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TORT LAW
Responsibilities and Redress

Fourth Edition

Wolters Kluwer

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FOURTH EDITION

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TORT LAW

Editorial Advisors

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To Julie
—J.C.P.G.

For Max
—A.J.S.

To Antonia
—B.C.Z.

Preface to the Fourth Edition

This edition includes extensive updating in text and notes, along with modest changes in principal case selection. Chapter 4 features new decisions that range from straightforward slip-and-fall cases to complex toxic tort cases. Our hope is that they more clearly convey the doctrinal and evidentiary issues associated with the causation component of negligence. We have also continued to follow the ongoing battle in products liability law between the risk-utility and consumer expectation tests. Toward that end, design defect decisions from 2013 and 2015 have been added to Chapter 12. As always, retired cases from prior editions are available, with accompanying notes, at http://www.aspenlawschool.com/books/goldberg_tortlaw.

Perhaps the most significant changes for the Fourth Edition concern format and pedagogy. In addition to a new, user-friendly design, the book is now sprinkled with sidebars and illustrations designed to enhance comprehension, review, and self-assessment. This edition is also the first to use Wolters Kluwer's Connected Casebook technology. (www.casebookconnect.com) Students who opt for a Connected Casebook will have instant online access to a trove of multiple-choice and essay questions that we have matched to each chapter of the book.

In addition to reiterating our thanks to those acknowledged in prior editions, we would like to express our gratitude to Nicole Pinard at Wolters Kluwer for overseeing this round of revisions, as well as to Andrew Blevins, Geoff Lokke, and Cindy Uh at the Froebe Group for their help in redesigning the book. Ming Cheung, Naomi Gilens, Anna Kurtz, Alex Moses, Colin Reeves, and Michael Rivkin provided excellent research assistance and editorial suggestions. Our work on the Fourth Edition has been generously supported by the Benjamin C. Cardozo School of Law, Fordham University School of Law, and Harvard Law School.

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Cambridge, MA; New York, NY
January 2016

Preface to the Third Edition

The positive feedback on the Second Edition of *Tort Law*—for which we are most grateful—leaves us mindful of the counsel against fixing things not broken. While we have comprehensively updated the book to reflect important developments since 2008, we have mostly done so in text and notes rather than by replacing principal cases. The few cases that have been removed are available at http://www.aspenlawschool.com/books/goldberg_tortlaw/ with accompanying notes.

While none of the chapters have undergone major surgery, Chapters 9, 12 and 13 contain the most significant revisions. For Chapter 9, we have reorganized and trimmed the materials to make them especially user-friendly for professors who commence their courses with intentional torts. Chapter 12 now more clearly charts the "post-402A" world of products liability that was heralded by the 1998 publication of the Third Restatement's Products Liability provisions and has been marked by the rise to prominence of the risk-utility test for design defect. Chapter 13 updates the treatment of the fast-moving topic of federal preemption of state tort law, and also offers new materials on human rights litigation and the Alien Tort Statute.

The cataclysmic Deepwater Horizon Spill transfixed the nation and the world in the summer of 2010. Its consequences for human health, for the Gulf states' economies, and for the environment are still not fully understood, and may not be for some time. In the meantime, the spill has given lawyers, courts and academics occasion to reconsider the scope and justifications (if any) for the rule against liability for negligence causing economic loss. It has also raised important questions about the interaction between conventional tort litigation and dispute-resolution through entities such as the Gulf Coast Claims Facility. We briefly discuss the spill in a new set of notes in Chapter 2.

