

Studies in American Tort Law

Third Edition



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Studies in American Tort Law

Third Edition

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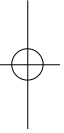
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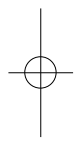
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To my parents,
Harry Paul Johnson and Anna Ruth Gozlick Johnson
for providing a world of support

To the memory of my mother,
Helen Whitnall Gunn





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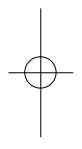


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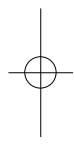
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Third Edition Preface and Acknowledgments

The third edition of *Studies in American Tort Law* attempts to capture the immense range of activity that continues to take place in this field of law. Seventeen new principal cases address emerging issues, such as constitutional limitations on punitive damages and on the right of publicity, intentional interference with intangible property (including domain names), and tort remedies for victims of domestic violence. The text seeks to demonstrate how states are grappling with critical doctrinal matters, such as defining the boundary between products-liability law and public-nuisance law (*e.g.*, in cases involving handguns and tobacco), or are applying established principles to new contexts (*e.g.*, Internet information brokers, mass marketers of products, and non-traditional families).

The notes in the third edition cite more than a hundred new cases and reflect, frequently by way of statutory excerpts, both the fruits of continuing “tort reform” campaigns and the contemporary preference for crafting statutory solutions to virtually every significant legal issue. State legislatures, for example, have recently passed a myriad of new laws limiting the liability of professionals and purveyors of goods; modifying joint and several liability; restoring or creating immunities for teachers, volunteers, mediators, and others; lengthening statutes of limitations for sexual abuse; and altering, in dozens of ways, the rules for determining damages.

Careful attention has been paid to the emerging Restatement, Third, of Torts, which has been cited and discussed throughout the volume. Every effort has been made to reflect, in their rich complexity, the rules, preferences, and policy determinations that today shape American tort law. The casebook continues to offer an economic analysis of tort rules in areas where that is particularly useful, as well as perspectives reminding students about the special ethical obligations of attorneys.

Since the second edition of *Studies in American Tort Law* was published in 1999, its companion volume, *Mastering Torts* (2d ed. 1999), has appeared in two Chinese editions published by China Renmin University Press in Beijing, under the title *American Tort Law*. One edition is a full Chinese translation; the other is published in English with Chinese keywords. Both editions were translated by Professor Zhao Xiuwen of Renmin University.

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Vincent R. Johnson
San Antonio, Texas
November 15, 2004

First Edition Preface

Tort law is a prime battleground in the ongoing debate over social policy. This book attempts to illuminate that debate through the use of cases and materials that clearly reflect not only the current rules on injury compensation, but also the policy choices underlying those rules.

Lawyers must know what the law is now, and how to apply it to the facts of a client's case. But they must also understand public policy, if they are to effectively participate in the important (and inevitable) legal processes through which existing rules are continually challenged, reaffirmed, discarded, and replaced.

As an instructional text, *Studies in American Tort Law (SATL)* does not speak from an ideological perspective. In that sense, the book is intended to be both “balanced” and “mainstream.” Within a clear doctrinal framework (which is undoubtedly influenced by the work of the late William Prosser), a range of views is presented, reflecting dominant themes and issues in tort law, such as fault, proportionality, deterrence, internalization of costs, and distribution of losses. These views are then linked, juxtaposed, and explored with the purpose of assisting students in the task of assessing the merits and limitations of these positions. In the end, however, the evaluation of the public policies which have shaped the current tangle of rules on liability for personal injury and property damage is left to the reader. This book attempts to promote a better understanding of the values advanced and the interests sacrificed by the adoption or application of particular rules in given contexts.

In terms of organization, *SATL* moves from simple concepts and elementary rules to ones that are more complex or elusive. The book has a strong doctrinal framework and strives for clarity, to the extent that clarity is possible, on the assumption that if simple points are dealt with efficiently, time can then be profitably spent on difficult or uncertain questions.

In selecting or writing material for the book, students and professors have been foremost in mind. At each juncture, the test has been whether the selection is both readable and teachable. The goal has been to include material that is vivid, provocative, and worthy of the reader's time.

