



# Torts

*Doctrine and Process*

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## ABOUT THIS BOOK

There are many torts textbooks on the market, including several excellent editions from which we have been privileged to learn and teach. Each serves its authors' particular pedagogical objectives as well as their sense of the needs of the students who will use it. This textbook was designed with three principal objectives in mind:

First, we want to offer a complete first-year course that is appropriately rigorous — that best meets the highest intellectual and analytical capabilities of our own students and of students at similar institutions. Thus, the cases and materials we have included are designed primarily for extraction learning: they are framed so that their doctrinal context is clear, but as with law practice, the rule and other relevant information are generally derived from careful reading and analysis of a set of materials. Throughout, we have also sought to use cases and materials whose factual contexts exemplify the complex circumstances our graduates are likely to encounter in sophisticated, modern practice settings.

Second, we want the course to prepare students to litigate difficult torts issues in the most contemporary settings. To this end, our approach is primarily doctrinal, and where other approaches — normative, economic, philosophical, and theoretical — are included, students are encouraged to think about their utility and merits as they implicate and fit within the law's existing doctrinal structure. The doctrine is presented consistent with the reality that tort law has evolved from its judge-made “common law” roots to be a true hybrid of common law and legislatively promulgated statutory rules.

Third, and also to this pragmatic end, the materials feature the relationship between the “black letter” or substantive law of torts, the rules of civil procedure, and the decisions and judgments required of practicing lawyers. Our goal is for students to see torts where they exist in the practice of law: at the juncture of the rules that govern the litigation process and the choices lawyers make using the facts and law to build arguments within those rules. The problems we have included throughout are derived from our own past exam questions and specifically test students' understanding of the doctrine and this juncture.

It was ultimately the search for materials that combined these three objectives—a combination we did not find in existing texts — that led us to develop this book. Our commitment has always been to provide the strongest possible educational foundation for our students, grounded in our own experience as academics and practitioners. We look forward to working with you.

Donald Beskind and Doriane Coleman  
Duke Law School



## DEDICATION AND GRATITUDE

To Professor Joseph (Joe) A. Page, for introducing me to Torts in law school and for helping to launch my academic career thereafter. Among many other things, I owe my understanding of proximate cause and the baseball cases to you. Your keen intelligence, seriousness of purpose, and playfulness live on in my classroom. And to Professor George C. Christie, for teaching me, through his own exceptional book and personal mentorship, how best to think about and teach doctrine, and also how to use Torts to teach legal method and process. Generations of students have benefitted directly from your pedagogical thoughtfulness; generations more will continue to benefit because you gave us these gifts, which we will pass along in turn. dlc

I join in the dedication to George Christie and add my dedication to all those whose life's work is or was keeping tort law connected to the scales of justice. dhb

We are grateful to Carolina Academic Press and to Marlyn Dail and Susan Raney at Duke Law School for working with us every year to produce an up-to-date edition worthy of all of our aspirations.



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George C. Christie, James B. Duke Professor Emeritus of Law, Duke Law School

Johanna M. Shepherd, Professor of Law, Emory Law School

The American Law Institute

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## CONVENTIONS

We use certain conventions throughout the book that are important to note at the outset.

The most important is that we omit string citations in original materials that are unnecessary for our immediate purposes. These omissions are not otherwise noted. We also omit text that is unnecessary for our purposes, but in this instance, we mark omissions with ellipses. Should you be interested in reading omitted material, you can find it in the full text of the original.

We use two different footnoting conventions. Footnotes in replicated material are numbered as they are in the original. Thus, if a case has ten footnotes numbered 1 through 10 and we include three of those in our excerpt — for example, the first, third, and tenth footnotes will be numbered “1,” “3,” and “10.” We use symbols instead of numbers for our own editorial footnotes.

Finally, we have not altered the citation forms used in original materials. This means, for example, that you will see courts’ own — and thus often different — citation forms throughout the text.



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## INTRODUCTION

Welcome to law school! We look forward to working with you this year. The material in this introductory chapter is designed to ensure that you are properly prepared for your courses in general; although it uses examples from Torts, it is not otherwise specific to this class. We hope that by being most transparent about our assumptions and expectations at the outset, you will have the opportunity to do your best work and also to enjoy a most engaging, intellectual and professional experience.

