

TORTS

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TORTS

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*Success is the ability to go from one failure to another,
with no loss of enthusiasm.*

WINSTON CHURCHILL

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Series Editor's Preface

Welcome to a new type of casebook. Designed by leading experts in law school teaching and learning, Context and Practice casebooks assist law professors and their students to work together to learn, minimize stress, and prepare for the rigors and joys of practicing law. Student learning and preparation for law practice are the guiding ethics of these books.

Why would we depart from the tried and true? Why have we abandoned the legal education model by which we were trained? Because legal education can and must improve.

In Spring 2007, the Carnegie Foundation published *Educating Lawyers: Preparation for the Practice of Law* and the Clinical Legal Education Association published *Best Practices for Legal Education*. Both works reflect in-depth efforts to assess the effectiveness of modern legal education, and both conclude that legal education, as presently practiced, falls quite short of what it can and should be. Both works criticize law professors' rigid adherence to a single teaching technique, the inadequacies of law school assessment mechanisms, and the dearth of law school instruction aimed at teaching law practice skills and inculcating professional values. Finally, the authors of both books express concern that legal education may be harming law students. Recent studies show that law students, in comparison to all other graduate students, have the highest levels of depression, anxiety and substance abuse.

The problems with traditional law school instruction begin with the textbooks law teachers use. Law professors cannot implement *Educating Lawyers* and *Best Practices* using texts designed for the traditional model of legal education. Moreover, even though our understanding of how people learn has grown exponentially in the past 100 years, no law school text to date even purports to have been designed with educational research in mind.

The Context and Practice Series is an effort to offer a genuine alternative. Grounded in learning theory and instructional design and written with *Educating Lawyers* and *Best Practices* in mind, Context and Practice casebooks make it easy for law professors to change.

I welcome reactions, criticisms, and suggestions; my e-mail address is michael.schwartz@washburn.edu. Knowing the author(s) of these books, I know they, too, would appreciate your input; we share a common commitment to student learning. In fact, students, if your professor cares enough about your learning to have adopted this book, I bet s/he would welcome your input, too!

Professor Michael Hunter Schwartz, Series Designer and Editor
Co-Director, Institute for Law Teaching and Learning
Associate Dean for Faculty and Academic Development

Acknowledgments

I am grateful to Michael Hunter Schwartz for a great number of things, including his vision in conceiving this series; for convincing me that this book was needed; and for the support, guidance and encouragement he has unwaveringly provided throughout this process. Without him, this book would not exist, and without his vision and encouragement my students would still be receiving inadequate and inactive instruction. He has been an invaluable mentor and friend.

I am also lucky to have been given the opportunity to teach so many remarkable people—and I would like to thank my students, who have contributed to this book in countless ways—from their willingness to work with very rough drafts of these chapters, to their thoughtful suggestions for improving its content. I would like to specifically thank those students who served as research assistants on this project: Kurtis Urien, Jaqueline Salazar, Stephen Strobel, Jeff Loposer, Camille Boudreau, Taylor Dudley, Sam Solodar and Matthew Greife.

Much of the skills instruction throughout this text was developed and refined while working with many of my gifted colleagues from around the country, including Ruth McKinney, Corie Rosen, Rebecca Flannagan, Larry Kreiger and Jeremiah Ho. Special thanks to Lisa Blasser for her thoughtful suggestions and observations, as well as her constant willingness to discuss skills instruction and how to better serve our students. I also want to thank my colleagues, whose dedication to teaching serves as both example and inspiration, and whose commitment to our students and to academic support in general, makes my work both possible and enjoyable.

I also want to thank Carolina Academic Press, and specifically Linda and Keith, for their vision in creating and supporting this series, and for allowing me to be a part of it. Also, thanks to Chris Harrow for his unending patience, for making my drawings into beautiful graphics and for helping me to achieve my vision for this book.

Introduction

Learning from This Book

Many students believe that they are coming to law school in order to “learn the law.” While this is true to some extent, what most students at the start of law school do not yet realize is that learning the law is only one, relatively small, aspect of law school. Law students really come to law school to learn how to learn and apply the law. In fact, you may have heard that the goal of law school is to teach students to “think like a lawyer.” This involves several things, including: learning how judges reason their way to a conclusion; learning about what kinds of legal arguments are legitimate, and will help your client prevail; learning how to marshal the evidence to prove your client’s case; and learning how to identify and use the facts of a case. This last point is particularly important in torts, because tort cases are usually very fact intensive and fact driven. For this reason, this book focuses on teaching you to solve problems that, like real tort cases, are factually complex. This focus on problem solving, and working with client facts, is one of the unique features of this book.