A few features of *SATL* deserve mention. First, although cases are used as the principal vehicle for teaching torts, a special effort has been made to integrate statutory law into the text. In particular, careful attention has been paid to the give-and-take process through which judge-made law and legislation influence one another. Second, the significance of liability insurance is highlighted, for students must come to appreciate the critical role that insurance (or the lack of it) plays in the resolution of real cases. Third, “ethics notes” have been included throughout the book for the purpose of sensitizing students to the difficult ethical questions that practicing lawyers face each day. These

notes demonstrate, in part, that lawyers are subject to higher standards than persons in other callings. Fourth, the materials in SATL explore a number of issues associated with the law and feminism movement. These issues raise questions of social justice that should be of concern to all lawyers.

SATL introduces students to—but is careful not to overwhelm them with—law and economics. At appropriate junctures in SATL, economic issues are explored, as in connection with the negligence balancing test and the materials discussing computation of damages, liability for nuisance, and strict liability. The goal is not to view all of tort law through an economic lens, but to employ economic analysis when it is particularly useful. This approach allows professors from the law-and-economics “school” to use the materials in the text as a starting point for classroom discussions; those faculty members who eschew economic analysis can allow the economic commentary to stand on its own, without need for in-class elaboration.

By emphasizing doctrinal clarity and the role of public policy, SATL seeks to afford professors maximum flexibility in teaching the law of torts. At the same time, it endeavors to ensure that all students develop a firm foundation in both what the law is and what it can be. We hope that SATL will prove to be a book that can be productively taught by professors and readily grasped by students.

Vincent R. Johnson
San Antonio, Texas

Alan Gunn
Notre Dame, Indiana

June 18, 1994

First Edition Acknowledgments

This book has been long in the making—so long, in fact, that it is almost embarrassing to recount the tale. The book began in the summer of 1985, when, after three years of teaching, and with a long career ahead of me, I decided that I wanted to use in my classes a set of materials which I truly enjoyed, and which my students could enjoy and benefit from, too. The first rough draft of SATL was made available to my classes at St. Mary's University in installments during the 1985-86 academic year. Those students were infinitely patient for allowing the manuscript to be parceled out piece-meal as it became available throughout the year, and I owe each of those persons a debt of gratitude for allowing the project to get started.

During the ensuing years, successive drafts appeared, with the work progressing in fits and starts. The manuscript grew and was continually refined, but the task was interrupted by all manner of diversions: the writing of law review articles; the founding of an international law program in Innsbruck, Austria; a year at the Supreme Court of the United States as the Judicial Fellow; a visitorship at Vermont Law School; and the renovation of a home in a San Antonio historic district.

By spring of 1991, it became clear that I should bring the project to completion; the draft then ran about 1000 pages, but still needed substantial work. With the help of Dean David T. Link of Notre Dame Law School, I began what I regard as an extraordinarily effective collaboration with a professor I had never met before, Alan Gunn. Alan brought to the text perspectives on tort law that complemented my own, as well as the experience and discipline of a seasoned author. His work on all parts of the manuscript has added immeasurably to the quality of the book. Alan is principally responsible for the law-and-economics gloss on the text.

There are both advantages and disadvantages to a project covering a long span of time. In this case, the advantages have included the opportunity to test and hone the materials over a span of years. If the cases are tightly edited (as I hope they are), that is due in part to the fact that they have been re-edited, at least annually, over the course of many seasons. In addition, the fact that the text of SATL has been taught at least nine times (in various versions) at St. Mary's, Vermont, and Notre Dame has allowed it to benefit from the comments and insights of many students.

In fairness, the disadvantages of an extended project should not be understated. Aside from the annoyance of having an unfinished task hanging over one's head, there are more practical problems. In this case, the word processing software with which the project began became obsolete, secretaries changed, and the "blue book" revised the rules on parallel state citations, all of which necessitated seemingly endless tinkering with the manuscript format.