### I. PREPARING FOR CLASS

Preparing for and “being prepared” for law school classes may be different from what you had to do to be successful in the past. At the risk of being too basic, this is because there are always different possible degrees of preparedness: You can be entirely unprepared because you didn’t read the assignment. You can be partially prepared because you only read a portion of the assignment, although you did that carefully. You can be generally prepared because you skimmed and maybe “book briefed”<sup>\*</sup> the entire assignment. Or you can be fully prepared because you read and briefed the entire assignment carefully. Like your future employers, your professors, especially your 1L professors, will expect you to be fully prepared every day, and they will consider you “unprepared” if your preparation falls short of this standard. Even in your 2 and 3L years, you will find that students who are consistently prepared in this sense are better able to engage the material. This translates, inevitably, into better lawyering skills, better grades, and a better reputation.<sup>\*\*</sup>

You want to be thought of by your fellow students, law school professors, and eventual employers as a person with an impeccable professional approach to your work. Preparedness is central to this approach, as is timeliness, courtesy toward peers and superiors, and the ability to work collaboratively in team settings, among other things. Notice that these attributes are separate from your substantive legal knowledge and analytical skills. You can get the equivalent of an “A” on every one of your exams, but if it’s clear to your professors that you weren’t professional in your approach to class on a daily basis, they won’t be there to write your letters of recommendation; by definition, the latter are designed to speak to more than just your grades since these are clear from your transcript. The same goes for your eventual work in the legal profession: although very bright lawyers are obviously an asset, the nature of the work is such that weak professional attributes will make difficult the case for hiring or promotion.

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<sup>\*</sup>Editors’ note: Book briefing is explained below. Essentially, it means making margin notes in your casebook.

<sup>\*\*</sup>Editors’ note: Being prepared is important whether or not you are called on. Even if you are not called on, you are expected to engage — respond, analyze, critique — silently. You won’t be able to do this if you don’t prepare.

To be prepared for class on a daily basis, you must carefully read the assigned material and brief the assigned cases. The first year of law school is notoriously difficult, not because the substance of the material is particularly complex or obscure, but because a lot of reading is assigned and a high level of preparation is expected. For many of you, these demands will be different from what you are accustomed to. You must embrace these demands. If you do, you will be rewarded with an appropriately sophisticated sense of and ability to work with the law. The 1L year is literally the foundation for all that you will do beginning in your 2L year and throughout your legal careers. Your goal this year should be to develop the strongest possible base from which to work in the future. The following provides the template for careful case briefing, which is the best way to ensure (big picture) that you do the groundwork necessary to establish this essential base, and (little picture) that you are appropriately prepared on a daily basis.

## II. BRIEFING CASES

### *Why Lawyers and Law Students Brief Cases*

Throughout your lives as law students and lawyers, you will be “briefing” cases. That is, you will be reading them to discover their various formally identifiable parts, and in most cases you will be reducing them — making them brief — so that they are easier to work with. Over time, you will acquire your own style of briefing cases, but even then, there are formal parameters that you will follow. This is necessary (and so even if you’re a free spirit you’ll toe the line) because law professors and other lawyers talk in a jargon that comprises in part the elements of a case brief, and you’ll need to communicate with them.

You should brief carefully for all of your classes this year because:

1. You want to be prepared for class in case you are called on and, even if you’re not, so that you can engage the material along with your classmates.
2. It is essential that you learn the law, which is frequently derived from rules as applied in cases.
3. Repeated briefing over time is necessary to the development of your ability to effectively and efficiently read, analyze, and synthesize cases. Relatedly, repeated briefing is also important to the development of your legal reasoning skills.

Note that only the second of these is directly relevant to exam taking; there is a lot more going on in law school and in your growth as lawyers than that.

