them as gold mines for discovery.

Discovery is the part of the litigation process during which each side can access and review each other's information — including sensitive, private information — as long as it is determined to be relevant to the case. Social media is fast becoming an integral part of the discovery process, particularly in personal injury cases.

A 2007 Pennsylvania case, *McMillen v. Hummingbird Speedway Inc.*, involved a plaintiff who sued to recover damages for substantial injuries he allegedly received when his car was rear-ended by a defendant's vehicle following a

stock car race. During discovery, the defendant found on the public portion of McMillen's Facebook page a description of a recent fishing trip as well as a trip to see the Daytona 500. The defendant then asked McMillen to reveal his username and password so that the entire page could be viewed for evidence that his injuries weren't as serious as he claimed.

Plaintiff McMillen refused on the grounds that the information was confidential. However, the court agreed with the defendant and compelled McMillen not only to reveal his login information but also to refrain from deleting or changing anything on his Facebook account.

The bottom line is that anything posted on social media sites is fair game for discovery in tort actions.

Voir dire

(French) "Look speak"; the process of questioning a juror to discover bias or prejudice, or who would make an acceptable juror to hear a case.

who are citizens of the county or state. These people come from all walks of life and all types of backgrounds. The only limitation is that a convicted felon is not allowed to sit on a jury. Short of that, there are very few limitations on who is allowed to sit on a jury.

When jury selection begins, both parties question the panel and use the answers as the basis for removing panel members until 12 jurors remain. This process is called **voir dire** or "striking" the jury, named after the process of striking off a person's name from a list. Each side in a civil case has the right to strike panel members. They usually take turns as each panel member's name is called out, either announcing that they strike or that they accept a panel member. As soon as the requisite number of jurors is selected (in some states, six-person juries can be seated), the rest of the panel is excused. At this point, the people who have been selected to sit on the jury are put into the jury box.

B. OPENING STATEMENT

Once the jurors are seated in the jury box, the next phase in most jury trials is the opening statement. In an opening statement, the attorneys for the plaintiff and the defendant are permitted to address the jury and explain their basic positions in the case. The plaintiff's attorney goes first. He or she often begins by explaining to the jury what the case is about. After that, the attorney explains how the plaintiff was injured

by the defendant's actions and how that injury entitles the plaintiff to receive monetary damages from the defendant. Once the plaintiff's attorney has addressed the jury, the defendant's attorney has the right to address the jury. Obviously, the defense opening will be very different from the plaintiff's opening. The defendant's attorney often tells the jury that the plaintiff's case is unjustified and that the plaintiff is not entitled to receive any money from the defendant. The jury has to decide which version of these two diametrically opposed viewpoints is the more reasonable.

C. PRESENTATION OF THE PLAINTIFF'S CASE

Once opening statements are over, the plaintiff presents her case. The plaintiff must prove the allegations she has raised in her complaint. If she has claimed that the defendant was reckless or negligent, she has to present evidence to support that claim. Proof comes in the form of witness testimony and physical exhibits. The plaintiff's attorney calls witnesses to the stand and asks them questions under oath. The purpose of this questioning, called direct examination, is to prove the claims in the complaint. The plaintiff's attorney asks the witnesses about what they saw on the day of the accident (if they are eyewitnesses) or about the plaintiff's medical troubles (if they are medical professionals). Whatever claim the plaintiff raises, she has to prove it through witnesses and exhibits. These exhibits often consist of items such as photographs, videos, documents, and medical records, among others.

Once the plaintiff's attorney has finished asking the witness questions, the defendant's attorney has the right to ask questions. This is called cross-examination. The purpose of cross-examination is very different from direct examination. In cross-examination, the defendant's attorney often attempts to show that the witness has a bias for the plaintiff or that the evidence could be interpreted in some other way, and so forth.

The plaintiff's case proceeds from witness to witness, exhibit to exhibit, until the plaintiff has presented all the evidence and the attorney believes that the claim has been proven. At this point, the plaintiff's attorney announces that she "rests." This announcement means that the plaintiff's case is over. At this point, the defendant will usually ask for a directed verdict.

D. MOTION FOR DIRECTED VERDICT

When the plaintiff's case is over and the plaintiff has rested, the defense normally asks the judge for permission to argue a **motion for directed verdict**. At this point the jury is sent out of the courtroom and the defendant's attorney will present an argument to the judge that the plaintiff has failed to prove her case. Most defense attorneys make this argument, even if the evidence in the case has been extensive. The defense attorney has nothing to lose by making the request and everything to gain. If the judge agrees with the defense, the case will be dismissed and the defendant will pay no damages. If the judge sides with the plaintiff, the case will proceed and the defendant is in no worse a position than he was when he started.

Sidebar

On television, attorneys are often seen screaming and yelling at witnesses, or sometimes at each other. In the real world, this seldom happens. For one thing, most judges would never put up with such behavior. For another, a trial is a very formal affair, conducted by professionals. As a general rule, the attorneys are very courteous to each other and the witnesses.

Motion for directed verdict

A motion brought by the defense at the end of the plaintiff's case, asking that the case be dismissed because the plaintiff has failed to prove the claims raised in the complaint.

E. PRESENTATION OF THE DEFENSE CASE

Sidebar

In some cases, the plaintiff may have the opportunity to dispute specific facts raised by the defense during its presentation. This right is called rebuttal.

The case for the defense closely resembles the presentation of the plaintiff's case. The defense is attempting to prove that the plaintiff has no basis for her suit, either because the defendant did not do anything wrong or because the plaintiff was not as injured as she claimed, and so forth. The defense calls witnesses to the stand, and these witnesses are questioned in exactly the same way as the plaintiff's witnesses were. The defense may also present exhibits. All of this evidence is designed to disprove the plaintiff's case. The plaintiff's attorney has the same right to cross-examine the defense witnesses as the defense attorney had to cross-examine the plaintiff's witnesses.

When the defendant has presented all his testimony and evidence, he makes the same announcement as the plaintiff made when she finished her case: "Your Honor, the defense rests." At this point, the trial of the case is over. No additional witnesses will testify and no other exhibits will be offered. The case is not over, however. There are still at least two more phases before the trial is complete: the closing argument and jury charge.

F. CLOSING ARGUMENT

Sidebar

Most studies show that jurors make up their minds about a case during the opening statement, not in the closing argument.

When the evidentiary phase of the trial is over, the attorneys have the right to address the jury one more time during closing argument. A closing argument resembles an opening statement, but only superficially. The attorneys speak directly to the jurors, explaining what they believe the evidence in the case proved. Obviously, the plaintiff will argue that the evidence proved her points. The defense attorney will just as obviously claim that the testimony and exhibits support his view of the case. Unlike an opening statement, attorneys are permitted to draw conclusions, appeal to the jurors' emotions, or argue the consequences to the community of a particular verdict.

G. THE JURY CHARGE

Once the closing arguments are complete, the judge addresses the jurors. She tells the jurors what they are supposed to do once they retire to the jury room. The judge tells the jurors how they should go about deciding the case. She also reads them the crucial legal points that factored in the case. For instance, a judge might instruct the jurors that, "One of your first duties upon retiring to the jury room will be to select one member to act as jury foreperson. This person will conduct the proceedings and alert the court when you have reached a verdict." These instructions are called *jury charges* and provide direction for the jury about what the law on particular points is and what weight they can give to certain types of evidence.

H. THE VERDICT

When the jury charge is complete, the jurors are told to leave the courtroom and sequester themselves in the jury room, where they can talk about the case. The jurors are also told that once they make up their minds, their decision, or **verdict**, should be