

TORT AND INJURY LAW

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TORT AND INJURY LAW

THIRD EDITION

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CAROLINA ACADEMIC PRESS
Durham, North Carolina

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ISBN 0-89089-205-9
LCCN 2006929442

CAROLINA ACADEMIC PRESS
700 Kent Street
Durham, NC 27701
Telephone (919) 489-7486
Fax (919) 493-5668
www.cap-press.com

Printed in the United States of America

For Helene

For Nat and Robin For Ben and Jackie

For Noah For Gabrielle, Aaron and Joshua

To the memory of my parents

Mitchell Shapo Norma S. Shapo

—M.S.S.

In memory of my grandparents

John & Tonina Rocchi

Sam & Althea Peltz

My godmother

Renée Peri Shank

And my torts professor

Jerome Culp

—R.J.P.

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PREFACE

Torts is, I think, the best subject to initiate learning about the law. It features human conflict, often at a raw level. It is chock full of interesting stories, but it also requires students to look underneath the stories to do the form of analysis that distinguishes lawyers.

This book presents the fundamentals of torts—theories of liability and duty and of defenses based on the plaintiff’s conduct, theories of duty and causation, and damages. It offers those materials, which are rooted in ordinary tort litigation, against the broad fabric of society’s many responses to the problems caused by injuries. These include compensation systems like workers compensation and regulatory systems.

Besides introducing material on those subjects, the book explores what are now basic tort law issues that arise from the application of health and safety statutes and regulations to personal injury actions. The next to last chapter poses the ultimate question of whether we should have a tort system at all. Throughout, the overarching question is the first one in the book: what should society do when A injures B?

The book also introduces the role of tort law as a response to imbalances in power and illustrates how law and science interact, uneasily, at the dawn of a new millennium.

In this twenty-first century, torts teachers are taking quite diverse approaches to their subject. This book offers points of departures for several of those approaches, including law and economics and feminism. At base, however, it is a book about the law. Its audience is students who seek to earn a law degree, mindful that there is a wide variety of professions and businesses in which they ultimately may live their working lives. In focusing on the law, as well as on various modes of thinking about the law, these materials are designed to instruct students in diverse ways of analyzing legal problems. Believing that legal education is generally a good and versatile education, I hope this approach will help to give students perspectives and tools that will enable them to work successfully in a variety of occupations.

* * * * *

After forty-one years in law teaching, I cannot hardly list all my debts to people who have helped me to understand the law, and to produce this book. I can mention just a few.

It was my great good fortune to begin my teaching career at the University of Texas School of Law in the mid-nineteen sixties. It was a clinic for a young teacher to be with two certified giants of torts teaching: Page Keeton, an incomparable dean who found time to be a formidable scholar, and Leon Green, a transcendent legal mind. Russell Weintraub was a vital mentor. The late Charles Alan Wright also gave me welcome support. Roy Mersky, still a leader in librarianship, provided a beacon for service that still holds up in an electronic world.

I have had the immeasurable benefit of continuing seminars in the law, both the law of tort and the law generally, with many other colleagues at each of my institutions—at Texas, at Virginia and now at Northwestern. I want to mention, in particular, two Northwestern colleagues: David Ruder, who provided me great encouragement to expand my horizons in mid-career; and the late Victor Rosenblum, truly a man for all seasons, for his sage comments on torts and a world of other issues, and for his friendship.

Students at all my schools—now thousands of them—have provided continuing stimulation in the quest for the elusive and provisional truths that challenge Torts students and teachers. Generations of student assistants have helped me, directly and indirectly, with the development of materials for this book. Among my most recent assistants, I particularly thank Cris Carmody.

Librarians at Northwestern, under the directorship of Chris Simoni, have been equal to every task I have assigned them. I especially appreciate the help of a splendid reference librarian, Marcia Lehr, whose good cheer and patience matches her ability and industry. I also thank Northwestern librarians Kathryn H. Amato, Pegeen Bassett, Irene Berkey, David Daskal, Heidi F. Kuehl, and Jim McMasters.

I appreciate all the aid I have received from the Northwestern University School of Law, under Deans David Ruder, Bob Bennett, and David Van Zandt. Many Northwestern grantors have provided financial support for the work that has gone into this book, with the most recent support coming from the Clemens and Jane Werner Faculty Enrichment Fund.

My secretary, Derek Gundersen, has been invaluable in his work on this book. Threading his way through the mysteries of various softwares, and enduring many revisions, he has earned my great thanks.

My parents, Mitchell Shapo and Norma S. Shapo, were my first teachers. I have often quoted to my classes from a letter I received from them in 1959. In particular, I quoted a sentence written by my father, who, studying law at night in the depths of the Depression while working full time, was able to produce the Note, Recent Trends in Housing Legislation, 8 *TEMPLE L.Q.* 99 (1933). He wrote to me, “When I studied law, it was my ambition to fight injustice.” These words I do not forget. My brother, Ronald A. Shapo, has been a constant source of wisdom concerning the current practice of law on the front lines.

