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TORTS IN A NUTSHELL

FIFTH EDITION

By
EDWARD J. KIONKA
Professor of Law Emeritus
Southern Illinois University School of Law

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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 the University of Illinois College of Law famously spoke.

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 idiosyncrasies, judicial and sometimes statutory. This text must not be taken as the law of any particular jurisdiction, but rather as a composite view.

The law student would be well-advised to base his or her study of tort law primarily on other

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sources. There is no substitute for a careful analysis of casebook 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 Dan B. Dobbs excellent Hornbook, *THE LAW OF TORTS* (2000), and also the Restatement (Second) and the Restatement (Third) of Torts. 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 we 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 entrée into the proverbial seamless web.

No single Nutshell could do justice to all of tort law. This one 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 (David G. Owen, *PRODUCTS LIABILITY IN A NUTSHELL* (8th ed. 2008)), as is the law applicable to those who provide medical and other health care services (Marcia Boumil, Clifford E. Elias, & Diane Bissonnette Moes, *THE LAW OF MEDICAL LIABILITY IN A NUTSHELL* (2d ed. 2003)).

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,

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and 8-22) because I believe that they are important to an accurate overview.

I am deeply grateful to all those students, lawyers, and legal scholars who have helped me learn about tort law and its processes. Deepest thanks also to my colleagues, friends, and family who have long supported me in this project specially Terri, my life partner, soulmate, and spouse, whose support and understanding never wanes. And thanks, Pete, for your invaluable help editing the first edition.

Portions of the Restatement of the Law of Torts (copyright 1965, 1971, 1972, 1976, 1977, 1979, 1998, 2000, 2010 by the American Law Institute) are reprinted with the permission of the American Law Institute.

EDWARD J. KIONKA

Carbondale, Illinois
May 2010

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.

Restatement of Torts. The Restatement of Torts, one of a series of restatements of the law produced by the American Law Institute, has been particularly well regarded by the courts. The Restatement (First) and its successor, the Restatement (Second), are seen as highly authoritative in most jurisdictions. I cite the Restatement of Torts frequently, but I do not cite every relevant section. Note that the Restatement of Torts, in addition to the black-letter sections, contains valuable explanatory comments and reporter notes, excellent sources of further information and illumination.

The Restatement of Torts is in transition from the Restatement (Second) to the Restatement (Third). Unlike the First and Second Restatements, the Third is being produced piecemeal and not in

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sequential order. The current project, which is nearly complete as of this writing, covers only certain topics. Those chapters are replacing the corresponding parts of the Restatement (Second), which are then superseded. As to the topics not yet covered in Third, however, the Restatement (Second) remains the latest version. It is too early to tell whether the Restatement (Third) will be accorded the same authority as its predecessors.

The first two parts published were the Restatement (Third) of Torts: Products Liability (1998), and the Restatement (Third) of Torts: Apportionment of Liability (2000). In 2010, the ALI published Volume One of the Restatement (Third) of Torts: Liability for Physical and Emotional Harm. This volume comprises six chapters: (1) intent, recklessness, and negligence: definitions; (2) liability for physical harm; (3) the negligence doctrine and negligence liability; (4) strict liability; (5) factual cause; and (6) scope of liability (proximate cause).

Volume Two of liability for Physical and Emotional Harm, which is not quite finished, will contain (7) affirmative duties; (8) liability for emotional harm; (9) liability of land possessors; and (10) liability of actors who retain independent contractors. Volume Two is scheduled to be published in 2011. Although not yet published, I have cited some sections from these chapters where work on those sections appears to be sufficiently final.¹

1. For the record, it should be noted that there is also a Restatement (Third): Unfair Competition (1995), that contains some topics that fall under the torts umbrella. This Restatement

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Confusingly, and unlike Restatements (First) and (Second), each of these three major collections—Products Liability, Apportionment of Liability, and Liability for Physical and Emotional Harm—has its own section numbers, starting with section one, and there is no correlation between the section numbers of Third and those of Second. Therefore, when citing the Restatement (Third), it is necessary to include the subtitle in the citation. This makes these citations longer than I would like, but there is no alternative.

For simplicity and to save space, I use abbreviations: “R.2d § ____” for the Restatement (Second) of Torts, and “R.3d [name of volume] § ____” for citations to the Restatement (Third).

Texts. Texts and articles are cited only occasionally. In its day, the most authoritative and useful text was the Hornbook originally authored by the late Dean William L. Prosser, PROSSER & KEETON, *THE LAW OF TORTS* (5th ed. 1984), fifth edition by W. Page Keeton, Dan B. Dobbs, Robert E. Keeton, and David G. Owens. For convenience, it is cited as “Prosser.” Although it remains a valuable reference, the Prosser Hornbook has not been updated since a 1988 supplement was released. The current Torts Hornbook is Dan B. Dobbs, *THE LAW OF TORTS* (2000), which is an excellent successor to Prosser.

There is also a useful six-volume treatise, FOWLER V. HARPER, FLEMING JAMES, JR. & OSCAR S. GRAY, *THE*

has superseded certain sections of the Restatement (Second) of Torts. However, those topics are beyond the scope of the first-year law school torts course.

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LAW OF TORTS (3d ed. 2009). Texts on individual subtopics are also available (e.g., DAVID G. OWEN, PRODUCTS LIABILITY LAW (Hornbook Series) (2d ed. 2008)).

References to Parties. For convenience and consistency, I use the terms “plaintiff” and “defendant” (sometimes abbreviated “P” and “D”) 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 that 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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