In Defense of Tort Law

Thomas H. Koenig and Michael L. Rustad

NEW YORK UNIVERSITY PRESS
New York and London

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Library of Congress Cataloging-in-Publication Data
Koenig, Thomas H.
In defense of tort law / Thomas H. Koenig and Michael L. Rustad.
p. cm.
Includes index.
ISBN 0-8147-4757-4 (cloth : alk. paper)
1. Torts—United States. I. Rustad, Michael. II. Title.
KF1250 .K57 2001
346.7303—dc21 2001002494

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10 9 8 7 6 5 4 3 2 1

This book is dedicated to the memory of
Thomas F. Lambert Jr.

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Acknowledgments

Many people contributed their time and talents to this manuscript, and we greatly appreciate their help. We would particularly like to thank Adele Barnaby, who provided us with excellent secretarial support through many drafts. Adele took an active interest in the contents of the manuscript and made many valuable suggestions. We would like to thank Don Feeney for suggesting the title. We would also like to thank Sarah Swan, who provided secretarial support during the final drafts. Our students at Northeastern University and Suffolk University Law School have been a great resource to draw upon. Many of them read and commented on earlier versions of the manuscript. Brian Flaherty, Elizabeth McKenzie, and Susan Sweetgall provided excellent research librarian support.

Many persons have contributed to the ideas in this book, most of all Tom Lambert. Elizabeth Lambert made useful suggestions for the book proposal. Edward Bander gave us important guidance on the organization of the book and prepared the index. Jim Johnson, attorney and *Legal Times* contributor, provided many useful suggestions. Russell Mohbiker, Jerry Phillips, and Joanne Doroshow also shared their insights with us.

Our research assistants at Suffolk University Law School were especially helpful: Stephen Brown, Chaz Landry, Anne-Maria Paone, Tanisha Roebuck, Punam Sharma, and Gina Takemori. Theresa Mursick-Meyer, Esq., provided valuable editorial assistance. Peter Stecher, Class of 2004, Suffolk University Law School, gave us editorial suggestions for several chapters. Ronald Kaplan helped solve computer problems.

Thomas Koenig would like to thank Maureen Norton-Hawk for her continuing support during this long project. Michael Rustad would like to thank his wife, Chryss Knowles, for her editorial work on this

In Defense of Tort Law

Preface

In Defense of Tort Law

Tort law is the chief guardian of the institutions, which are central to our civilization; it protects bodily integrity; the right to enjoy property and do business and such basic liberties as freedom of speech, reputation, and family relations . . . Tort law has been progressive and dynamic.—Thomas F. Lambert, Jr.

Introduction: Tort Rights Under Siege

William L. Prosser, in his classic treatise, observed that, "perhaps more than any other branch of the law, the law of torts is a battleground of social theory."[1] Torts is the branch of law that provides compensation for injuries to persons and property caused by the fault of another. Tort law has always been contested legal terrain because of fundamental disagreements over who should bear the financial burden for an injury and what wrongs should be compensable. Tort law inevitably involves balancing individual and social interests. Today, many tort remedies are under siege, including those for consumers injured by defective products or reckless HMO cost containment, as well as victims of sexual harassment, dangerous railroad crossings, hate crimes, drunk drivers, environmental injuries, Internet fraud, and other civil wrongs.[2] This struggle mirrors deep cultural and political divisions in contemporary American society.

Prosser describes torts as "a body of law which is directed toward the compensation of individuals rather than the public for losses which they have suffered."[3] This view is a narrower one than ours. We believe that there are both *manifest* and *latent* functions in American tort law.[4] The most important manifest function of torts is to restore plaintiffs to the position they were in prior to the injury by awarding monetary damages.

In the case of wrongful death, the estate receives the damages. In the absence of tort law, the injury or property loss would fall to the victim, his or her family members, or the taxpayers.

