

# The Modern Law of Torts



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## A Contemporary Approach

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*To Melissa and our amazing progeny,  
Madison, Quinn and Ailish. You make me happy and  
keep me in the real world.  
You are, in fact, the best. Thank you.*



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# About This Book and How to Use It

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This book takes a contemporary approach to learning torts that makes it easier to understand the legal doctrine while challenging students to become critical thinkers.

Practicing law is an intellectually challenging occupation. Foremost, it requires critical thinking and problem-solving skills. These skills are necessary to navigate a labyrinth of detailed and nuanced legal doctrine under which outcomes are often uncertain. Clear and critical thinking won't matter much, of course, if the lawyer doesn't also possess essential knowledge about the relevant legal rules. And, in the short term, law students must possess such rule-based knowledge in order to pass a bar exam and earn their professional license. This book, the product of over 30 years of law school teaching, is motivated by the belief that traditional casebooks make this challenging task—effectively developing critical thinking skills while teaching essential bar related substantive content—far more difficult and inefficient than it should be. How is this book different?

First, the book utilizes a hybrid approach that provides significant textual explanations and a more narrow and focused use of caselaw than traditional offerings. Most law school teaching materials are called “casebooks” for a reason. In my view, they tend to overemphasize reading cases to the exclusion of other effective learning methodologies. Critical reading of cases is an essential skill, but cases are an inefficient and sometimes ineffective means for learning basic black letter law, definitions and foundational principles—at least in traditional common law subjects like torts. On the other hand, cases are often ideal for pushing students toward a deeper understanding of legal principles, problem solving and critical thinking. Problem solving with cases requires active learning. The book attempts to use cases almost exclusively for this latter purpose.

Second, most casebooks fail to provide sufficient narrative explanation and guidance to direct students toward clear, and explicit learning objectives. Background, context, orientation, direction, clarification and identification of overarching purposes are important to student learning and most efficiently delivered through narrative explanations laced with illustrations and examples. Every topic covered in this book is supported by substantial textual introductions and explanations of doctrinal foundations. What this means is that the most basic legal rules are provided and explained up front, with context, narrative descriptions and examples. Caselaw is

presented to explore nuances and complexities, problem solve and prompt critical thinking.

Third, and most importantly, over-reliance on cases and lack of narrative support often leads to a deficient structure for learning—failing to recognize that long-term, effective learning comes in stages which may include “baby steps” for even the most talented students. Most law students eventually “figure it out” despite the lack of guidance and structure, but why should it be made so difficult? How does this book address this perceived deficiency? Most fundamentally, the book is designed around the idea that effective learning, especially in law school, involves a progression that encourages active learning. Developing higher-level thinking skills while simultaneously learning and understanding an intricate web of substantive rules is best accomplished by *starting with what is basic and clear, before progressing to the more complex and nuanced*. Much like building a tall building, effective learning starts with setting a sound foundation before constructing the upper floors. This analogy describes the structure of each chapter of the book.

Accordingly, each chapter is generally, but not slavishly, organized in a reoccurring pattern or “stages.” These stages, in turn, correspond to the themes of the book and its focus on three objectives—learning doctrine (including bar exam preparation), developing lawyering skills (critical reading, critical thinking, and analytical method), and exposure to practice. The initial sections of each chapter address learning essential foundational rules and concepts. I consider this to be the “first stage” of learning the law—learning essential rules commonly called the “black letter” law in first year, common law subjects like torts. Unlike traditional case books, this text does not generally use cases for the straightforward task of identifying basic, generally well-accepted rules and definitions. Although cases are occasionally included in this foundational stage, the chapters always start with textual explanations, black letter definitions and illustrations of basic concepts. This section focuses on basic doctrine which every student should commit to memory.

The second section of each chapter focuses on what I think of as the second stage of legal training: developing a deeper understanding of legal doctrine through practical applications. This includes identifying nuances, exceptions and ambiguities. More fundamentally, however, it requires development of practical and basic analytical skills, such as a logically sequenced application of essential rules and elements to the facts. It also involves confronting the reality of legal uncertainty—that answers to legal problems are inevitably grey rather than black and white. Problems and cases are made the centerpiece of this section with the objective of pushing students to engage in critical thinking over uncertain applications, requiring legal argumentation based on distinction, analogy, rule rationales and focused use of facts. *Case analysis is emphasized in this section as the means for thinking through problems and arguing about nuances in application—that is, to work on critical thinking and problem-solving skills.*

The third section of each chapter corresponds to a third stage in learning involving deeper thinking, mastery and synthesis. These sections typically present current

and difficult challenges in tort law. These challenges may explore conflicts in jurisdictional approaches, conceptual “puzzlers,” or the outer boundaries of doctrine including controversial applications and modern problems. This “challenge” section also sometimes includes more practical applications and tasks that should help students understand how what they are learning fits into the context of law practice.

The final section of each chapter provides “formative” assessment and feedback tools designed both to improve student mastery over essential basic concepts and to evaluate performance. The assessment and feedback section of each chapter is meant to be comprehensive and cumulative—later chapters will often incorporate assessment questions or problems that require knowledge and understanding of concepts learned in prior chapters. Assessment and feedback tools are not confined to the last section of each chapter, however. A wealth of problems and assessment tools, both simple and complex, also appear throughout the other sections of each chapter in the belief that effective learning is ultimately about doing. To this end, practical exercises are periodically presented to introduce students to the critical juncture between learning and practicing law.

I hope the format is effective. It seems unreasonable to ask that you enjoy it, but I hope that you do.