Commercial materials are available that contain “canned” or already-prepared briefs; briefs for many cases are also available online. It is our strong recommendation that you resist relying on such materials. While they may be helpful either when you have not had adequate time to prepare or when you are not sure you understand a case, relying on them consistently and in lieu of your own preparation is problematic in two ways:



First, relying on the work of others will retard the development of your own ability to read, analyze, and synthesize cases. Because this is a big piece of what lawyers do in practice, the development of these skills is not optional. And it is certainly not something you want to tackle for the first time when you are out of law school, when there are no more canned or prepared briefs available.

Second, although published materials will generally be correct in the sense that they will accurately represent the facts, issue, and rule of a case, they will not necessarily provide you with the detail or depth necessary to a particular professor's approach or class discussion. In this sense, they may function as effectively as skimming a case, but they may not be adequate otherwise.

Relying on others' briefs either much or all of the time is one of the four most frequent patterns we see with students who do not do as well on their exams as they would have expected or liked.

Companies that advise pre-law and first-year law students sometimes also recommend that students "book brief" — make margin notes — in lieu of preparing full case briefs. Whether this is an adequate strategy depends largely on the individual student/lawyer, her ability accurately and comprehensively to retain information that is not captured in the margin notes, and the eventual uses of the case material. In other words, book briefing works for some people sometimes, but not for everyone or for all purposes. It is our recommendation that you not book brief, at least not until you are adept at the skill of full case briefing and you have a good sense of what it is that your professors want from you. If you book brief before then, you are likely to be less-than-fully prepared.

### ***How to Brief a Case***

The standard or formal elements of a brief, indeed of all legal analysis, are often helpfully broken down into the acronym "IRAC." IRAC stands for Issue, Rule, Application, Conclusion. Specifically, IRAC requires that the lawyer derive the issue or issues to be resolved, find or develop the law or legal rule that is or should be used to address the issue(s), apply the rule to the facts, and reach a conclusion as to how the issue(s) is/are to be resolved and what happens next in the case. We are not being dramatic when we tell you that what we have just written comprises much of what you will be doing in every course throughout law school and otherwise throughout your legal careers: almost every case you analyze or "brief," and every memorandum, brief, or opinion you write, will follow a version of this paradigm.

As a threshold matter, IRAC assumes that the facts or factual background of a case have already been presented. For purposes of case briefing, however, it is essential always to have ready a good statement of the *relevant* facts. And so if you wish, you may refer to the briefing paradigm as FIRAC instead.

(F)IRAC breaks down this way:

*(F) The facts of the case, also called “factual background” or “underlying facts.”*

These are the underlying events that give rise to the lawsuit. The case facts are to be distinguished from the Procedural History (PH) of the case, that is, the facts that describe the course of the litigation once it has been initiated. In some courses, you may be asked by your professors to provide the procedural history of a case.

Note that proper legal analysis requires that you cull from the facts presented only those that are relevant to the issue(s) presented. For example, if the raw facts tell you that the suit is for damages arising out of a car accident, and that A, who is 20, and B, who is 16, were both passengers in the car, it is likely that their ages will be irrelevant to the analysis of whether their suits against the negligent driver will be successful. That is, their ages have nothing to do with the negligence of the driver. On the other hand, their ages might be relevant if the issue were whether their consents to medical treatment, signed as they were brought into the hospital, were valid as a defense to a battery claim brought against the physician who treated them. This is because the validity of consent may turn, in part, on the age of the person consenting.

*(I) The legal issue that is implicated by those facts, also called “question presented.”*

Lawyers, and certainly your professors, will sometimes break this component down and distinguish between the “procedural issue” and the “substantive issue” in the case. In a nutshell, the procedural issue is the question that arises relating to the stage of the trial or appellate process at which a substantive issue was disposed of; e.g., if the trial court dismissed the plaintiff’s case and she appeals the dismissal, an issue might be whether the judge correctly dismissed the case before all the witnesses had been deposed. The substantive issue or question presented relates to what the applicable law is or how it should be construed; e.g., if the case that was dismissed involved a claim for battery, the issue might be whether the plaintiff’s evidence amounted to a battery or the applicable law required additional facts plaintiff could not show.