The latent function—the hidden face—of tort law is its public role of addressing corporate misconduct without requiring a rigid government bureaucracy. Private tort litigants serve the public interest by uncovering dangerous products and practices.[5] This public law purpose of torts is rarely recognized in law school classes, court decisions, or by the litigants. Professional responsibility courses emphasize the duty of the lawyer to zealously advance the interests of the client. However, the trial attorney also serves a less visible public policy function by uncovering and punishing corporate malfeasance. Thus, tort law not only performs the manifest function of alleviating "the plight of the injured," but it also fulfills the latent function of furthering "the cause of social justice."[6] "Punitive damages . . . are awarded to the injured party as a reward for his public service in bringing the wrongdoer to account."[7]

This latent function has sometimes been referred to as the role of the "private attorney general."[8] Trial lawyers, acting as private attorneys general, have uncovered numerous "smoking gun" documents unmasking corporate culpability. An industry-wide cover-up of the deadly consequences of unprotected exposure to asbestos dust, which destroyed the health of hundreds of thousands of American workers, was unmasked in asbestos products liability cases. Johns-Manville Corporation, for example, had definite knowledge as early as the 1930s of the dangers of exposure to asbestos dust but had a corporate policy of not informing employees that x-rays taken by company doctors revealed clear evidence of asbestosis.[9] Johns-Manville executives claimed that this policy was motivated by concern for employees, so that they could "live and work in peace and the company benefit by their many years of experience."[10] The asbestos industry lulled government regulators into complacency for decades with false assurances that their products posed no health hazard.[11]

Private attorneys general have been particularly effective in protecting the health and safety of women. Dangerously defective products that have been taken off the market or modified after tort litigation include the Dalkon Shield and Copper-7 intrauterine devices associated with reproductive injuries, high-absorbency tampons linked to toxic shock syndrome, oral contraceptives that caused kidney failures, and silicone-gel breast implants with a high rupture rate.

In the field of medical malpractice, torts have provided female patients with remedies for mismanaged childbirth, sexual exploitation by medical personnel, botched cosmetic surgeries, and the failure of providers to obtain informed consent.[12] All Americans are safer as the result of private attorneys general whose medical malpractice lawsuits led to liability-limiting policies such as post-surgery sponge and instrument counts, greater screening of affiliating physicians, and improved protocols for emergency room treatment. Elderly and disabled residents of nursing homes have benefited from the contingency fee system, which allows them to have the means to obtain legal representation to redress neglect and substandard treatment by profit-seeking corporations.[13]

The film *Erin Brockovich*, starring Julia Roberts, depicts the true story of a young woman who helped to launch a toxic torts lawsuit that ultimately resulted in a $333 million class action settlement against a California utility for polluting the local water supply.[14] Legal crusaders like Erin Brockovich protect the public by uncovering corporate conduct that threatens the community. In the real life case that inspired the film, Erin Brockovich discovered chromium 6 in the well water of a California town.[15] Tort law, like sunlight, acts as a disinfectant by exposing hidden threats to the public welfare.[16]

This book discusses the past, present, and future of tort law as a protector of core American values. Tort law shapes public policy by punishing the irresponsible distribution of handguns, reallocating the financial burden of caring for tobacco smokers, and increasing the accountability of health maintenance organizations.[17] In June 1997, the states reached a multibillion-dollar settlement with Big Tobacco. In 1998, Congress expanded the settlement to $516 billion over twenty-five years.[18] Tort remedies for injured consumers are opposed by what Tom Lambert called "habitual defendants."[19] This used to refer to railroads, streetcar companies, corporations, and utilities and now includes product manufacturers, managed-care organizations, tobacco companies, securities firms, and environmental polluters, as well as their insurance company allies and ideological friends, all of whom seek to nullify tort remedies.

"Whoever controls the language, the images, controls the race,"[20] noted the late poet Allen Ginsberg. This observation clearly applies to the tort reform debate. The proponents of tort retrenchment are winning by controlling the language and imagery of the political struggle.[21] On the basis of remarkably little empirical study, thirty states have enacted tort reform

statutes during the last five years alone.[22] This book defends American tort law, making its case that retrenchment will only produce new injustices with systematic data, featured cases, and historical examples.

