TORT LAW AND PRACTICE
FOURTH EDITION

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MATTHEW BENDER

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Dedications

Dedicated to the generations of students of torts who make the teaching of this subject such a joy!

Dominick Vetri: To my partner Doug DeWitt.

Lawrence C. Levine: To my friend and colleague Julie Davies; my past, present, and future students; and in loving memory of Jeff Poile and Gerald Levine.

Joan E. Vogel: In loving memory of my parents, Harry and Marion Vogel, and to my good friends, Hugh Scogin and Reed Loder.

Ibrahim J. Gassama: To my mother Humu Awa Fofana, my partner, Marva Donna Solomon, my daughter Fatima Selene Gassama, and in loving memory of Lucille Elvira Solomon.

Introduction

> [L]ogic, and history, and custom, and utility, and the accepted standards of right conduct, are the forces which singly or in combination shape the progress of the law.
>
> BENJAMIN N. CARDOZO, CHIEF JUDGE, NEW YORK COURT OF APPEALS.

You have embarked on a noble and important journey — the study of law. We will be studying our system of law which is older than our nation's 230-plus years. Ours is a legal system with roots in the British-American colonies, England, Normandy, Rome, and beyond. To understand law, to think about law, and to learn to use law requires the development of a range of skills. You will be learning, as law teachers are fond of saying, "to think like lawyers!" These important skills that turn political scientists, historians, nurses, engineers, school teachers, musicians, and philosophers into competent lawyers include: careful reading, active listening, comprehending relevancy, critical evaluation, developing understanding and a sense of caring about people, institutions, and the local, national, and world communities. It also involves the ability to be sensitive to ethical concerns. Your college work and real life experience undoubtedly has given you a good start with many of these skills. You will develop them considerably more in your law study.

A strange thing about law study is that in most first-year programs you do not study these important lawyering skills directly. Mostly, these skills are acquired and honed as an implicit part of your study of substantive law subjects like torts, contracts, criminal law, and civil procedure. Importantly, American law schools typically do not teach law by having you read and memorize rules and principles from scholarly legal treatises. Instead, in most first-year programs, students learn the law and gain an understanding of the legal system through the study of the materials that lawyers and judges use in their daily work — cases, statutes, and administrative regulations. Law teachers believe that this method is the most effective way to teach the law.

Studying law is admittedly no easy task. It will be unlike anything you have ever done before. It will require intense critical thinking and extensive time. It is, however, an adventure — a challenging and rewarding new experience that will bring you immense intellectual and personal satisfaction.

Torts is a challenging field of law because it deals with everyday human experience and tragedy. Tort law is all about contemporary society — the accidents we experience, the personal and family relationships we create, the technology we use, and the societal mores we continue to evolve and reformulate. Torts is not only relevant to injured victims and their lawyers, but is also vitally important to society as a whole, the business and corporate community, the health care industry, and professionals of all types. Tort law most definitely is not a stodgy, old compartment of the common law; it is a vital component of our living common law.

The study of torts includes diverse areas of wrongful conduct such as negligence, personal injury law for unintentional harm, intentional torts (e.g., assault and battery), products liability, abnormally dangerous activities liability (e.g., blasting, aerial pesticide spraying), nuisance (e.g., air, water, and noise pollution), defamation (libel and slander), privacy invasion, fraud, misrepresentation, and intentional interference with contracts. Tort law study includes consideration of alternatives to the liability scheme, such as no-fault systems. Our study also includes legislative measures undertaken in recent years by Congress and many state legislatures. These legislative changes are usually referred

to as "tort law reform." Maximum recoveries ("caps") on pain and suffering damages, shorter statutes of limitation, restrictions on medical malpractice actions, protection against frivolous lawsuits, restrictions on contingency fees, and prevailing party attorney fee awards are the areas receiving much legislative attention.

The casebook begins with an overview of the different culpability standards that can be used in tort cases: intent, recklessness, negligence, and strict liability. The chapter uses hypothetical variations on the now infamous McDonald's hot coffee spill case to illustrate the spectrum of culpability. These opening materials help you to begin to formulate the goals and objectives of the legal system as they relate to providing compensation for physical and emotional harm from intentional misconduct and unintentional accidents. Some teachers begin with intentional torts, others with negligence law. There are excellent reasons for starting with each subject area; the book is designed to accommodate either approach.

Historically, intentional torts evolved first. An understanding of this subject area allows for the elements of topics such as assault and battery to be readily developed and understood. Negligence has become the predominant means of recovery for unintentional harm in American law today. Virtually all that is learned in our focus on negligence has direct benefit and application in studying the other areas of tort law, particularly products liability. In studying negligence, we investigate the fundamental objectives that our society seeks to achieve through this method of compensation for unintentional harm.

