

ASPEN COLLEGE SERIES

■ Neal R. Bevans

TORT LAW FOR PARALEGALS

FIFTH EDITION



Wolters Kluwer

Aspen College Series

Tort Law for Paralegals

Fifth Edition

Neal R. Bevans, J.D.

Western Piedmont Community College



Wolters Kluwer

Copyright © 2016 Neal R. Bevans.

Published by Wolters Kluwer in New York.

Wolters Kluwer serves customers worldwide with CCH, Aspen Publishers, and Kluwer Law International products. (www.wolterskluwerlb.com)

No part of this publication may be reproduced or transmitted in any form or by any means, electronic or mechanical, including photocopy, recording, or utilized by any information storage or retrieval system, without written permission from the publisher. For information about permissions or to request permissions online, visit us at www.wolterskluwerlb.com, or a written request may be faxed to our permissions department at 212-771-0803.

To contact Customer Service, e-mail customer.service@wolterskluwer.com, call 1-800-234-1660, fax 1-800-901-9075, or mail correspondence to:

Wolters Kluwer
Attn: Order Department
PO Box 990
Frederick, MD 21705

Printed in the United States of America.

1 2 3 4 5 6 7 8 9 0

ISBN 978-1-4548-5219-3

Library of Congress Cataloging-in-Publication Data

Bevans, Neal R., 1961- author.

Tort law for paralegals / Neal R. Bevans, J.D., Western Piedmont Community College. — Fifth edition.
pages cm

Includes index.

ISBN 978-1-4548-5219-3

1. Torts — United States. 2. Legal assistants — United States — Handbooks, manuals, etc. I. Title.

KF1250.Z9B48 2015
346.7303—dc23

2015010712



About Wolters Kluwer Law & Business

Wolters Kluwer Law & Business is a leading global provider of intelligent information and digital solutions for legal and business professionals in key specialty areas, and respected educational resources for professors and law students. Wolters Kluwer Law & Business connects legal and business professionals as well as those in the education market with timely, specialized authoritative content and information-enabled solutions to support success through productivity, accuracy and mobility.

Serving customers worldwide, Wolters Kluwer Law & Business products include those under the Aspen Publishers, CCH, Kluwer Law International, Loislaw, ftwilliam.com and MediRegs family of products.

CCH products have been a trusted resource since 1913, and are highly regarded resources for legal, securities, antitrust and trade regulation, government contracting, banking, pension, payroll, employment and labor, and healthcare reimbursement and compliance professionals.

Aspen Publishers products provide essential information to attorneys, business professionals and law students. Written by preeminent authorities, the product line offers analytical and practical information in a range of specialty practice areas from securities law and intellectual property to mergers and acquisitions and pension/benefits. Aspen's trusted legal education resources provide professors and students with high-quality, up-to-date and effective resources for successful instruction and study in all areas of the law.

Kluwer Law International products provide the global business community with reliable international legal information in English. Legal practitioners, corporate counsel and business executives around the world rely on Kluwer Law journals, looseleaves, books, and electronic products for comprehensive information in many areas of international legal practice.

Loislaw is a comprehensive online legal research product providing legal content to law firm practitioners of various specializations. Loislaw provides attorneys with the ability to quickly and efficiently find the necessary legal information they need, when and where they need it, by facilitating access to primary law as well as state-specific law, records, forms and treatises.

ftwilliam.com offers employee benefits professionals the highest quality plan documents (retirement, welfare and non-qualified) and government forms (5500/PBGC, 1099 and IRS) software at highly competitive prices.

MediRegs products provide integrated health care compliance content and software solutions for professionals in healthcare, higher education and life sciences, including professionals in accounting, law and consulting.

Wolters Kluwer Law & Business, a division of Wolters Kluwer, is headquartered in New York. Wolters Kluwer is a market-leading global information services company focused on professionals.

Preface

INTRODUCTION TO THE FIFTH EDITION

The fifth edition of *Tort Law for Paralegals* has undergone a major rewrite and revision. The author has worked hard to incorporate the most recent changes in tort law and to discuss the growing impact of technology in the day-to-day practice of law, examining the challenges (and benefits) that it provides practitioners. The text begins with a general discussion of civil law and then proceeds through the concepts of intentional torts and defenses, followed by an in-depth examination of negligence law. This examination spans several chapters and includes all elements of a negligence action, as well as defenses to negligence. From there, the author moves on to a discussion of product liability, business torts, and an explanation of the impact of insurance coverage on bringing and defending tort cases.