The corporate-insurance establishment uses carefully crafted language to portray corporations as the victims of a litigious society rather than focusing on the plight of the true victims: those who have suffered because of defective products, negligent medicine, or unreasonably dangerous practices. The term *tort reform* implies that caps and other limitations on injured plaintiffs' recovery improve the functioning of the American civil justice system. In reality, applying the word *reform* to these restrictions is as misleading as referring to nuclear weapons as "peacekeepers." Tort reform is a code phrase for one-sided, liability-limiting statutes that favor corporate interests.[23] Questionable lawsuits brought by corporate interests, such as the product libel suit filed by Texas ranchers against Oprah Winfrey for injuring the reputation of U.S. beef, are not targeted by these "reformers."[24]

Tort law, like any other body of law, can be improved, but the tort reformers do not take an evenhanded approach in analyzing its strengths and shortcomings. The future of tort law is in doubt because of the success of the tort reform movement in convincing legislatures to reduce the price of corporate wrongdoing. A recent study concludes that tort reform groups

> [c]laim to speak for average Americans and represent themselves as grassroots citizens groups determined to protect consumer interests. But their tax filings and funding sources indicate that they actually represent major corporations and industries seeking to escape liability for the harm they cause consumers—whether it be from defective products, medical malpractice, securities scams, insurance fraud, employment discrimination or environmental pollution.[25]

The coalition opposing plaintiffs' rights unites around the theme of federalizing tort law.[26] The Supremacy Clause of the U.S. Constitution makes it likely that federal tort reforms preempt common law remedies. The chief source of tort law is common law—the legal rules that have evolved from court decisions over many centuries. During the past twenty years, there has been a downturn in tort law's common law foundation. All fifty states have enacted at least one limitation on common law tort recovery during this period. Tort reform–inspired statutes undermine the greatest social benefit of tort law: its ability to evolve in order to constrain new forms of oppression.

As a nineteenth-century New York court noted: "It is the peculiar merit of the common law that its principles are so flexible and expansive as to comprehend any new wrong that may be developed by the inexhaustible resources of human depravity."[27] Tort law has expanded to redress new dangers and hazards from the Internet. State tort law has the flexibility to redress unfair, deceptive, and oppressive practices. The federal takeover of tort law would undermine this unique strength, namely, its latent function of evolving to protect the public interest from emergent threats.

This book dispels civil justice myths so that evolutionary tort law can continue to protect the public from the hazards that Americans will face in the twenty-first century. Courts are already applying old tort causes of action to Internet-related harms. Tort law remedies are increasingly punishing online consumer fraud, cyberstalking, defamatory e-mail messages, theft of corporate trade secrets, invasions of corporate espionage, privacy, and other wrongs committed at the click of a mouse. Misperceptions about the American civil justice system fostered by the tort reformers deflect attention from the crucial role tort law plays in improving public safety.

A Tale of Two Torts: Tire Explosions and a Hot Coffee Spill

[A] Tread Separations in Bridgestone-Firestone Tires

Private attorneys general, not government regulators, discovered that Firestone tires mounted on Ford Explorers caused hundreds of rollover accidents due to tread separation. Many deaths linked to defective Firestone tires occurred in accidents involving Ford Explorers.[28] The high center of gravity in Ford's sport utility vehicles makes them more difficult to control after tire failure.[29] Trial attorneys found that Firestone had recalled this model of tires in other countries without informing the National Highway Traffic Safety Administration (NHTSA) of the potential danger to American drivers.[30] NHTSA based its recall of 6.5 million tires on information provided by plaintiff's counsel, not by government investigators.

Firestone and Ford stand accused of causing the deaths of over one hundred Americans by failing to inform government regulators of the hazardous design defects.[31] If Ford is found liable for concealing safety information from NHTSA, the maximum fine the agency can impose is a mere $925,000,[32] obviously an inadequate amount to deter wrongful conduct by a corporation that earns $800,000 per hour.