Note that a single appeals court opinion may involve more than one issue. When you brief cases for class, you should focus on the issue most pertinent to the subject at hand. If it is not obvious, the chapter title and subheading under which the case appears should be helpful to you in identifying the issue. For example, if the case you are briefing is in the book to illustrate the rules that apply to offensive battery claims, and the case involves multiple issues including the issue whether the plaintiff has a viable claim for offensive battery, your brief should focus on that issue. Nevertheless, there is value to reading and making notes about peripheral issues; this is one of the ways lawyers learn about the law more generally, including about how different issues intersect with one another.

*(R) The rule of law that is or should be used to address the issue, also called “law” or “applicable law.”*

The applicable law is the law that the court uses to resolve the case. Applicable law generally falls into one of three categories:

Mostly, the courts resolve issues using their interpretation of existing law. Existing law for this purpose includes constitutional (state or federal), statutory (state or federal), and judicially pronounced or common law. The law as it has been articulated in prior cases is often called “precedent” or “applicable precedent.”

Sometimes, the issue before the court is whether the existing law ought to be changed. Because lower courts have no power to change existing law, this issue is only properly before the state’s highest court, and even then, only if that law itself was judge-made rather than statutory.

On other occasions, there is no existing law on point. If a lower court is confronted with this situation, it will make new law — usually by borrowing the standard in another jurisdiction. Such lawmaking is subject to review by higher courts.

Developing the ability to identify and describe the applicable law and its source is part of what your legal training will be about. Correspondingly, where the law is not entirely clear, or where it might be subject to modification, your legal training also will involve developing the ability to argue convincingly that the court should adopt your position (rather than your opponent’s) on what the existing law means or what the newly declared law should be. All of this involves understanding the value of precedent in the law, as well as the ability to synthesize cases and analogize among related areas of law. (You will work most directly on these skills in your legal writing class, and your other professors will assume you are in fact developing them in that context. Thus, as you do your work both in and out of legal writing class, train yourself to think about how these skills apply, not only to your own writing, but also to the structure and articulation of judges’ opinions, and to the way advocates and judges in all subject matters engage their analyses.)

*(A) The court’s application of the facts to the rule or law. This is also called the court’s analysis.*

It is in this part of the case that the court considers the parties’ different arguments about how the law applies to the facts, and also the part in which the court resolves those arguments. This part also may contain the court’s rationale, or explanation for the ultimate holding and result.

While courts frequently work methodically through the parties’ arguments, sometimes the analysis that appears in the opinions you read will be incomplete or conclusory. When that happens, beyond describing whatever analysis the court provided, your task is to construct and briefly set out in your brief the best arguments for both the result reached and the result urged by the party that lost. Having done that, take care not to confuse the analysis that you’ve imagined — which will be important to you both in and out of class — with what the court actually wrote.

Note that this is usually the place in a case brief or other legal document (such as a memorandum or advocacy brief) where the lawyer is able to be the most creative; it is the place where facts are brought to bear — proof or evidence is proffered — in support of an argument that the law requires a particular outcome.

*(C) The court's conclusion, also called the holding of the case.*

This is your precise statement of the new rule that emerges as a result of the court's analysis. Think of the holding as what this court might want a later court to say was the precedent this case established. As with the issue, the conclusion or holding also may be broken down into both a procedural and a substantive holding. There is quite a science to developing the substantive holding in particular; you will spend a lot of time working on this skill, also most directly in your legal writing class. In this regard, note carefully that the conclusion or holding is to be distinguished from the result in the case, which is simply the "yes" or "no" answer to the issue, or more simply the answer to the question, who won in the end.

### ***Final Notes on Briefing***

When you work with your other professors, the IRAC formula may be presented a bit differently than we have here. But since we all speak the same language in the end, you should be able to reconcile the different formulas without much difficulty. Note also that while some of your professors will focus class discussion on critical analysis of cases including all the elements of case briefs, others will assume you have engaged this analysis on your own and will use that assumed analysis as a springboard for additional discussion — for example, of the policy implications of the law or its theoretical sources — while yet others will engage a hybrid approach. The professor's approach depends upon his or her pedagogical objectives for the class.