FEATURES

This fifth edition continues many of the features that have made previous editions so popular. The material attempts to balance theory with practice. It is designed to appeal to various learning styles. Many of the components give the text a solid, visual appeal while also delivering important information about the bases of tort law.

■ Chapter Objectives

Each chapter begins with clearly stated learning objectives to guide readers in their studies.

■ Tort Basics at a Glance

Scattered throughout each chapter are small synopses of the basics of tort law. Students can see a brief summary of the topic and the critical points to be gleaned from the material.

■ Definitions

As each new term is introduced, it is also defined for the student. These contemporaneous definitions help to reinforce the concept under discussion and provide an additional frame of reference for the legal term.

■ **Figures, Tables, and Diagrams**

Each chapter has been extensively updated with new figures, tables, and diagrams to assist students in understanding concepts by presenting them in a visual format.

■ **Practical Advice**

The text also provides examples and advice about topics as varied as drafting a complaint to billing for time.

■ **Case Excerpts**

Almost every chapter in the text has been updated with new cases that reflect the most up-to-date changes in tort law.

■ **Litigation Facts**

The text also contains checklists, figures, and tables that allow students to bring the theoretical discussions into a more practical realm by showing how attorneys and paralegals prepare for a wide variety of tort cases.

■ **Skills You Need in the Real World**

This feature helps create a balance between theoretical legal discussions and down-to-earth practicality by showing the reader how various activities in the real world are carried out. Whether investigating a claim, billing an account, or preparing legal documents, this section—which comes at the end of each chapter—helps emphasize the day-to-day activities carried out by paralegals who work in tort law.

■ **Life of a Paralegal**

Each chapter also contains a profile of a real-life working paralegal. The reader can hear in the paralegal's own words what it is like to work at a private firm or to investigate a claim or to meet with clients, among many other topics discussed by these paralegals. This section also contains practical advice for readers seriously considering a career as a paralegal.

■ **Ethics Issues for the Paralegal**

Ethics is a critical concern for attorneys and paralegals, and ethical scenarios and rules are presented throughout the text to help emphasize this point. At the end of each chapter, the author discusses a particular ethical issue in great detail. Examples include how the attorney-client relationship is established to avoid legal malpractice claims.

■ **Tech Topic**

The text also contains a new feature: Tech Topic, which updates the discussions to examine technological innovations and how they impact the practice of law.

■ Chapter Summary

At the conclusion of each chapter, a summary presents a condensed overview of the material covered in the chapter, helping the reader focus on the key points raised.

■ Websites

The fifth edition of this book has even more broadly expanded its consideration of the Internet and its impact on the day-to-day practice of law. Each chapter contains websites that direct the reader to online resources for more extensive and targeted reading on a particular topic. The chapters have been revised to discuss the impact of the Internet on all areas of tort law.

■ Forms and Court Documents

Among the many items in the end-of-chapter materials are excerpts from actual court documents. These contain examples of pleadings that range from complaints and answers to interrogatories and motions. This section allows the reader to see how the various legal topics discussed in the chapter are actually put into place by attorneys and paralegals as they pursue (or defend) a civil tort case.

■ Key Terms

Each of the key terms discussed in the body of the chapter are excerpted and provided to the reader again at the conclusion of the chapter. This allows students to ensure that they have mastered the important concepts discussed throughout the text.

■ Review Questions

Extensive review questions test the student's understanding of concepts raised in the chapters and also serve as a way to stimulate in class discussion of various tort law concepts.

■ Applying What You Have Learned

In the author's continuing effort to balance theory and practice, this section allows students to apply the chapter's theoretical concepts to specific, real-world problems and to arrive at solutions for these problems.

■ Non-Gender-Specific Language

In recognition of the impact of gender-specific language, the author has adopted the following convention in the text: even-numbered chapters use "he" in general discussions and examples, while odd-numbered chapters use "she" for the same purpose.

