

TORTS AND COMPENSATION

PERSONAL ACCOUNTABILITY AND
SOCIAL RESPONSIBILITY FOR INJURY

Fourth Edition

Dan B. Dobbs
Paul T. Hayden

American Casebook Series®



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By

Dan B. Dobbs

*Professor of Law
University of Arizona*

Paul T. Hayden

*Professor of Law
Loyola Law School, Los Angeles*

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Preface to the Fourth Edition

In the preface to the Third Edition, we emphasized the continuing development of tort law and our effort to present in this book both the changing and unchanging nature of that law. This edition reflects new developments in cases, topics, and academic contributions to tort law. The user will find more than 25 new main cases new to this edition and more than 30 new case abstracts, in addition to many new case citations. A few of the cases new to this edition antedate the third edition, but no less than twelve were decided in 2000.

We want to add that some important changes that have influenced this edition were not changes in the law. First, times change and students reflect cultural attitudes and preoccupations. Second, we ourselves learn from experience in teaching the materials—both our own experience and that of other teachers who have generously made suggestions or engaged us in discussion about particular items. This edition's changes reflect the influence of changed times and added experience.

Recent legal changes include these:

Lawyers and state and federal administrators have been increasingly involved in problems of nursing home liability for mismanagement and harm to patients. We have added a substantial new section on nursing home liability, with sidelights on the larger topic of elder abuse and the role of administrative law compared to tort law. Other new health care materials involve managed care and some new ideas about informed consent, in particular the suggestion that patients may be entitled to get the health care provider's record of success and failure.

Products liability has heavily engaged practicing and academic lawyers (not to mention judges) for decades. The new Products Restatement reflects changed attitudes and issues. The privity issue largely disappeared in personal injury cases some time ago. The issue of liability for unknowable risks has shriveled and shrunk. Liability for inadequate warnings accordingly loom larger, as does the proof of defect issue. These are among the legal changes we've tried to reflect there, along with citations to the final version of the Products Restatement.

Another new Restatement is the Restatement of Apportionment. That Restatement deals both with apportionment of responsibility between plaintiffs and defendants and with apportionment among the defendants themselves—in other words, with comparative responsibility and with what we have traditionally called contribution and indemnity. Some of the problems tackled by that Restatement are quite difficult and some of its provisions have generated a degree of controversy. This edition reflects the issues and the Restatement itself both in the chapters on comparative responsibility and in the chapter on apportionment among defendants.

Prompted by the Restatement and by an interesting article, we have re-introduced and expanded coverage of an old idea—that in some cases the plaintiff has “no duty” to protect herself and hence cannot be charged with comparative fault if she fails to do so in certain circumstances.

The march of immunities as the general solution to almost everything and with complete absolution for faulty conduct that causes injuries is a phenomenon that has not been adequately noted in the literature of torts, but one that is much reflected in this book at a time when political figures can argue in the same breath for both accountability and immunity.

Less obvious to casual observers of tort law are problems of integrating tort law with its neighbors. As in earlier editions, this book tries to introduce to first year students some of the non-tort ways of dealing with injury through administrative law (nursing home regulation, workers’ compensation, social security disability). Contract, criminal law, and property concepts also play their part. Some of the new materials in this edition deal with this borderland of tort and other solutions.

Suggestions from teachers who use this book and our own experience resulted in another major change in this edition. We have added a new Chapter 1 to introduce some of the considerations that go into tort liability—justice, social policy (such as deterrence), and process concerns. Concerned that some students start law school with fixed opinions that get in the way of learning, we have also tried to use this chapter to let students directly confront the claim that tort plaintiffs are simply greedy people who want something for nothing by showing them a few damages cases.

New materials do not necessarily make a good book and we have tried at all times to keep the main goal in sight—to teach students, to challenge them, and to provide everyone involved with a good time in the process. An email from a worried student at another school leads us to add that we select and edit cases to provide opportunities for analysis and to strengthen skills in reading, interpretation, evaluation, and synthesis of legal materials. Students using this book should not see their job as merely listing a collection of elusive (and illusive) majority rules. They should realize that we have selected cases and written notes with the purpose of sharpening intellectual skills and the understanding of legal process.

On the topic of case selection, we should add that we attempt to use cases that reflect both our times and the factual setting in which injury occurs. A good many real-life tort cases are most unpleasant, involving murderous parolees, spouse-beaters, child abusers, or horrible medical injuries. Although legal principles might be distilled from old cases and in less varied settings, tort law is about living people with real injuries and our cases verbally (but not graphically) reflect some of these.

As with other editions, this one focuses primarily on personal injury torts. That focus includes, most centrally, common law tort solutions. Yet, most injuries in America are redressed through alternative means, such as workers’ compensation, social security, or private insurance. A picture of injury law, therefore, includes those topics and they remain a part of the fourth edition.

Yet not all tort law is about personal injury. Indeed, some of the biggest growth in tort law in the late 20th century is found in areas involving economic torts such as interference with contract. Even so, the economic tort materials provided in this book are limited to core rules. They cannot take the place of appropriate advanced courses that cover defamation, misrepresentation, intellectual property, interference with contract, employment law and the like. The materials in this book provide an introduction to those topics that suffices to help students recognize that tort law is not exclusively injury law and perhaps to help them decide on advanced elective courses.

Apart from new materials and ideas, we have added a few charts or diagrams. We have also divided some chapters into shorter units so that they will be less daunting. Most omissions of citations go unmarked. We cite a few cases in our notes but, as in earlier editions, we try to avoid mere case collections. We hope that these styles and formats will help make this book readable and contribute to its value as a teaching tool.

Editing and Abbreviations

We've discovered that some students are not familiar with the use of ellipses to indicate omission, so we make this explanation. The opinions of appellate judges almost always include a good deal of matter on procedural points. They may also include discussions of many arguments made by lawyers that are not relevant to the issue we are developing in this book. They almost always include many citations to cases as precedent or example. Finally, some opinions are extremely repetitive. All this can make for very long opinions, sometimes many times the length of the edited case we present here. We mark our omissions in the main cases by ellipses – three dots for omissions internal to a sentence, four for omissions that go to the end of the sentence or beyond.

To save space and improve readability, we also omit almost all citations the judge makes to other cases. Finally, as another space-saving device, we sometimes summarize some portions of cases in our words. When we do this in a main case, we put our words in square brackets and omit the judge's words.

The case abstracts in this book are different. They are our own summaries of a point in the full case, somewhat similar to briefs the student writes. In these abstracts, usually only one long paragraph, we use quotation marks if we quote the judge, but in the absence of quotations we have no need for ellipses or brackets since the abstract is merely our summary.

There are some standard works on torts that we cite from time to time. A major work in six volumes, now being published in a third edition, is Fowler V. Harper, Fleming James, Jr., and Oscar S. Gray, *The Law of Torts* (2d ed. 1986) and some volumes in the third edition. We cite this work as Harper, James, and Gray. A second work is Dan B. Dobbs, *The Law of Torts* (2000), a one-volume work. It is cited as Dobbs on Torts.

The Restatements of Torts in various editions are the product of the American Law Institute. They attempt to state a black-letter rule about

most traditional tort issues. Students may find them difficult to parse, but they have had an enormous effect on tort law. The newest Restatements are designated as the Restatement Third of Torts with subtitles to indicate the particular area covered, for instance, the Restatement Third of Torts: Products Liability. We'll often refer to these Restatements by their subtitle—The Restatements of Products Liability, the Restatement of Apportionment, the Restatement of Unfair Competition.

—DAN B. DOBBS
PAUL T. HAYDEN

Tucson, Arizona
Los Angeles, California
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