In studying torts, you will learn much about our legal system, and particularly about our common law system. Indeed, one of the reasons torts is considered a building block and required course in the first-year curriculum is that an understanding of the subject carries along with it an understanding of the common law legal system. You will become very familiar with the legal process in civil cases, the use of precedents, and the role of the courts.

In the earliest period of the evolution of the common law legal system in Britain, crime and tort were much the same in scope. The intentional torts of assault and battery and trespass to land were probably the first to develop. The law's function in both instances was to satisfy a public and private need for vengeance, and to avoid citizens taking the law into their own hands. Deterrence of wrongful conduct also came to be seen as an important objective. Tort liability, in effect, was a legal device to dissuade a victim from seeking retaliation by offering the victim monetary compensation instead. The recognized torts in this evolutionary period were closely related to threats of public disorder, or what came to be known as breaches of the King's peace.

During this early period (before 1800), life was mostly agrarian in nature and injury resulting from the conduct of strangers was primarily intentional. Life was tough and inordinately short. Concern over unintentional harm was not a primary interest. As industry, urban life, and transportation developed, unintended accidents became much more commonplace, and indirect injury occurred more frequently. The new risks posed by the developing industrial economy confronted the courts with problems that could not be resolved readily by the existing tort law; torts before then were based primarily on notions of causation and whether or not the harm was direct.

The common law courts, on both sides of the Atlantic and in other parts of the world, proceeded to develop a new accident law to cope with the changing society. Finding the "right balance" between the competing concerns of compensating victims and not unduly impeding developing entrepreneurship and industrialization was an important part the development of torts law. In trying to find the right balance between these two concerns, the courts built upon the ancient concept of negligence. Your study will show that negligence law has not remained static since that early period. The negligence law

of the twenty-first century is not the same as the negligence law of the nineteenth century. As society has changed, so has negligence law. We will examine whether the right balance has been struck for our time.

We will also study about accidents in American society. Accidents are an ever-present reality in the American scene. Importantly, we have made considerable progress in bringing down the accident rate, but there have been no miracles here. The total number of accidents involving serious injuries and death on U.S. highways, at work, in our homes, and in public venues remain at unacceptably high levels. As part of our study of tort law, we will inquire into the kinds of accidents that occur in America today and their costs, both human and financial. Studying accidents naturally leads to consideration of accident prevention. Logically, accident prevention is a much wiser course of action than merely coping with medical treatment of injuries after the fact. We will consider whether in the scheme of things, accident prevention is generally given a high enough priority to have a significant effect on the number of accidents that occur.

Accidents cause injuries and injuries involve costs. The costs include not only physical injury harm, the resulting medical and rehabilitative expenses, and the loss of employment earnings, but also resulting property damages and economic losses. Furthermore, they include the human costs in terms of pain and suffering, loss of work ability and self-esteem, death, and the emotional distress that arises from accidents. How do accident victims cope? How do they pay those costs? Health and disability insurance are major players in dealing with some of these costs. But for too large a segment of our population have not had access to health or disability insurance. With the recent passage of health care reform, more people will have access to some form of health insurance in the future. We will have to examine whether the extension of health insurance coverage will lower the costs of accidents and injuries. As you will see, tort law interacts in complex ways with liability, health, and disability insurance. Liability insurance has grown alongside negligence law and has become its partner, some would say senior partner, in the modern era.

The administrative costs of the negligence system are excessively high, and include: judicial salaries, courtroom facilities, jury fees, court clerks, secretaries, bailiffs, security guards, clerical personnel, building use costs, furniture, computers, utilities, cleaning expenses, and more when looking at trial and appellate court operations. Then there are the attorneys' fees, both plaintiffs' and defendants', that have to be factored into overall administrative costs. The costs of our current accident scheme require us to also consider the cost of liability insurance, which includes the expenses of selling and administering the insurance system through adjusters and supervisors. In addition, settlement and mediation of accident claims have become increasingly important in recent years.

Tort law alone cannot be the only device to deter accidents in our society. Administrative safety regulations, criminal laws, private standard setting, public interest consumer and worker organization oversight, safety education, and publicity about safety concerns all are part of the effort to reduce the accident level, along with tort law. It will be appropriate to consider the proper mix of these efforts on accident deterrence. Tort liability and liability insurance are not the only means of compensation for injuries; private health and disability insurance, no-fault auto insurance, and public welfare are other important mechanisms for covering accident losses. Here, too, we need to be concerned about the proper blending of these resources.