The U.S. Supreme Court has continued to maintain an active presence in tort law. Many of the Justices continue to demonstrate receptivity to defendants' preemption arguments. Thus the reprieve for failure-to-warn claims against manufacturers of brand-name drugs provided by *Wyeth v. Levine* (2009) was quickly overshadowed by the elimination of failure-to-warn liability for generic drugs in *Pliva v. Mensing* (2011). Both decisions are reproduced in Chapter 13. Likewise, the Court read the federal Vaccine Act to preempt design defect claims against vaccine manufacturers. (*Bruesewitz v. Wyeth* (2011)). Meanwhile, the Court has influenced tort law in subtler ways that include reading into federal admiralty law a 1:1 cap on the ratio of punitive to compensatory damages (*Exxon Shipping Co. v. Baker* (2008)) and interpreting FELA to operate with a capacious conception of proximate cause (*CSX Transportation v. McBride* (2011)). Each of these developments is discussed in new notes. Finally, in anticipation of the Court taking on a more active role in shaping litigation under the Alien Tort Statute, we have

included in Chapter 13 its decision in *Sosa v. Alvarez-Machain* (2004), as well as additional materials pertaining to the debate over that now-controversial federal law.

At the level of common law doctrine, the most important development since 2008 has probably been the publication of the "Physical and Emotional Harm" provisions of the Third Restatement of Torts, which now stand alongside the "Apportionment" and "Products Liability" provisions that were published, respectively, in 2000 and 1998. The Physical and Emotional Harm provisions restate basic negligence law, as well as rules for affirmative duties, premises liability, and infliction of emotional distress (intentional and negligent). They also cover strict liability for abnormally dangerous activities. Other topics — including liability for economic loss, medical malpractice, intentional torts, and property torts — await treatment. (The ALI is currently circulating draft materials on economic loss.) There is much to like in the new Restatement provisions, but also much with which to take issue. We address them in notes throughout the book.

Once again we want to take this opportunity to thank the many professors and students who have generously offered thoughtful advice on how to improve the book. Jonathan Bruno provided indispensable assistance in developing the PowerPoint slides available for use with this edition. http://www.aspenlawschool.com/books/goldberg_tortlaw/ John Devins and Gretchen Otto carefully steered us through the revision process. We remain deeply appreciative of the enthusiastic support that *Tort Law* continues to receive from Mike Gregory, Carol McGeehan, Rick Mixter, George Serafin, and their Wolters Kluwer colleagues. Our work on the Third Edition has been generously supported by the Benjamin N. Cardozo School of Law, Fordham University School of Law, and Harvard Law School.

John C. P. Goldberg
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Cambridge, MA; New York, NY
June 2012

Preface to the Second Edition

Much has happened in the world of torts since this book was first published early in 2004. In keeping with the general trend since about 1980, a lot of the action has involved efforts to limit the reach of tort law. Several state legislatures, including those of Georgia, Mississippi, Oklahoma, South Carolina, and West Virginia, joined the now sizable majority that have limited or eliminated joint and several liability for indivisible injuries. Congress failed to pass the mammoth Fairness in Asbestos Injury Resolution (FAIR) Act of 2006, but continued its practice of sporadically intervening to protect certain industries, including gun manufacturers via the 2005 "Protection of Lawful Commerce in Arms Act." Comparable efforts to block "obesity suits" against purveyors of fast food failed in the Senate, although some state legislatures have adopted such laws. The national legislature's efforts to stave off personal injury litigation arising out of 9/11 by capping liability and creating a victim compensation fund appear to have been largely successful. To be sure, the scheme of payouts ultimately devised by special master Kenneth Feinberg has generated considerable commentary and criticism. Still, 97 percent of those eligible for relief from the fund applied for compensation. Suits brought by those who did not apply are about to go to trial. For its part — as mentioned in the notes following Geier (Chapter 13) — the Roberts Court is about to resolve several potentially important suits concerning the extent to which federal statutes and regulations preempt state tort law. Philip Morris USA v. Williams, 127 S. Ct. 1057 (2007) (excerpted in Chapter 13) continued the Court's recent practice of articulating somewhat cryptic due process limits on punitive damage awards. Although talk of a medical malpractice "crisis" seems to be subsiding, activists and scholars are now busily arguing over whether malpractice insurance rates have responded to cyclical market forces or instead to pro-defendant tort reforms.