Finally, although critiques of/policy arguments about the law or its application to a particular set of facts may form part of a court's discussion (in the R/Rule and/or A/Application portions of its opinion) the IRAC template does not provide a place for you to do the same. A brief is a summary of the court's opinion, not yours. Nevertheless, intellectual engagement in class materials means more than just briefing. And so as you proceed, be sure to develop your own approach to thinking about and chronicling your (and your professors' and classmates') critiques and policy arguments. You even may wish to include these in a "notes" or "comments" section that you include at the end of your brief, but, again, take care not to conflate your analysis with the court's.

## **III. INTRODUCTION TO CIVIL LITIGATION**

### **A. The Plaintiff's and Defendant's Cases**

Civil litigation begins with a lawsuit being filed. After paying a filing fee, the plaintiff who brings the suit files a complaint and obtains a summons requiring the defendant, the person sued, to respond to the complaint. The summons and the complaint must be "served" on the defendant by the plaintiff. Until the defendant receives the complaint, he ordinarily has no obligation to respond to it. Once served, however, the defendant must respond. His options include a "motion to dismiss" for deficiencies in the claim, an "answer" denying liability and an affirmative defense that, in effect says that even if the defendant is responsible, the law provides an excuse from liability. The defendant also may file any claims he has against the plaintiff or anyone else arising out of the same transaction.

The plaintiff's claim can be based in torts, contracts, property, constitutional law, etc. Regardless of the area of the law at issue, however, all claims raised require the plaintiff to allege facts establishing a set of elements fixed by the relevant law. Thus, for example, as we will see shortly, tort law requires the plaintiff who files a battery claim to establish four elements: (1) the defendant committed a *voluntary act*, (2) with *intent* to cause harmful or offensive bodily contact, (3) which *caused* the plaintiff (4) a relevant *injury*.

Merely alleging facts establishing each element is not enough to get a plaintiff to trial on her complaint. If challenged, after filing the complaint but before trial, she will have to establish that she has evidence on each element that, if not rebutted, would require the case be decided in her favor. This quantum of evidence as to each of the elements is, in the aggregate, called a "prima facie" case. That term comes from the Latin for "at first sight."

Although what follows simplifies things substantially, for present purposes it suffices to know that once the plaintiff has set out a prima facie case, the case can proceed to a trial at which defendant's litigation options are: (1) to rebut one or more of these elements — for example, if the claim at issue is battery, to deny that she committed a voluntary act, and/or (2) to proffer an affirmative defense — for example, to argue that any battery was legally permissible because of consent or self-defense.

As you will see below, the plaintiff can succeed only if she is able to make out and persuade the trier of fact that she is correct as to each and every element of her claim, and the defendant is unable to make out and persuade the trier of fact that he is correct as to any affirmative defense he raised. If the defendant succeeds in persuading the trier of fact either that one or more elements of the plaintiff's case was not proved, or that every element of an affirmative defense has been proved, the plaintiff will lose.

One helpful metaphor is to think of a claim as a box, and to think of its elements as empty compartments within the box. (Imagine a parts box you'd buy at Home Depot with the number of compartments required by your project.) For example, the intentional tort of battery is a box within which (according to the law) there must be four compartments labeled (in shorthand) (1) act, (2) intent, (3) causation, and (4) injury. This means that when the plaintiff files a battery claim, he must allege *both* that all of these four compartments exist within the box *and* that he has facts to put into each. For example, he must allege that the defendant committed a voluntary act and he must describe (at least summarily) facts that will prove this allegation, and then he must do the same for intent, causation, and injury. If the judge sees that there are less than four compartments in the box, she will dismiss the complaint. If the complaint survives this initial check, it will proceed through the litigation process described immediately below, but as it does, the plaintiff will be required to do more than continue to allege the existence of facts to fill each of the compartments: he will have to produce evidence backing up that allegation. For example, he will have to produce a witness who will testify that the defendant voluntarily threw the punch that injured him, etc. If, at any point in the litigation, it becomes clear that there are not sufficient facts for each compartment, the claim will be dismissed.\*\*\*

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\*\*\* Editors' note: This box metaphor is applicable to any claim or defense where a party has the burden of proof. The compartments are always based on the elements required by law.