Your study of torts will teach you much about the legal rules and policies underlying the accident system in the United States. Importantly, it will also teach you about the common law legal system. This knowledge will be helpful in your other studies and in your law career years ahead. Welcome to torts.

Bookguide

> The questions one asks oneself begin, at last, to illuminate the world, and become one's key to the experience of others.
>
> JAMES BALDWIN, NOBODY KNOWS MY NAME (1961).

Studies of teaching show that engaged students learn better. Because reading materials and listening to lectures involve only a low level of engagement, almost all of your classes in law school involve discussion and interaction with the teacher and other students to raise the level of engagement, and thus, enhance the learning experience. This casebook uses several techniques to increase the level of engagement as well. One of the first things you will realize is that there are lots of cases and a relatively low level of narrative information about the law. We teach primarily from cases, and more recently, from statutes and administrative regulations because they are the raw materials that lawyers and judges use in their daily work. Acquaintance with these materials and how to reason from them are critical to legal training.

Also, there are a number of questions following each case. You may find these questions somewhat difficult at first, but they are worth your patience and effort. Typically, they are designed to increase your understanding of the case, the evolving legal rules, and the attributes or deficiencies in the reasoning. They often do not have definitive answers, and are intended to stimulate your development of analytical skills. Work through as many questions as you can by re-reading the relevant parts of the case and talking over the questions with your colleagues. Sometimes in coming back to a question, you will later find that you have begun to work out an answer. The class discussion may often be patterned on, or relate in some way, to the questions. The questions are designed to engage you at a deeper level with what you have read, to force you to go beyond memorizing basic legal concepts, and to help you think about the materials.

One of the features of the book in the negligence area is its introduction to the five elements of a negligence claim including damages and the concept of defenses in an overview of negligence law at the outset. The basics are set out early in your learning process; you get to see the larger picture and where we will be headed for a good part of the semester. The next several chapters take each element in turn, and focus on the more complex aspects of the element. The questions, materials, and problems following the cases frequently remind you to maintain the overall perspective of the five necessary elements to make out a negligence claim, as well as possible defenses. This book emphasizes sequential learning. Gradually, you will increase your sophistication and understanding of each element as we proceed through the chapters. As you build your skill and understanding, the more challenging portions of the subject will fall into place.

Our study of tort law will give you the basic grounding in understanding our common law system and the use of precedents. The common law, in contrast to authoritative texts such as constitutions and statutes, is that part of the law that is established by courts. Common law courts typically invoke precedents to justify their conclusions. They also often explain why they have followed certain earlier decisions and not others. The common law is knowable only by reading past cases and deducing legal principles from those cases. It is different from statutory and constitutional law in that common law is self-generating, that is, past decisions are used to justify present decisions, and present decisions are references for future cases. At the same time that the common law relies on past decisions to decide many of today's cases, however, it must be open to change in light of an evolving society. A system of law that ties itself only to the past would soon be useless in the modern world. Thus, working with precedents, you will learn, is far more sophisticated and complex than just trying to determine what the rule was in a case decided 50 years ago. Our earliest concerns will be in determining what is precedent, why courts should follow it, logical extensions of precedent, developing analogies from precedent, and the flexibility courts have in dealing with precedents that are out of date, discriminatory, unbalanced, unfair, or simply wrong. Learning to identify the "holdings" of cases is the first step in working with precedents, since holdings are binding as precedent on future courts. A Case Briefing Guide is provided at the end of this Bookguide to get you started in working with cases.

Bookguide

The materials from the outset help you to integrate civil procedure into tort practice. The two are inextricably intertwined. You will also find that our study of torts complements your study of criminal law, contracts, and property in many areas. Our work with statutes will also prepare you well for administrative law and the heavily statutory-based courses, such as environmental law, the Uniform Commercial Code, and tax law. Traditionally, areas like torts, contracts, and property were predominantly common law. Statutes, however, have come to play an increasingly important role in these three subject areas. We will focus on the relationship of courts and legislatures in our system. The roles of judges and lawyers also loom large in the text.

A major feature of this book is its use of problems. Problems are placed strategically throughout the materials to engage you and to reinforce learning. Learning how to problem solve is quite important, because essentially, that is what lawyering is all about. Problem solving takes you beyond learning rules. These problems help you learn application, synthesis, and the integration of legal doctrines and skills into practice. Educators know that this is the most effective way to learn. Problem analysis raises the level of engagement considerably.