Yet the story of tort law in the past few years has not been completely one-sided. Large-scale products liability litigation continues. Most notably, thousands of products liability suits were filed alleging that the pain reliever Vioxx caused patients to suffer heart failure and strokes. A tentative settlement involving payouts of nearly $5 billion was recently announced. The settlement is significant as much for its form as its substance: It consists not of agreements between the defendant and individual Vioxx claimants but rather of a contract between the defendant and the key plaintiffs' law firms involved, whereby the latter promise to recommend the settlement to each of their clients. Among the numerous suits against insurers for losses related to the destruction wrought by Hurricane Katrina are many tort claims for bad faith denials of coverage. Claims against churches and other institutions for turning a blind eye to sexual abuse by employees have generated millions of dollars of liability. In less visible ways, state courts have expanded the scope of tort liability, often in the context of holding "background" or "remote"

actors liable for injuries caused most immediately by another wrongdoer. Coombes v. Florio, 450 Mass. 182 (2007), a just-issued decision, holds that a treating physician who fails to warn his patient that prescribed medication can cause drowsiness is subject to liability for the death of a bystander who was killed when the driver fell asleep at the wheel. Meanwhile, in Ferdon v. Wisconsin Patients Compensation Fund, 701 N.W.2d 440 (2005), the Wisconsin Supreme Court, joining several other state high courts, went so far as to strike down on state constitutional grounds a medical malpractice reform statute that included caps on noneconomic damages. In Sosa v. Alvarez-Machain, 542 U.S. 692 (2004), decided just after the first edition of this book was published, the Supreme Court perhaps unexpectedly declined an invitation simply to cut off litigation under the Alien Tort Claims Act, instead recognizing the validity in principle of some suits by foreign nationals seeking to hold actors accountable for gross human rights violations. And, after years of dormancy, market share liability met with the approval of courts in Wisconsin and California, and the Southern District of New York.

Our aim in revising the book for this edition has been to introduce incremental rather than sweeping changes. The book's basic structure remains intact, although in various places we have replaced or added new cases and notes to reflect developments of the sort described above, as well the immensely valuable feedback we have received from users of the book. Chapter 9, which covers battery, assault, and false imprisonment, contains the most significant changes, which have been introduced so that the chapter provides better support to professors who begin their classes with intentional torts. Although our judgment is that the changes we have introduced throughout the book constitute improvements, we recognize that some may prefer things the way they were. For this reason, we have made available on the book's website electronic files containing all the main cases that were removed from the First Edition: www.aspenlawschool.com/goldberg2. A table summarizing the major changes between the two editions can be found at the front of the Teacher's Manual for this edition.

We wish first to thank the many law professors and students who generously offered thoughtful advice on how to improve the book. Thanks are also due (again) to Mike Gregory, Carol McGeehan, Rick Mixter, George Serafin, and the other members of the Aspen team for their unflagging support of this project and its authors, as well as Barbara Roth and Troy Froebe for carefully steering us through the revision process. Steven Berneman provided valuable research assistance. Our work on the book has been generously supported by Brooklyn Law School, Benjamin N. Cardozo School of Law, Fordham University School of Law, Harvard Law School, and Vanderbilt Law School.

John C. P. Goldberg
Anthony J. Sebok
Benjamin C. Zipursky

Nashville, New York
February 2008

Preface to the First Edition

This book has been written to help a new generation of law students learn an area of law — Torts — that is at once ancient and contemporary, rule-governed and flexible, well-established and controversial.

American tort law traces back to the law of medieval England, a time and place in which government efforts to secure citizens' security from injury were relatively modest. Today, tort law — itself a complex institution — exists within a vastly more complex regulatory state that devotes substantial effort to promoting safety and to providing for citizens' welfare. We hope to give students a sense of where tort law has come from, and of the roles it plays, and might play, in our modern system of government.

As an evolving body of doctrine shaped in courtrooms around the country, tort law simultaneously empowers and limits individuals in their ability to invoke the legal system, and likewise empowers and limits legal decision-makers such as judges and juries faced with the task of deciding whether to hold one person liable for another's injuries. We aim to help students appreciate both the constraining and the power-conferring aspects of tort law.