This is the second class action suit against Firestone for defective tires.

Tread separations of Firestone 500 steel-belted radial tires caused dozens of deaths and hundreds of injuries in the 1970s.[33] The company's defense in the Firestone 500 suit closely parallels its central defense in today's mass tort disaster: Firestone claimed that tread separations were caused by "owner abuse, road damage, or under-inflation."[34] In fact, Firestone tires had a "design defect in which the steel belt did not bond to the tire carcass."[35] Most Americans welcome the nationwide recall of Firestone tires. However, when Americans think about the civil justice system, the image that comes to mind is not of deaths caused by Firestone's tread separations, but McDonald's hot coffee.

[B] The McDonald's Coffee Case: A Tort Reform "Poster Child"

Plaintiffs are often portrayed in the mass media as greedy or wacky claimants seeking a "judicial jackpot," rather than as victims obtaining redress for injuries caused by unreasonably dangerously products. Similarly, tort law is usually described by the media as corporate torture, as if jury verdicts were as unjust and arbitrary as the medieval ordeal by water.[36] In early feudalism, disputes were settled by arbitrary methods such as trial by fire or water.[37] The trial by ordeal consisted of tying the defendant to a chair and submerging him in water. Each time he was asked if he wished to tell the truth. If he did not say what was expected, he was again submerged. If he did not drown during the ordeal, he was innocent.[38]

Tort reformers have spun out a web of illusion in the form of misleading or false tort horror stories. The media's mischaracterization of the McDonald's hot coffee case has done more than any other tort horror story to create a climate of distrust about tort law and its remedies.

The tort reformers' distorted presentation of the McDonald's case was responsible in part for motivating state legislators to hastily enact comprehensive tort limitation statutes.[39] Two state supreme courts, Ohio and Illinois, overturned tort reform statutes after learning of the true facts behind the McDonald's litigation.[40] A number of other state courts have struck down tort reforms on state constitutional grounds.[41] The McDonald's case may not be as compelling as the Firestone tire mass disaster, but it was far from frivolous.

The most popular character on the television series *Seinfeld* was Cosmo Kramer, known for his herky-jerky movements and for barging into Jerry's apartment without knocking. In one famous *Seinfeld* episode, Kramer spilled a hot latte coffee in his lap while smuggling it into a movie theater. Kramer retained the services of Jackie Chiles, a parody of Johnnie Cochran, one of O. J. Simpson's defense attorneys, to sue the shop for selling him the too-hot coffee. But instead of following Jackie's advice to seek punitive damages for faulty design of the cup, Kramer negotiates his own settlement for a lifetime supply of latte.[42] This *Seinfeld* episode was inspired by the real McDonald's hot coffee litigation, which, at first glance, appears to be as outlandish as Cosmo Kramer's case.

Very few Americans know the true circumstances that led to the McDonald's verdict because the tort reform lobby won a public relations victory by framing the media coverage of this lawsuit. At least a thousand news stories reported that a clumsy elderly woman spilled coffee on her lap and then sued McDonald's because the hot coffee she ordered was too hot. The case was the subject of mocking monologues by late night talk show hosts Jay Leno and David Letterman. After this media blitz, it is hardly surprising that the popular view of the verdict is that it is exhibit number one in the case for tort reform.

News reporters and comedians had a lot of fun with the McDonald's hot coffee case, but there is no humor in the catastrophic injuries suffered by the plaintiff. In Albuquerque, New Mexico, seventy-nine-year-old Stella Liebeck purchased coffee at the drive-through window of a McDonald's restaurant. Contrary to most of the news stories, Mrs. Liebeck was not driving the car, nor was the coffee spilled while the vehicle was moving. Her grandson had pulled the car to the curb and stopped completely before Mrs. Liebeck placed the cup of coffee between her knees to remove the plastic lid. As she was removing the cover, the scalding coffee spilled onto her lap and was immediately absorbed by her sweat pants. Mrs. Liebeck sustained full-thickness burns because the super-heated coffee was held next to her skin by her clothing.[43] The beverage severely scalded her groin, inner thighs, and buttocks.