Summary of Contents

<i>Contents</i>		<i>xi</i>
<i>Preface</i>		<i>xxxiii</i>
Chapter 1	An Introduction to Tort Law	1
Chapter 2	Intentional Torts	39
Chapter 3	Defenses to Intentional Torts	73
Chapter 4	Introduction to Negligence	107
Chapter 5	Duty	143
Chapter 6	Breach of Duty Under Negligence Law	181
Chapter 7	Proximate Cause	219
Chapter 8	Damages	267
Chapter 9	Defenses to Negligence	303
Chapter 10	Strict Liability and Products Liability	349
Chapter 11	Defamation	391
Chapter 12	Malpractice	435
Chapter 13	Insurance	477
Chapter 14	Fraud, Misrepresentation, and Business Torts	517
<i>Appendices</i>		<i>557</i>
<i>Glossary</i>		<i>585</i>
<i>Index</i>		<i>589</i>

Contents

PREFACE

xxxiii

CHAPTER 1: AN INTRODUCTION TO TORT LAW	1
I. INTRODUCTION TO A TORTS CASE	1
A. "Can I Sue?"	2
B. Torts Are Legal Wrongs	3
C. Cause of Action	3
D. The Basis of a Lawsuit Is a Cause of Action	5
II. TORT LAW COMPARED TO OTHER FORMS OF LAW	5
A. Who Brings the Case?	5
B. The Pleadings	6
C. Civil and Criminal Cases Operate Independently of One Another	7
D. Proof in a Civil Case Is Preponderance of Evidence	7
E. Terms Are Different	8
III. TORT LAW COMPARED TO OTHER AREAS OF LAW	8
IV. A SHORT HISTORY OF TORT LAW	9
A. An Eye for an Eye	9
B. Money for an Eye	9
C. The Development of Tort Law in the United States	10
V. BRINGING A TORT CASE	10
A. Investigating the Cause of Action: Rule 11	11
B. Litigation Chart	12

C. Sources of Proof	13
D. Filing a Complaint	14
VI. DISCOVERY IN CIVIL CASES	14
A. Interrogatories	14
B. Depositions	15
C. Request for Production of Documents	15
D. Request to Admit Facts	15
E. Request for Physical and/or Mental Examination of a Party	15
VII. THE TRIAL OF A CIVIL CASE	16
A. Jury Selection	16
B. Opening Statement	17
C. Presentation of the Plaintiff's Case	17
D. Motion for Directed Verdict	18
E. The Defense Case	18
F. Closing Argument	19
G. The Jury Charge	19
H. The Verdict	19
VIII. ALTERNATIVE DISPUTE RESOLUTION	20
A. What Is Alternative Dispute Resolution?	20
B. Arbitration Versus Mediation	20
IX. APPEALS	21
A. The Importance of Case Law	21
1. <i>How Is Case Law Created?</i>	22
B. Stare Decisis	22
C. An Example of Case Law	24
<i>Vallejo v. Ebert</i>	24
Chapter Summary	25
Skills You Need in the Real World	26
The Life of a Paralegal	27
Ethical Issues for the Paralegal: An Introduction	27
Relevant Cases	28
Websites	33
Forms and Court Documents	34
Key Terms	36
Review Questions	36
Applying What You Have Learned	36

CHAPTER 2: INTENTIONAL TORTS	39
I. THE CHUMLEY CASE	39
II. THE PROBLEM WITH INTENTIONAL TORTS	40
III. ASSAULT AND BATTERY	41
A. The Elements of Assault	41
1. <i>The Defendant's Actions Are Intentional</i>	42
2. <i>Fear or Apprehension</i>	42
3. <i>Harmful or Offensive Contact</i>	43
B. The Elements of Battery	43
1. <i>Defendant Acted Intentionally</i>	43
2. <i>What Do We Mean by "Contact"?</i>	44
a. <i>Making Contact with Weapons or Other Objects</i>	44
b. <i>The Connection Between the Defendant's Actions and Ultimate Harm</i>	44
3. <i>Harmful or Offensive Contact</i>	46
4. <i>The Reasonable Person Standard</i>	46
IV. FALSE IMPRISONMENT	47
A. The Elements of False Imprisonment	47
1. <i>Restraint Must Be Intentional</i>	47
2. <i>Restraint Must Be Unlawful</i>	48
3. <i>By the Use of Force or Threats</i>	48
4. <i>Holding Personal Property Hostage</i>	49
B. Defenses to False Imprisonment	49
1. <i>Consent</i>	49
<i>Thompson-El v. Bank of America</i>	49
V. ALIENATION OF AFFECTIONS	52
VI. INTENTIONAL INFLICTION OF EMOTIONAL DISTRESS	52
A. Elements of Infliction of Emotional Distress	52
1. <i>Intentional or Reckless Conduct</i>	53
2. <i>Bystander Emotional Distress</i>	53
3. <i>Causation</i>	53