Tort has been a part of American law since the nation's founding. Today, however, it is at a crossroads: Lawyers, politicians, and academics disagree sharply about its continued utility and viability. We seek to enable students to see why tort law is basic to our legal system, but also why it has become a source of controversy.

In pursuing these pedagogic goals, we have been guided by five themes:

1. As its title suggests, this book is organized around the general theme of responsibilities and redress. Tort law, in our view, has two fundamental features. First, it articulates and imposes on members of society a set of legal obligations — i.e., responsibilities — to avoid injuring others. Second, it empowers persons to bring suit to establish that they have been injured by another's failure to heed this sort of obligation — i.e., to pursue and obtain redress. Tort is a core part of the first-year curriculum for these reasons: It examines the law's imposition of basic obligations not to injure others, as well as the law's recognition of the right of aggrieved persons to seek redress through the courts for violations of those obligations.

2. We have edited the cases in this book lightly, in a conscious effort to allow readers to experience the "thick" contexts out of which tort law emerges. Put simply, we aim to allow students to read the facts of each case for themselves. We also try to let the judges speak for themselves through their opinions. Our hope is that this approach will help beginning law students appreciate the degree to which judgments about legal responsibilities are sensitive to facts, and to see that common-law principles are not extracted from some "heaven of legal concepts," but instead derive from ordinary

experience. Further, we hope that, by presenting cases edited in this way, we will aid students in developing the capacity to read carefully, an essential tool for good lawyering.

3. The cases and the notes in this book aim to demonstrate to students how the substance of a body of law like torts is heavily influenced by rules of procedure, by the institutions that have been created to handle tort litigation, and by other bodies of law that address some of the same conduct and issues addressed by tort law. Thus, throughout the book, we point out ways in which the demands of trial and appellate processes shape tort doctrine. In various places, we also explore the role played by legislatures in developing, or responding to developments in, tort doctrine. Another of the book's aspirations is to ensure that students appreciate that tort is but one part of the law, and that it can only be adequately understood in relation to other areas of law, including civil procedure, contracts, property, employment law, anti-discrimination law, and constitutional law.

4. Apart from retaining "classic" tort opinions that all law students are expected to know, we have sought as much as possible to use contemporary cases presenting situations that students will be able to recognize. We hope that, by employing these sorts of cases to illuminate the basic concepts of tort law, we will make the subject less archaic and mysterious to novice lawyers, while also helping them to begin to think for themselves about the various choices that courts and lawmakers must make as they carry tort law forward into the future. We also believe that the use of relatively recent cases will help students perceive the relevance of the subject and the significance of the issues that are currently in play in the law of tort.

5. This book adopts a perspective on law that we hope is refreshing. It is, of course, vital that first-year law students come to appreciate that "the law" is not a rule book—that there is play in its joints and deep tensions in its soul. Yet it is equally important that students not be left with the skeptical lesson that law is nothing more than what a particular judge or jury says it is. Thus, in these materials, we strive to help students grasp how the key concepts of tort—concepts such as "reasonable care," "causation," and "intent"—structure and organize legal analysis even as they point it in new directions. A good lawyer, we hope to demonstrate, is one who appreciates both the limits and the flexibility of tort doctrine; one who has a sense of how to make innovative and progressive arguments from within the law. For these reasons, our book has a number of distinctive features. Particularly in its early chapters, it contains a good deal of expository text, in part to help students overcome the steep learning curve encountered in the first weeks of law school. It also contains a number of opinions from intermediate appellate courts, in part because these courts tend to approach cases as presenting problems in the application of law, rather than occasions to rework it. The book also includes some "easy" cases. These opinions can help students avoid basic confusions by providing clear examples of certain torts, or certain concepts. Lastly, the notes following the principal cases strive to be explanatory rather than Delphic. If our own engagement with this subject has taught us anything, it is that tort law, even when presented in a relatively straightforward way, is more than rich enough to captivate students and professors alike.

John C. P. Goldberg
Anthony J. Sebok
Benjamin C. Zipursky

Nashville, Brooklyn, Manhattan
April 2004

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