The coffee sold to Mrs. Liebeck was held at a temperature between 180 and 190 degrees Fahrenheit. As the temperature of coffee or any other hot liquid decreases to 155 degrees and below, the risk of serious burns is reduced exponentially. A beverage served at 180 to 190 degrees will cause third-degree burns in two to seven seconds. Coffee is typically brewed at 135 to 140 degrees for home use.

Mrs. Liebeck's severe burns required a week of hospitalization. She suffered through painful debridement procedures to remove layers of dead skin and several skin graft operations. She initially sought out a lawyer only to receive reimbursement for her medical bills, which totaled

nearly $20,000.[44] Only after McDonald's refused to pay her medical bills did she file a products liability lawsuit. The New Mexico jury awarded the plaintiff $200,000 in compensatory damages, which was then reduced to $160,000 because the jury found Mrs. Liebeck partially at fault for the spill.[45] The jury also awarded the plaintiff $2.7 million in punitive damages, a judicial remedy intended to punish McDonald's and deter the company from needlessly endangering its customers. The purpose of punitive damages is "to further a state's legitimate interests in punishing unlawful conduct and deterring its repetition."[46]

The $2.7 million award represented only about two days' profit from the nationwide sales of McDonald's coffee—not two days' total earnings. The trial judge reduced the punitive award to $480,000. Eventually, the parties reached a confidential post-verdict settlement, presumably for a substantially reduced amount. In the end, McDonald's payment was the equivalent of a parking ticket for a multinational restaurant chain.

McDonald's Corporation had constructive, if not actual, notice that its coffee was too hot long before Mrs. Liebeck was scalded. Mrs. Liebeck's attorney learned through discovery that McDonald's files contained more than seven hundred reports of prior similar injuries caused by their super-heated coffee, yet the company had taken no steps to lower the heat.[47] After the New Mexico lawsuit, McDonald's reduced the temperature of its coffee to a safer level.

Journalists failed to inform the public about the underlying factual circumstances that led to the award. Few reporters even mentioned that hundreds of other McDonald's consumers had been injured by super-heated coffee. The media devoted more coverage to the restaurant chain's plight and the tort reformers' take on the incident than to the plight of the victims.

Many news reports make the questionable assertion that products liability law hurts American consumers by creating a litigation crisis, but few journalists document the many ways that Americans benefit from tort law. Products are now more thoroughly tested in the company's laboratory rather than in the consumer's home or workplace due to tort verdicts. The lesson of Firestone tires, McDonald's coffee, and a host of other awards is the continuing need for strong tort remedies to control corporate wrongdoing.[48]

Courts do not lay down general principles; rather they decide specific controversies. Each of the chapters in this book shows how individual cases are in effect public policy in disguise.

Chapter 1 traces the evolution of tort rights and remedies from Blackstone's day to the twenty-first century, with particular attention to how tort law has evolved to serve the public interest in each historical period. The common law of torts adapts to the exigencies of new technologies and is not a closed system of immutable rules. Tort law has widened the circle of civil justice in redressing harms for women, minorities, and consumers in recent years.

Chapter 2 illustrates the latent function served by private attorneys general through a study of featured cases. The human face of tort law is revealed through the stories of private litigants whose lawsuits have created a safer America. Successful lawsuits often prevent future accidents. "The plaintiff acts as the private attorney general to punish and deter future social misconduct, thereby encouraging adherence to safety standards that benefit consumers generally."[49] These cases show the considerable difficulties of taking legal action and winning and collecting an award from a large corporation, as well as the emotional burden shouldered by the litigants.