B. Emotional Distress: What Is It?	53
1. <i>The Defendant's Actions Were Outrageous</i>	54
VII. MALICIOUS PROSECUTION	55
A. The Elements of Malicious Prosecution	55
1. <i>Defendant Brings or Continues a Criminal Charge Against the Plaintiff</i>	55
2. <i>The Case Terminates in the Plaintiff's Favor</i>	55
3. <i>The Defendant Acted with Malice in Bringing the Charge</i>	56
4. <i>There Was No Probable Cause for the Charge</i>	56
VIII. TORT IMMUNITY FOR FAMILIES	56
IX. INTENTIONAL TORTS INVOLVING PROPERTY: TRESPASS	57
A. Intent	57
1. <i>Unprivileged</i>	57
B. Entry onto the Plaintiff's Real Property	58
1. <i>Proving "Entry"</i>	58
C. Without Permission	58
X. NUISANCE ACTIONS	59
A. Public Nuisance Versus Private Nuisance	59
1. <i>Private Nuisance</i>	59
2. <i>Damages and Injunctions</i>	60
B. New Lawsuits Under Environmental Theories	60
XI. TORTS TO PERSONAL PROPERTY: TRESPASS TO CHATTELS	60
Chapter Summary	61
Skills You Need in the Real World	62
The Life of a Paralegal	64
Ethical Issues for the Paralegal: Statutes of Limitation	64
Relevant Cases	64
Websites	68
Forms and Court Documents	68
Key Terms	70
Review Questions	70
Applying What You Have Learned	70

CHAPTER 3: DEFENSES TO INTENTIONAL TORTS	73
I. WHAT IS A DEFENSE?	73
II. SELF-DEFENSE	74
A. The Response Must Be Equal to the Threat	74
B. Limitations on Self-Defense	75
1. <i>No Self-Defense for Aggressors</i>	75
<i>a. Self-Defense Claim if Aggressor Voluntarily Stopped Fighting</i>	75
<i>2. No Self-Defense for Martial Artists</i>	75
C. Claiming Self-Defense When Defending Others	76
D. Other Limitations on Self-Defense: No Deadly Force to Protect Property	76
E. Mutual Combat	77
III. CONSENT	77
IV. DURESS, NECESSITY, COMPULSION, AND COERCION	78
A. Duress	78
B. Coercion	78
C. Necessity	78
D. Compulsion	79
V. INTOXICATION	79
A. Voluntary Intoxication	79
B. Involuntary Intoxication	80
VI. MISTAKE	80
VII. AGE	80
VIII. INSANITY	81
A. The Insanity Defense	81
IX. IMMUNITY	82
X. PRIVILEGE	83
<i>Carter v. Scott</i>	84

XI. STATUTES OF LIMITATION	87
XII. DEFENSES AVAILABLE TO CODEFENDANTS	87
A. Joint and Several Liability	88
B. Vicarious Liability	89
1. <i>Employer/Employee Liability</i> (Respondeat Superior)	90
a. <i>Limitations on Respondeat Superior</i>	90
2. <i>Family Purpose Doctrine</i>	92
3. <i>Joint Enterprise</i>	92
Chapter Summary	93
Skills You Need in the Real World	93
The Life of a Paralegal	94
Ethical Issues for the Paralegal: Avoiding a Claim of Unauthorized Practice of Law	95
Relevant Cases	95
Websites	102
Forms and Court Documents	102
Key Terms	103
Review Questions	104
Applying What You Have Learned	104

CHAPTER 4: INTRODUCTION TO NEGLIGENCE	107
--	------------

I. NEGLIGENCE: WHAT MAKES IT DIFFERENT?	107
II. THE HISTORY OF NEGLIGENCE	108
III. THE CHUMLEY CASE	108
IV. THE FOUR ELEMENTS OF NEGLIGENCE	109
A. Duty	109
B. Breach	111
C. Causation	112
D. Damages	112
<i>TransCare Maryland, Inc. v. Murray</i>	113
V. THE LAWYERS WHO REPRESENT PLAINTIFFS AND DEFENDANTS	117
A. Becoming a Lawyer	117
B. The Economics of Law Firms	117