For the most part law schools, and law school textbooks, have utilized a very narrow range of methods for teaching students how to “think like a lawyer.” Essentially, students read appellate court decisions (cases) to learn (1) how judges reason (in hopes that students will later model such reasoning), and (2) how to derive the rules and policy from reading cases. These are important skills, and they are included in this book. However, this book moves beyond that method and that skill set, in order to provide you with a broader range of skills and experiences, in hopes that you will be better equipped for the practice of law. This book utilizes a problem solving approach—setting the materials and cases in the context of client problems. This simulates the practice of law because lawyers read material (including cases) with their client’s facts in mind (rather than in a vacuum).

Each chapter of this book contains materials and exercises designed to help you acquire (1) learning and study skills; (2) law practice skills; and (3) knowledge and understanding of the basic substantive law of torts in the identified area. Each chapter begins by identifying the specific chapter objectives for each of these three areas.

It is important to understand at the outset that this book is not designed to teach you every area of tort law, or to make you an expert on the topic of torts. In fact, tort law, for the most part, is state specific, meaning each state has established its own rules, which you will have to learn in order to practice in that jurisdiction. Rather than focus on all of the potential tort causes of action, this book focuses on teaching you how to learn and understand the law and apply it to solve client problems. It provides you with the tools and guidance to accomplish this task so that in the future you will be able to learn and apply the law in any area or context.

This book is designed to provide multiple opportunities to learn and practice law school skills—like reading, briefing, and exam writing—and to see how these skills connect to skills lawyers use in practice.

This book is also designed to provide you with an opportunity to learn and practice critical lawyering skills. You will review, use, and draft the types of documents lawyers use—including complaints, answers, motions, and discovery devices. The exercises will guide you through real lawyering tasks, including how to: evaluate claims; develop a theory of a case; make legal arguments to support your position on the law; develop factual subject matter knowledge; obtain and use evidence; grapple with complex factual issues; select and use expert witnesses; and many other practical skills.

Each section provides the background material needed to understand the law, followed by exercises designed to help you learn and organize the material, and then apply it, to resolve a client problem. The exercises are designed to help you see how a lawyer would apply the concept in practice.

Throughout the book you will find skill specific instruction; each time the book introduces a new skill it will be accompanied by a description of that skill, and how the skill is employed.

This book encourages you to think about and develop a professional identity, by asking you to think about the kind of lawyer you would like to be—the values you hold, and would like to maintain, when you enter practice.