The problems typically ask you to assume the role of a lawyer. The materials also challenge the system and legal structures and call upon you to consider public policy choices. Law exams are typically based on problems that are similar to the ones you will encounter throughout the text. Learning how to analyze the problems and write organized, coherent answers will prepare you for not only torts exams, but those in all your courses. You are encouraged to write out your answers to problems and to discuss the problems and your answers with your colleagues.

Ethical concerns and ethics problems are also integrated throughout the materials. Ethical integrity and propriety are an important part of legal education and your law career ahead. Such an important area cannot be left to a single course on Professional Responsibility. Ethics issues are best understood in the contexts and circumstances in which they arise. You will confront ethical decision-making in personal injury cases, such as the problem of the lying client, conflicts of interest, honesty to the court, the zealous advocacy role of the lawyer, and others.

The cases, problems, hypotheticals, and questions in the book also present the opportunity to learn about issues related to people of color, ethnic groups, gender, disabilities, sexual identity, and sexual orientation. As lawyers, you will handle cases for people from a wide variety of backgrounds, and you must be prepared to conscientiously, sensitively, and competently represent clients from the diverse American community. As a small starting point, the names of the parties in the problems throughout the book reflect the multi-cultural nature of American society. The factual settings of the problems also, on occasion, provide information and raise issues that are of concern to diverse communities. In short, the book is intended to reflect contemporary America and to prepare you to practice law in this milieu.

Our study of tort law will not focus on the law of any particular state. Much of tort law, as we shall see, is either the same or quite similar among many states. The differences and variations among states often are opportunities to learn about alternative solutions and about law reform possibilities. We will be learning general principles, alternatives, exceptions, and the role of public policy in court decisions on torts. Since law continues to evolve, comparing alternatives and evaluating exceptions is an important role for lawyers. Many of the cases in the book were decided after 1990, and a number within the last five years. The classic torts cases, however, have been included. A sense of legal history is provided. Tort law is an evolving social phenomenon and the book aims to be contemporary.

The names of the cases usually reflect only the first party on each side of the case, for example, *Rudolph v. Arizona B.A.S.S. Federation*, the first case in Chapter 2. There were several parties on each side of this case, but the practice by lawyers in citing cases is to use only the first party's name on each side. Most courts today place the plaintiff's name to the left of the versus line, and the defendant's name to the right. An earlier practice, reflected in older cases, placed the appellant's name (the appealing party whether plaintiff or defendant) to the left of the versus line, and the respondent's name after.

The citation of a case follows the case name, for example, the *Rudolph* case is followed by 182 Ariz. 622, 898 P.2d 1000 (Ct. App. 1995). The first cite is usually to the volumes of official reports, here Arizona Reports, and the second cite is usually to a private commercial reporter system — West Publishing Co., here the Pacific Second series. The numbers 182 and 898 in the preceding cite are to the respective volume numbers of the reports, and

the numbers 622 and 1000 are the page numbers in those reports where the case begins. Thus, you will find the *Rudolph* case in volume 182 of the official Arizona reports at page 623, and the same case also appears in volume 898 of West Publishing's second series of Pacific Reports at page 1000. The year the case was decided is placed in parenthesis after the citation. If the highest court of the state wrote the opinion, only the date is in the parenthesis. If a lower court wrote the opinion, an abbreviation of that court's name appears in the citation. In the *Rudolph* case, the Arizona Court of Appeals, an intermediate court lower in rank than the Arizona Supreme Court decided the case. You will soon become an old hand at working with these citations. It has become common practice to use only the regional citation with an identification of the state by an abbreviation in the parentheses before the year, such as the Rudolph case, 898 P.2d 1000 (Ariz. App. 1995).

The names of the attorneys who wrote the briefs and argued the cases on appeal can also be found by looking up the cases in the reports. Customarily in casebooks, to save space, the attorneys' names are omitted. This is a disservice to the hardworking attorneys because their work is usually the basis of the opinions of the courts. Much of the responsibility for the quality of opinions belongs to the attorneys. The judge that is the author of the opinion usually should not get all of the credit if it is a good opinion, or all of the blame, if the opinion leaves much to be desired. The *Rudolph v. Arizona B.A.S.S. Federation* case in Chapter 2 includes the names of the attorneys, to remind you of their necessary role in the process. A fundamental dimension of this book is to orient the student towards the lawyers' work in presenting, defending, and appealing personal injury cases.

