

Torts



®

EDWARD J. KIONKA

TORTS IN A NUTSHELL

THIRD EDITION

By

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PREFACE

This book, like all others in the Nutshell series, is intended for anyone seeking a concise exposition or review of the basic principles of American law. Its main value, however, will probably be to first-year law students taking the course in torts, who are struggling to get a glimpse of the elusive “big picture” of which my former dean and colleague John Cribbet of Illinois so often spoke. (Every law student and lawyer should know his famous “big picture” story. See JOHN E. CRIBBET, *PRINCIPLES OF THE LAW OF PROPERTY* ix-x (2d ed. 1975).)

This Nutshell, again like all others, must be used with caution and with a clear understanding of its limitations. Overall, I believe that it presents an accurate “big picture” of the subjects discussed. But many of the rules are subject to minor exceptions and qualifications which space does not permit to be mentioned. Some rules and subrules, not essential to an understanding of the basic principles, have been omitted altogether. Some hard problems are only alluded to. In addition, the tort law of every jurisdiction is a little bit different from that of every other, and each contains its own idiosyncracies, judicial and sometimes statutory. This text must not be taken as the law of any particular jurisdiction, but rather as a composite view.

PREFACE

The law student would be well-advised to base his or her study of tort law primarily on other sources. There is no substitute for a careful analysis of case-book materials for a more thorough treatment and for a necessary perspective of tort law in action. And it would be wise to flesh out one's knowledge of the various areas by study of a more complete text, such as Dean Prosser's classic *Hornbook* (now Prosser & Keeton), and also of the Restatement (Second) of Torts and, as it emerges, the Restatement (Third). Reference to other sources available in the law library is sometimes necessary in areas where enlightenment seems slow to come. Nevertheless, it is my firm belief that law students (as all of us are) must have a clear view of the forest before they can truly understand and appreciate the various trees. I hope that this book will help to provide that overview, a solid structural framework of concepts to which the elaborations and refinements of ever more specific rules can be attached. May it serve as an entree into the proverbial seamless web.

No single Nutshell could do justice to all of tort law. This one's focus is the basic principles of liability, defenses, and damages. The volatile area of products liability, discussed briefly here, is the subject of a separate Nutshell (JERRY J. PHILLIPS, *PRODUCTS LIABILITY IN A NUTSHELL* (5TH ED. 1998)). And the law governing the liability of those who provide medical services has been undergoing rapid growth and change, and there are important statutory develop-

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ments in this area. See MARCIA MOBILIA BOUMIL & CLIFFORD E. ELIAS, *THE LAW OF MEDICAL LIABILITY IN A NUTSHELL* (1995).

On the other hand, I have covered some subjects not normally included in basic torts texts and courses (see, e.g., Chapter 1 and §§ 8-14, 8-15, 8-21, and 8-22) because I believe that they are important to an accurate overview.

I am deeply grateful to all those — who have helped me learn about tort law and its processes, and to my colleagues, friends, and family who supported me in this project. Many thanks also to Southern Illinois University School of Law, which, as always, has provided excellent support and encouragement to faculty scholarship. And thanks, Pete, for your invaluable help editing the first edition.

Portions of the Restatement of the Law, Second, Torts (copyright 1965, 1971, 1972, 1976, 1977, 1979 by the American Law Institute) are reprinted herein with the permission of the American Law Institute.

EDWARD J. KIONKA

Carbondale, Illinois
May, 1999

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EXPLANATORY NOTES

The following notes may be helpful in using this book.

Cases. For obvious reasons, cases have been cited sparingly. In general, the cases cited are either (1) leading authorities on a particular point, (2) landmark cases, or (3) illustrative cases.

Only the name, court of decision, and date are cited in the text. The full citation may be found in the Table of Cases. If only the name of the state is given, it is the highest court of that state.

Restatement of Torts. The Restatement of Torts has been particularly well regarded by the courts, and it is highly authoritative in most jurisdictions. Frequent references to it are given, but I have not cited every relevant section. Ordinarily it is cited where the provision or its comments provide further illumination of the point under discussion. Citations are to the Restatement (Second) unless otherwise noted. For simplicity and to save space, I use the form "R. § ____."

Texts. Texts and articles are cited only occasionally. It is generally agreed that the most authoritative and useful text is the Hornbook originally authored by the late Dean William L. Prosser, PROSSER & KEETON, THE LAW OF TORTS (5th ed. 1984). For

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convenience, it is cited as "Prosser." There is also a useful six-volume treatise, FOWLER V. HARPER, FLEMING JAMES, JR. & OSCAR S. GRAY, *THE LAW OF TORTS* (2d ed. 1986). Texts on individual subtopics are also available.

References to Parties. For convenience and consistency, the terms "plaintiff" and "defendant" are used throughout to include not only persons who technically have that status (i.e., those who have brought suit or been sued) but also persons who *potentially* occupy one status or the other—one who has been harmed, or one who is arguably a tortfeasor. Also, plaintiffs and defendants are personalized by use of the pronouns which refer to natural persons (e.g., "he"), which should be read to include, where appropriate, legal entities such as corporations. And male and female nouns and pronouns are used throughout in a generic sense to include both men and women.

Where appropriate, the term "plaintiff" should be read to include one who was *fatally* injured. Technically, in such a case the proper term would be "plaintiff's decedent," since the plaintiff would be a living person or entity suing on behalf of the decedent's estate or beneficiaries. To conserve space, I use the term "plaintiff" generically to mean the immediate victim of the tortious conduct.

The terms "injury" or "harm" include fatal injuries unless the context requires otherwise.

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