Chapter 3 presents an empirical and public policy analysis of the social consequences of tort reform on women. Over the past fifty years, forward-looking courts have increasingly recognized the biological and social role of women by expanding recovery for reproductive damage and gender-based emotional injuries. As the Dalkon Shield, breast implant, and Copper-7 mass tort cases illustrate, tort law fulfils a latent function in protecting women's health by taking defective products off the market.

Chapter 4 explores the latent function of medical malpractice lawsuits in protecting the rights of patients. Medical malpractice awards originated as a remedy against intentional misconduct or criminal manslaughter by individual doctors but has now expanded to meet the dangers inherent in bureaucratic health care. In response to the threat of litigation, preventive medicine has improved patient care in a host of areas. The question of patients' rights now centers on managed care. Arizona, Maine, Oklahoma, and Washington have enacted new remedies for greater HMO accountability. Congress is also considering a patients' rights bill to provide federal remedies for the reckless delay or denial of necessary medical care.

Chapter 5 is a study of corporate misbehavior that led to punitive damages in products liability. Punitive damages are not random lightning strikes; they are actually quite predictable. It is good public policy that companies that conceal dangers are assessed large punitive damage

awards, while companies that enact prompt remedial measures reduce their litigation exposure. By punishing companies that do not practice preventive law, tort remedies serve the latent function of aligning the private and public good.

Chapter 6 speculates on the future path of tort law. Tort law needs to retain its flexibility in order to counter emergent forms of wrongdoing. Old tort doctrines such as "trespass to chattels," for example, are being employed to protect against the invasion of privacy caused by website marketers who track users' every keystroke using new surveillance tools. A court recently imposed a $675,000 Internet libel verdict against a defendant for posting a defamatory message on a Yahoo! website.[50] This is not to say that torts are always a perfect remedy. However, as Felix Frankfurter reminds us, "We do not discard a useful tool because it may be misused."[51]

1

The Path of Tort Law

§1.1. *Introduction*

The legal historian William Nelson argues that "no topic has captured the attention of private law theorists in America more than the law of tort."[1] This chapter is a study of the rise, fall, and future of tort law in American society. The word *tort* is "derived from the Latin 'tortus' or twisted."[2] The history of tort law can be summarized as the evolution of ever more effective remedies to control wrongdoing, from pre-industrial England to the age of the Internet.[3]

William Prosser begins his classic tort treatise with the statement that "[a] really satisfactory definition of a tort has yet to be found."[4] In order for a tort to exist, "two things must concur, actual or legal damages to the plaintiff and a wrongful act committed by the defendant."[5] Tort law assigns responsibility for injuries to the wrongdoer by requiring the payment of compensation. Injunctive relief and other equitable remedies may be ordered where legal remedies are inadequate. In some nuisance cases, a defendant's activities may be enjoined if they interfere with the possessor's use and enjoyment of land. In all tort cases, the actor is liable because his conduct (a) was intended to cause harm; (b) was negligent; or (c) created extra-hazardous risks to others.[6] Tort damages are broadly divided into three categories: economic, non-economic, and punitive. Economic damages compensate the plaintiff for injuries to person or property and may include medical bills, past and future earnings, and other direct economic expenses.[7] Non-economic damages, often referred to as "pain and suffering" damages, are also compensatory.[8] Pain-and-suffering awards include compensation for disfigurement, infertility, or reproductive injuries.

Tort remedies are chiefly monetary damages for personal injury though a plaintiff may receive a recovery for an injury in the form of personal or real property. Punitive damages, sometimes referred to as exemplary damages, are awarded above and beyond compensatory damages to

punish the defendant for torts committed intentionally or with a spirit of reckless indifference to public safety, as well as to deter such future misbehavior. Punitive damages fulfill the latent function of sending a message to the entire community that torts do not pay. Punitive damages are especially warranted where there is deliberate concealed harm and the probability of detection by government regulators is low.[9] Punitive damages have been assessed in the United States for more than two hundred years, long before torts evolved as a separate branch of the law.