We have tried to balance the use of pronouns throughout the book. Older cases and articles almost invariably use male references. The note cases that sometimes follow lead cases are primarily in the language of the courts, but occasionally we have rephrased some of the content. In such note cases, the language of the court always appears in quotes. The cartoons are used to lighten up what often is rather tragic material. When you think about it, this is a book that, for the most part, deals with injuries, death, and other kinds of harm. Although keeping a certain emotional distance from the problems confronted is essential to doing competent work, total disengagement is not acceptable either. Finding the right balance is one of the criteria that defines a professional.

The book makes frequent reference to a number of excellent texts and treatises, available in your law library, in a shorthand fashion as follows: DAN B. DOBBS, THE LAW OF TORTS (2000) usually cited as "DOBBS" followed by a page or section number; DAN B. DOBBS, LAW OF REMEDIES, a multivolume treatise is shortened to DOBBS, LAW OF REMEDIES; JOHN L. DIAMOND, LAWRENCE C. LEVINE & ANITA BERNSTEIN, UNDERSTANDING TORTS (4th ed. 2010), abbreviated as "UNDERSTANDING TORTS"; and JOSEPH W. GLANNON, THE LAW OF TORTS: EXAMPLES & EXPLANATIONS (3d ed. 2006) is abbreviated as "GLANNON."

Class preparation requires that you brief the cases that you read. Briefing is an art that lawyers acquire from experience. Teachers often have special ways they like to have cases briefed, so there is no uniform pattern. The following suggestions on briefing, however, are offered as general guidelines as you begin your classes. We are indebted to Professors Paul J. Mishkin and Clarence Morris and their impressive book, ON LAW IN COURTS at 11 (1965), for their considerable insights about briefing cases.

Case Briefing Guidelines

(1). **Facts.** Identify the critical facts of the case, striking off those facts that are not relevant to the decision of the court.

(2). **Procedural Background.** Determine the particular ruling or rulings of the trial judge that became crucial on appeal. Was it the grant or denial of a directed verdict motion, a summary judgment motion, a motion on the pleadings, a motion on the judgment, etc. Another way of looking at this is to ask, who won below and what procedural device did the winner invoke? Isolating the procedural ruling helps to identify the issue on appeal in terms of law and fact questions.

(3). **Issues.** Identify the precise legal issues on appeal. Determine the legal questions that were necessary for the court to resolve. A ruling on an issue that is not necessary to the resolution of the case is referred to as dictum. Rulings on relevant issues are referred to as holdings. Holdings have precedential value for future cases. Dicta has whatever persuasive weight future courts choose to give it.

(4). **Holding.** State the holding of the case as a rule of law. Often, there are several holdings. You will learn that a holding can be stated broadly or narrowly in terms of their effect on future cases. Lawyers, on behalf of

their clients, often use this flexibility in describing holdings when arguing the merit of a precedent in future cases. You should attempt to both frame your holdings broadly and narrowly in each case to help you develop the skill. Consider the rules the plaintiff and defendant were respectively seeking to have adopted by the court. Determine whether the court chose one party's suggestions or developed its own legal rule. We are looking for the guidance the decision provides for future cases. Procedural details and irrelevant facts should be eliminated from your holding statements. Determine if the case expands existing precedents, modifies them, overrules them, or possibly reduces the reach of the precedents.

(5). **Sources of Authority.** Identify the sources of authority relied on by the court. Determine if the court relies on in-state precedents, out-of-state decisions, statutes, administrative regulations, treatises, law review articles, etc. Analyze whether the sources of authority are clearly on point, are based on strong principles, are controlling, and are persuasive. Determine if the court relied on public policy considerations. Policy considerations such as accident prevention, economic concerns, compensation, administrative workability of rules, and fairness and justice are often appropriate factors in the resolution of torts cases.

(6). **Evaluate the Reasoning.** Consider whether the reasoning of the court is sound, effective, and persuasive. Determine if the court overlooked or under valued anything. Consider how you would have decided the case.

(7). **Concurring and Dissenting Opinions.** Determine why the judge believed it necessary to write a separate opinion. These separate opinions may provide insights about what the majority did. Compare the reasoning and the use of precedents of the differing opinions.

We trust that as you work your way through this book and develop competent lawyering skills, you will find your study of tort law as intellectually stimulating and interesting as many generations of law students before you have found it. Good venturing in tort law!

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Acknowledgments

> [A] person does not cease to be a person when she puts on her black robe, any more than a judge who acknowledges her humanity thereby ceases to be a judge. The best judges are those who can be both judge and human at once.
>
> Shirley S. Abrahamson, Chief Justice, Wisconsin Supreme Court

Dominick Vetri

I am deeply indebted to my extremely competent and diligent research assistants for their work and insights on the four editions of the casebook.

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Lawrence C. Levine

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