For almost a decade, I have been assisted by a legion of highly qualified research assistants, many of whom are now successful attorneys in private practice or public ser-

vice. The pleasure of working with these young lawyers would have made the endeavor worthwhile, even if the book had never been brought to completion. The project began with the help of Mike Bassett and Chris Warren, but soon included the assistance of Kay Reamey, Laura Johnson Urbis, Lee Parsons, Mark Brewster, Bill McMurrey, Sara Murray, Pat Barsalou, Michael Warren, Jamie Bagnall, Cassandra Johnson, and Kathleen Lucas. I particularly enjoyed working with John Palmer, Susan Bowen, John Carroll, Philip Lionberger, Joseph Gay, Curt Cukjati, Jared Woodfill, Cory Hawryluk, and Daniel Chalker, as well as with Scott Crutchfield and Allen Nye, Rob Dickinson, Brett Kraemer, John Love, and "Four" Price. In the latter stages of the project, I needed research assistants with an eye for detail, and was ably served by David Wiley, Laura Gabrysch, Tracy Caldwell, Frank Alvarez, Phillip Hall, David Rivela, Greg Geerdes, Kristina Weber, Chris Hebner, and Shawn Paschall.

Secretarial support for this book was provided by Cecilia Aguilar, Hortense Cannon, Claudia Apolar, Aurelia Vincent, Maria Sanchez, Kathleen Worthington, and Rachel Butera at St. Mary's University, and Laura Gillan at Vermont Law School. Becky Ortiz, who cheerfully assists me on a range of projects, did excellent work locating photographs for this book. At the Law Book Company of Texas, Mrs. Katie Lee has played a valuable role in the distribution of successive drafts of SATL since the very beginning of the work.

I am indebted to Dean Barbara Bader Aldave for her support of this project, and, more importantly, for her continuing encouragement of faculty scholarship at St. Mary's University. Several of my friends on the faculty have assisted me indirectly by cultivating a climate at the law school conducive to scholarship, particularly Michael Ariens, Victoria Mather, Mark Cochran, Jeff Pokorak, Marsha Huie, David Dittfurth, Doug Haddock, Jon Dubin, Laura Burney, Faye Bracey, and Beto Juarez. My colleagues in the torts field Charles Cantu, Paul Ferguson, and John Teeter have graciously shared their insights with me over the course of many years. Since 1982, my good friend Geary Reamey, now our Associate Dean, has acted as a valuable sounding board for all manner of ideas, including many of which are part of this book.

Alan acknowledges his gratitude to Marlou Hall for secretarial support and to Dave Link and the Notre Dame Law School for financial support.

Several of the photographs in SATL were provided either by the individuals pictured or by law schools with which they were associated. Additional credit is given to: the New York State Court of Appeals for the portraits of William S. Andrews and Charles D. Breitell; the Supreme Court Historical Society for the photograph of Sandra Day O'Connor (copyright held by the National Geographic Society); and the Curator's Office at Supreme Court of the United States for the photograph of Benjamin N. Cardozo. The photograph of Judge Learned Hand was obtained through the kind assistance of Steven Smith of the Harvard Law Art Collection.

The excerpts from the Restatement of Torts (1934-39), the Restatement (Second) of Agency (1957), and the Restatement (Second) of Torts (1965, vols. I and II; 1977, vol. III; and 1979, vol. IV) are reprinted with the permission of the American Law Institute, which holds the copyrights on those works.

Since before this project began, I have had the friendship and counsel of my dear wife Jill Torbert, an attorney whose intelligence, independence, and integrity brings honor to the practice of law.

Vincent R. Johnson
June 18, 1994

About the Editing

With minor exceptions, the material quoted in the text appears in its original form. However, some changes have been made, usually for the purpose of standardizing the appearance of quoted sources.

In general, the deletion of footnotes has not been noted. Otherwise, the omission of text is shown by ellipses. If only supporting authority (and no text) has been deleted, the word “citation” or “citations” appears in brackets. The use of italics and caps in the names of cases, books, articles, and judges, and for Latin terms, has sometimes been changed. In many instances, the words “section” and “sections,” or related abbreviations, have been converted to section symbols. Quotation marks normally have been deleted from block paragraphs.