C. Plaintiffs' Firms	118
D. Defense Firms	119
E. Contracting with a Law Firm	119
F. Contract in the Chumley Case	119
 VI. OBTAINING INFORMATION FROM THE CLIENT	 123
A. Authorizations from the Client	123
B. Other Information from the Client: Facts and Photos	123
Chapter Summary	126
Skills You Need in the Real World	128
The Life of a Paralegal	129
Ethical Issues for the Paralegal: Initial Client Meeting	130
Relevant Cases	131
Websites	136
Forms and Court Documents	136
Key Terms	139
Review Questions	139
Applying What You Have Learned	139

CHAPTER 5: DUTY **143**

I. THE CHUMLEY CASE: A DANGEROUS INTERSECTION?	143
 II. THE LEGAL DEFINITION OF DUTY	 144
A. When Does a Duty Arise?	145
B. Using Formulas to Determine Duty	145
C. Duty Does Not Depend on Victim's Identity	146
D. Duty as a Legal Obligation	146
E. Duty Does Not Arise from Habit or Custom	147
F. Duty Arising from Professional Status	148
1. <i>Different Levels of Duty for Some Professionals</i>	148
2. <i>What Is the Standard of Care for a Professional?</i>	148
3. <i>Specialists</i>	149
G. Duty Arising Out of Other Factors	149

III. HOW THE COURTS DETERMINE DUTY	150
A. Relationship Can Determine Duty	151
B. Special Relationships	151
IV. DUTY FROM A SOCIAL RELATIONSHIP	152
A. Are Friends a Special Relationship?	152
B. Social Host Liability	153
V. PREMISES LIABILITY	154
A. Duty Is on Possessor, Not Owner	154
B. Classifying Visitors	155
C. Classifying Visitors: Trespassers	156
1. <i>Exceptions to the General Rule of No Duty to Trespassers</i>	156
a. <i>The Attractive Nuisance Doctrine</i>	157
b. <i>Rescue Doctrine</i>	158
D. Classifying Visitors: Licensees	158
E. Classifying Visitors: Invitees	158
1. <i>“Economic Benefit” Test</i>	159
2. <i>Abnormally Dangerous or Ultra-hazardous Conditions</i>	159
F. Abolishing the Categories (and Distinctions) Between Invitees and Licensees	160
G. Guest Statutes	160
1. <i>Automobile Guest Statutes</i>	160
VI. DUTY TO THIRD PARTIES	161
A. Foreseeability of Injury to Third Party	163
<i>Tarasoff v. Regents of University of California</i>	163
B. Can a Defendant Waive His Duty?	167
Chapter Summary	167
Skills You Need in the Real World	168
The Life of a Paralegal	169
Ethical Issues for the Paralegal: Keeping Up with Developments in the Law	169
Relevant Cases	170
Websites	176
Forms and Court Documents	177
Key Terms	178
Review Questions	178
Applying What You Have Learned	178

CHAPTER 6: BREACH OF DUTY UNDER NEGLIGENCE LAW	181
I. INTRODUCTION	181
II. WHO BREACHED A DUTY IN THE CHUMLEY CASE?	182
III. BREACH OF DUTY	183
A. The Objective Standard	184
B. The Jury Determines the Standard of Care	186
C. Physical Characteristics	186
D. Emergencies	187
E. Custom or Tradition to Establish Breach of Duty?	187
IV. PROFESSIONALS HAVE A HIGHER STANDARD OF CARE	188
V. COURT DOCTRINES THAT HELP TO DETERMINE BREACH OF DUTY	188
A. <i>Res Ipsa Loquitur</i>	189
1. <i>The Commonsense Element of Res Ipsa Loquitur</i>	190
2. <i>Defenses to a Res Ipsa Claim</i>	190
3. <i>Pleading Res Ipsa Loquitur: What the Complaint Should Allege</i>	191
B. Negligence Per Se	191
1. <i>What the Complaint Should Say About Negligence Per Se</i>	193
<i>Young-Gibson v. Patel</i>	195
VI. EXPERT EVIDENCE AND BREACH OF DUTY	199
Chapter Summary	200
Skills You Need in the Real World	200
The Life of a Paralegal	203
Ethical Issues for the Paralegal: Confidentiality	203
Relevant Cases	204
Websites	214
Forms and Court Doctrines	214
Key Terms	215
Review Questions	215
Applying What You Have Learned	216