Tort law did not develop as a separate doctrinal field until the middle of the nineteenth century. In 1852, when torts were still in their infancy, Joseph Story called for law to be "forever be in a state of progress or change, to adapt itself to the exigencies and changes of society."[10] The path of tort law, from the pre-tort era of Blackstone to the new millennium, is thus a story of the progressive unfolding of new tort remedies to counter new social hazards.

Tort law's "continuous and profound effect upon the everyday life . . . makes it critical to chart its course."[11] Tort law is a "cultural mirror" that reflects changing societal conditions.[12] The touchstone of tort liability is not found in rigid rules of law but in protecting the way of life in a particular historical epoch. The tort timelines in this chapter depict the evolving nature of tort law and its relationship to changing social institutions.[13] In the pre-industrial period, tort law redressed seduction, criminal conversation, and other affronts to the individual, family, and community.

Nineteenth-century tort law "belonged to the corporate defense."[14] With the post–Civil War rise of the railroads, the doctrinal development of negligence burst onto the scene. In this "negligence era," tort law assumed that certain injuries were "unavoidable costs of industrialization."[15] Prosser stated that the "law of negligence in the late nineteenth century was to a considerable extent the law of railway accidents."[16] Negligence was a byproduct of the social, economic, political, and technological changes that accompanied large-scale industrialization.[17] During this period, courts developed a number of regressive doctrines such as contributory negligence, the assumption of risk, and the fellow servant rule to promote industrial development.[18] The public policy impact of broad employer immunities left the burden of injury entirely upon the victim.

Many such immunities and defenses were either rolled back or eliminated after World War II.[19] The law of torts expanded substantially during the progressive tort law era (1945–80), creating many new possibilities for obtaining redress and reparations for injuries. Since the early 1980s, this liberalizing trend has largely reversed course.[20] Forty-six states have enacted at least one new limitation on the tort remedies available to injured consumers and patients since 1980.[21] Today, the further expansion of torts is required for the Age of the Internet.[22]

The tort law timelines below traces the rise, fall, and uncertain future of progressive tort remedies from the dawn of common law to the dawn of the twenty-first century. The first part of the timeline traces the rise of medieval English law, whose shadow is still cast upon the present.[23] English tort law originally redressed only intentional injuries to persons and property, although defendants were held strictly liable for trespass to property.

§1.2. The Intentional Torts Era: 1200 to 1825

Intentional torts were first developed at early common law to provide plaintiffs with remedies for misconduct that threatened the public order, such as battery,[24] assault,[25] false imprisonment,[26] and trespass.[27] Intentional torts included injuries against the person as well as invasions against property interests.[28] Tort law later evolved to compensate a broader range of harms such as mental distress, prenatal injuries, and social dislocation.[29]

The "intent" in intentional torts refers to the state of mind of the defendant. Intentional torts redressed deliberate physical injuries to the person or invasions of common law property rights.[30] At early common law, torts preserved the social order of a pre-industrial age dominated by disputes in the local community.

Exemplary damages, the precursor of contemporary punitive damages, punished wrongdoers who maliciously committed torts that upset community tranquility. As Oliver Wendell Holmes, Jr., observed, "the first requirement of sound law is that it correspond with the actual feelings and demands of the community, whether right of wrong."[31] Tort law expanded to provide the ordinary citizen with more effective remedies against abuses of power.

[A] Intentional Tort Law Timeline

1066—The Norman institution of the jury is incorporated into the English legal system by William the Conqueror.[32]

1348 or 1349—*I de S et ux. v. W de S*[33] recognizes assault as a form of trespass to the person.[34]

1616—*Weaver v. Ward*[35] is first case to hold "that a defendant might not be liable, even in a trespass action, for a purely accidental injury occurring entirely without his fault."[36]

1647—Court rules that a man carried onto the plaintiff's land against his will by third parties is not liable for trespass.[37]

1669—Court holds that conditional threats unaccompanied by immanent hostile action do not constitute an assault.[38]