My sons, Ben and Nat, have proved that you can be exposed to Torts hypotheticals from the time you are a toddler and still grow up to become productive citizens. Whenever I finish a book, however much I have labored to make it seamless, I am humbled by a definition that Ben, now a research engineer, offered of “files” when he was five years old: “Files are something you put papers in, and then you staple them together and put a cover on them, and you have a book.” Ben, a humanist who is a scientist, has helped to convince me that computers, properly handled, are an author’s friend. And I carry forward into this edition research on sports torts that Nat, a lawyer and formerly Director of Insurance for the State of Illinois, provided at age 11.

Finally, I most gratefully thank Helene S. Shapo, who read and criticized the manuscript, and who as a spouse and as a standard setter for law and for writing is a nonpareil.

MARSHALL S. SHAPO
Chicago and Evanston
April 2006

PREFACE TO THE THIRD EDITION

The teacher familiar with this book in its preceding editions will note modest but important changes. Naturally, references to the *Third Restatement of Torts*, as its development continues, have been added where appropriate. A number of cases and some secondary materials have been cut as duplicative or outdated, replaced where needed by concise and updated notes. Developments have been recorded in areas including product liability litigation, punitive damages limitations, and compensation for terrorist acts. Overall, though, the book retains its familiar organization, format, and tone.

* * * * *

I am grateful to Professor Shapo for bringing me on board to contribute to this third edition of his *Tort and Injury Law*. I selected this book in its second edition for my first Torts class, and never have I regretted it. Professor Shapo has a singular talent for winnowing the most salient and instructive passages from the vast body of primary and secondary materials on torts. He adds notes that are pointed and provocative, ample fodder for class discussion. The naturally colorful material that makes up our body of tort law demands a textbook writer who, like a landscape artist, can render boundless shades and tints for the secondhand observer, and Professor Shapo teaches through his texts with that capacity. Whether or not I have contributed with the same vision and zeal, it has been my privilege to make the endeavor.

My torts professor was Jerome M. Culp, Jr., at Duke Law School in 1993 and 1994. Professor Culp died in 2004, at age 53, after a long and courageous battle with kidney disease. He is widely well regarded and remembered for his prolific scholarship in areas such as critical race theory and law and economics. But to me as a timid first-year, Professor Culp was first and foremost a torts professor, and sometimes a scary one. Armed with a seating chart of cut-out faces, he was unhesitant to call on students. He once had the class wait in agonizing silence while an unprepared student silently read a case. He mystified us—well, me, at least—with graphs on the economic impact of different models of tort law. It seemed at times that he delighted in torturing students.

But if it was his design to make a Kingsfield-ian impression, he did not have the heart to finish the job. For Professor Culp outside of class was ever jovial, ever concerned over his students' tribulations, and ever proud of his students' accomplishments. He eagerly talked basketball, literature, and popular culture, all with acumen. He brought fruit for students during exams because he worried they were not eating healthily. If Professor Culp seemed stubborn and mystifying in class, it was because he had the highest expectations and refused to settle for less.

I am grateful to the many persons who supported me in the preparation of this work. In Little Rock, at the University of Arkansas, I am grateful for the friendship and professional support of my dean, Chuck Goldner, and of many colleagues, especially, but not exclusively, Coleen Barger, Mike Beard, Terri Beiner, Jessie Burchfield, John DiPippa, Michael Flannery, Ken Gallant, Kelly Olson, Rob Steinbuch, and Tom Sullivan; for the kind support of our professional staff, including Laura Austin, Cheryl Bigelow, Gail Harris, and Glennis Jackson; for the aid of my capable research assistants, Elizabeth Dulong and Joi Leonard; and for the guidance of Andrew McClurg, now at Florida International University, and Glenn Pasvogel, retired.

I had the privilege while working on this project of visiting at The Catholic University of America, in Washington, D.C., where I was welcomed with the greatest warmth and kindness. I especially thank at CUA Deans Veryl Miles, Bill Fox, and Bill Wagner; librarian Greg Stack; faculty Sylvia Bacon, Sarah Duggin, Lisa Lerman, Rett Ludwowski, the Rev. Ray O'Brien, Nerissa Skillman, Leah Wortham, and Harvey Zuckman; professional staff Stephanie Michael, Laurie Fraser, and Katie Aaron; and my teaching assistant, Elizabeth Cox. I thank as well my many students at UALR and CUA who have made this job the reward that it is.

Finally, and above all, I thank my family for their support of my education and career, especially my parents, Yvonne and Jack Serio, and Rich and Patricia Peltz, and my brothers and sisters, whether by law, blood, or heart, Andrea Serio, Nick and Spencer Peltz, and Chris and Sallie Crenshaw.

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Little Rock and Washington
April 2006