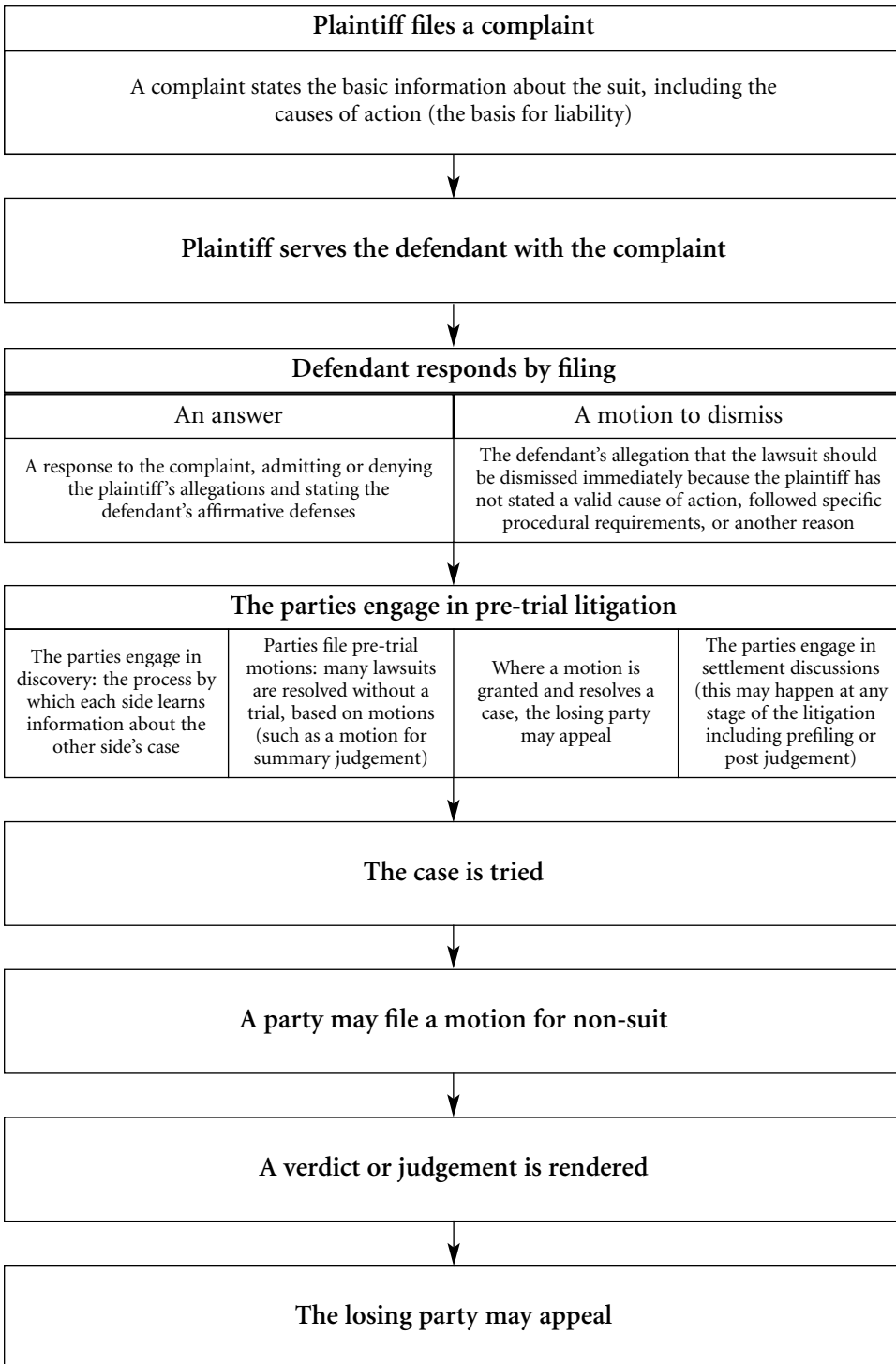
This book also encourages you to think about your client's perspective, to remember that clients are real people with a range of human emotions, and to understand the types of emotions your client may experience, and how those emotions may impact the client's case.

The book culminates in a capstone experience which allows you to use the combined knowledge, skills and values you have gained from the materials in the book, to represent a client, and practice what you have learned.

This book ultimately seeks to help you bridge the gap between law school and law practice.

Introduction to the Study of Torts

A tort is a civil wrong, other than a breach of contract, for which the law provides a remedy. Tort litigation occurs in the context of the civil system. Therefore, it is helpful to have working knowledge of how a lawsuit moves through the civil system. The following chart depicts key aspects of the litigation process you will encounter in your reading in this book.



Generally speaking torts are divided into three categories—intentional acts, negligent acts and actions for which there is strict liability. You will learn about examples of each of these categories in this book. Tort law covers a wide array of conduct for which an actor can be held liable, and you may be familiar with many examples; for instance, each of the following is an example of a case involving one or more torts:

- A toy distributor sends toy stores shipments of toys painted with a lead-based paint; children ingest the paint and develop brain injuries
- One waiter locks another waiter in a walk-in refrigerator
- A landowner does not install railing in a swimming pool and her tenant slips and falls while climbing into pool
- A restaurant patron eats lobster at a local restaurant and is hospitalized for food poisoning
- A child is attacked by a neighbor's dog and suffers physical injury
- A doctor implants the wrong embryos into a patient, who delivers twins that are not biologically her children
- A newspaper publishes false reports that a school teacher is a convicted pedophile
- A company dumps toxic waste into a town's water supply causing injury to the residents
- A teenager is talking on her cell phone in violation of a new state law, and causes an automobile accident
- A security guard wrongly suspects a customer of shoplifting and detains him in a back room for two hours

In the chapters that follow, you will learn that each tort cause of action has a series of elements that a plaintiff must prove, in order to establish a *prima facie* case (and liability). A defendant may prevail by showing that plaintiff did not prove her case, or by proving that defendant has a valid affirmative defense. With this in mind, we turn to the first task—evaluating the claim.