1697—*The Statute of 5-6 William and Mary c. 12* abolishes the criminal side of the writ of trespass, leaving it as a purely civil action.[39]

1704—Court rules that the least touching of another in anger constitutes a battery.[40]

1763—First court to use the phrase *exemplary damages* to describe a monetary penalty paid to the plaintiff above and beyond compensatory damages.[41]

1768—Sir William Blackstone publishes *Commentaries on the Law of England.*

1784—First American court to award punitive damages, in a case involving a physician spiking his rival's wine with Spanish fly, a pain-causing cantharide.[42]

1799—The defense of assumption of risk is applied for the first time.[43]

1799—The English case of *Merryweather v. Nixon*[44] is the first to recognize the doctrine of joint and several liability in ruling that wrongdoers cannot have redress or contribution against each other.

1808—English court rules that there is no recovery for wrongful death absent a specific statute.[45]

1846—The English Fatal Accidents Act of 1846, referred to as Lord Campbell's Act, provides a statutory remedy for wrongful death.[46]

1809—*Butterfield v. Forrester*[47] devises rule of contributory negligence barring actions where "a party . . . [who] contributes to his own injury . . . may not recover anything from the defendant."[48]

1814—Court upholds exemplary damages award where the actual damages are slight in *Merest v. Harvey.*[49]

1834—Court rules that a master is not liable for a servant's torts on the grounds that the servant was on an unauthorized "frolic"[50]; this becomes an exception to an employer's vicarious liability.

1837—First court to hold a seller liable for injuries caused by a defective product on the theory of deceit.[51]

1837—English court holds farmer liable for negligence even though he was ignorant of the danger to neighboring cottages posed by spontaneous combustion of uncured hay.[52] Court's ruling is key for developing an objective standard of reasonable care in negligence actions.[53]

1837—Court constructs the common employment or fellow servant rule barring recovery when a co-worker is at fault.[54]

1842—Privity of contract bars a lawsuit filed by a horse-drawn mail coach that overturned due to a defective wheel. Privity was the chief roadblock to the development of products liability.

1842—The pro-defendant doctrine of the "last clear chance" is first recognized in *Davies v. Mann.*[55]

1851—U.S. Supreme Court upholds punitive damages award in a trespass action, stating that the measure of damages is based upon the "enormity of the offense" rather than the compensation owed to the plaintiff.[56]

1852—Punitive damages are assessed against a pharmacy for the deadly consequences of careless mislabeling of poison by a druggist. This was a precursor to awarding punitive damages in products liability.[57]

1856—Justice Alderson defines negligence as conduct falling below the standard established by law that creates an unreasonable risk of harm.[58]

1859—First American treatise on tort law is published by Francis Hilliard.[59]

1860—First English treatise on tort law is published.[60]

1863—English court devises the doctrine of *res ipsa loquitur* or the "thing speaks for itself." That doctrine was later extended to medical malpractice cases where the unexpected outcome would not have occurred without negligence.[61]

1865—English court treats *res ipsa loquitur* as a species of circumstantial evidence.[62] Court rules that the circumstances of the accident created an inference that someone was careless and that it "arose from want of care."[63]

1873—The railroad turntable doctrine permits child trespasser to recover for injuries despite having no permission to be on the premises.[64]

1876—Court develops spousal immunity. Husbands and wives cannot sue each other on the grounds that lawsuits disrupt family harmony.[65]

1884—Justice Oliver Wendell Holmes, Jr., ruled in *Dietrich v. Northampton* that there was no remedy for prenatal injuries.[66]

1889—New York Court of Appeals recognizes consortium as an element of damages. Loss of consortium includes loss of love, companionship, affection, and sexual relations as well as solace.[67]

1897—In *Wilkinson v. Downton*[68] the court permits the plaintiff to recover for extreme emotional distress when a practical joker told a woman that her husband was seriously injured in an accident. This case led to the tort of outrage, first recognized in the modern period.