## B. The Civil Trial and Appellate Process

The Federal Rules of Civil Procedure, about which you will learn in detail when you take the procedure course, establish the process through which litigants in civil cases proceed. Each state has adopted a similar set of rules. Because the cases you read in law school text or casebooks always arise at the intersection of substance and procedure — that is, at a particular point in the process and based on a particular legal rule or set of rules — and because the procedural posture of a case often influences what a court is permitted to do with its substance, it is essential that you are familiar at the outset with the basic outlines of the litigation process. Here it is, in summary and sequential list form.

As you read through this list, note that we have italicized those stages of the process that involve either dispositive motions or other stages involving decisions of law that you will see reviewed most often in law school casebooks. For our purposes, dispositive motions are requests to the court made by one or the other party to dispose (one way or the other) of an entire claim on the basis that it is either (1) unequivocally flawed, or (2) unequivocally good. A claim will be unequivocally flawed if — as described in Part II(A) above — one or more elements of the claim are not alleged or the facts are not there to support each of them.

### THE PRETRIAL PROCESS

1. Plaintiff's Complaint
2. *Defendant's Answer or Motion to Dismiss Plaintiff's Complaint*
3. Plaintiff's Response to Motion to Dismiss
4. Defendant's Reply to Plaintiff's Response to Motion to Dismiss
5. Discovery (e.g., Interrogatories, Depositions, Requests for Production of Documents and Things, etc.)
6. *Plaintiff's and/or Defendant's Motion for Summary Judgment*
7. Response of opposing party

### THE TRIAL PROCESS

8. Opening Statements
9. Plaintiff's Case in Chief
  - A. Plaintiff calls witnesses — direct examination by plaintiff, cross-examination by defense, redirect by plaintiff
  - B. Plaintiff offers exhibits
  - C. Plaintiff rests

10. *Defendant's Motion for Judgment as a Matter of Law (a/k/a for a Directed Verdict)*
11. Plaintiff's response
12. Defendant's Case in Chief
  - A. Defendant calls witnesses — direct examination by defendant, cross-examination by plaintiff, redirect by defense
  - B. Defendant offers exhibits
  - C. Defendant rests
13. *Plaintiff's and/or Defendant's Motion for Judgment as a Matter of Law (a/k/a for a Directed Verdict)*
14. Response of opposing party
15. Closing Arguments
16. Jury Instructions (if tried to a jury)
17. Jury Deliberations (if tried to a jury)
18. Verdict
19. *Renewed Motion(s) for Judgment as a Matter of Law (if previously made) or Motion for a New Trial (a/k/a Motion for Judgment Non Obstante Verdicto (JNOV))*
20. Response of opposing party
21. Final Decision of Trial Court

## THE APPELLATE PROCESS

22. Appeals from that final decision to the intermediate appellate court on issues of law or clearly erroneous factual findings (including brief of appellant, response of respondent, reply of appellant, oral arguments, and decision of court).
23. Appeals to the Supreme Court on issues of law or clearly erroneous factual findings (including brief of Appellant, response of Respondent, reply of Appellant, oral arguments, and decision of court).

Depending on the jurisdiction, appeals to the Supreme Court may be “as of right,” meaning that the appellant (the party who lost below and who seeks reversal of that adverse decision) has a right to be heard by the high court, or they may be “discretionary,” meaning that the high court has the power to determine whether it wishes to hear the dispute or not. In the latter situation, appellant files a petition for certiorari or, colloquially, a “cert petition,” explaining why the court should take the

case. In some places, this is known as a petition for discretionary review. Respondent (the party who won below and who would like that decision to stand) is permitted to file an opposition brief explaining why the court should not take the case.

### C. Standards and Burdens of Proof

The law assigns different standards of proof to different kinds of cases based on a formula that considers the significance of the parties' respective interests, including as compared with each other, and on an evaluation of the risks of error that it is willing to bear in the circumstances. There is a substantial body of constitutional law on this point, but for present purposes, it suffices to appreciate the following:

*Preponderance of the evidence.* If the law considers a deprivation to be important, but not very important, and it is willing to bear the risk of more significant error given the interests on the other side, it requires that the potential depriver prove her case by a "preponderance of the evidence." This standard requires the depriver to show that each element is "more likely than not" true, or that the metaphorical scales that would weigh the evidence are "tipped past equipoise" in their favor. Equipoise is the equally balanced scale. The preponderance standard is also called "the greater weight of the evidence." This is the standard used in civil (including tort) litigation, which generally deprives the defendant "only" of money; money is considered to be relatively unimportant — in contrast with the deprivation of liberty or of one's child, for example — and the risk of relatively significant error bearable, considering the plaintiff's and society's interest in the existence of a system that provides effective compensation for injuries.

*Clear and convincing evidence.* If the law considers a deprivation to be very important, but not of utmost importance, and if it is willing to bear some but not a big risk of error to protect a competing interest, it will demand proof of fault by "clear and convincing evidence." Aspects of proceedings to terminate parental rights on the basis of permanent abuse, neglect, or abandonment are conducted according to this standard, on the view that the permanent loss of one's child is a very important deprivation, but one that must be balanced against the child's interest in a settled parental relationship and the state's *parens patriae* interest in protecting child welfare. Increasingly, this standard is being made relevant to tort cases by legislatures enacting it to, for example, reduce the number of punitive damage verdicts, make it more difficult to sue emergency room health care providers, or otherwise protect potential defendants.

*Beyond a reasonable doubt.* If the law considers a potential deprivation to be of utmost gravity and importance, and (at least formally) it is only willing to bear a miniscule risk of error, it will demand that the eventual depriver prove fault "beyond a reasonable doubt." This is the standard that attaches to criminal prosecutions, because they typically risk one of the ultimate deprivations, i.e., a deprivation of personal liberty, including the freedom of mobility. (Death falls into the same category, of course.) This is the basis for the well-known mantra that, "It is better to let a guilty man go free than to risk improperly imprisoning an innocent one." This burden of proof is not relevant to tort cases though jurors who watch too much television are often confused.



The law is loathe formally to assign numerical values to burdens of proof, but it is sometimes said that “beyond a reasonable doubt” means 98 or 99% sure; “clear and convincing evidence” might be valued (depending on the court) at between 65 and 90% sure; and “by a preponderance of the evidence” or “greater weight” both mean more than 50% sure.

It is generally said that the plaintiff bears the ultimate burden of proof in a civil case, including a torts case. However, this is merely a generalization. In fact, there are several different burdens in a case and some of them can shift depending on the stage of the litigation.

Specifically, there are three different, sequential burdens of proof in a civil case:

*The burden of pleading.* This requires the plaintiff to file a complaint that pleads (states or alleges) the facts required to prove each and every element of the claim. The plaintiff will survive a dispositive motion, as described in the immediately preceding section, if she alleges in good faith sufficient facts to support each element. The defendant also has this burden if she files an affirmative defense or her own claim against the plaintiff or others.

*The burden of production.* This requires the plaintiff to produce evidence to prove or support every essential factual allegation made in the complaint. For example, if the complaint alleges that the defendant’s negligence was in running a red light, the plaintiff must prove this — e.g., with an eyewitness or the defendant’s admission that she was speeding. Plaintiff will survive a dispositive motion on the issue if he is able to produce this evidence. Once the plaintiff makes out a prima facie case, the burden of production shifts to the defendant to rebut the case. The defendant also has a burden of production if she has an affirmative defense or her own claims.

*The burden of persuasion.* This requires the party who brought the claim or affirmative defense to satisfy the trier of fact that the fact is true. This burden never shifts; it always remains on the party who brought the claim or asserted the defense.

\* \* \*

Chapter One will introduce you to Torts as a subject. From that chapter, you will get a sense of its origins, its objectives, and also of common threshold issues that may affect the viability of claims regardless of their category. As you move forward from this chapter to the next, and so on, be sure to take prior knowledge and lessons forward. This will help you integrate material from the beginning so that by mid-semester and later, you have the best sense possible of how methodology and doctrine fit together.

