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Cases and Questions

Second Edition

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Law & Business

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For Janet.

— W.F.

To Jeanne M. Brady
and Francis Taylor Grady.

— M.F.G.

PREFACE TO THE SECOND EDITION

This casebook is designed to help students learn about basic principles and policies of tort law, and to develop their skill in working with cases — especially their ability to distinguish cases that seem superficially similar, and to find connections between cases that are superficially different. For these purposes the best cases often are older ones that, when put side by side with others, provide grist for lively and instructive class discussions. Since the book does not aim to provide detailed information about the most recent wrinkles in tort doctrines that various states have produced, the revisions for this edition tend not to be "updates" of that kind; most of the changes instead are responses to requests and suggestions from instructors who have assigned the book — for example, that additional facts be included in case descriptions here and there, or that a favorite case be added or expanded, or that an unhelpful case be dropped. A number of instructors also asked for enlarged coverage of the Restatement (Third) of Torts; we thus have added additional excerpts to many sections of the book. And we have added notes on some recent public events of interest to the student of tort law: the 9/11 Victims' Compensation Fund (in the chapter on damages), and litigation over the painkilling drug Vioxx (in the chapter on cause in fact).

We consider the experience of those who have used a casebook to be the most valuable guide to how it might be improved. We thus are very grateful for the recommendations made to us by professors who worked with the first edition, and encourage future users to pass on additional suggestions in reply to this new one.

W.F.
M.F.G.

May 2009

PREFACE TO THE FIRST EDITION

The distinctive approach of this casebook is to present pairs and clusters of cases that contain factual similarities but arrive at different outcomes and to invite exploration of how they might be distinguished. This is a departure from the standard format of most casebooks, which typically present a lead case and then notes afterward that talk about the case just presented, ask questions about it, and make reference — usually in brief — to some related cases. There are lead cases here, as in other books; but the notes afterward consist largely of other judicial decisions presented at intermediate length: not as long as lead cases, but still fully enough to support discussion of the relationships between them. Our view is that the best way to examine an issue of tort law is not by reading a case about it, but rather by reading two cases that reach different results on related facts. We have found that this approach makes for a compelling torts course, and that it offers the following advantages in particular:

1. It makes clear to the user what to *do* with the reading: distinguish the cases and think through their implications. The apparent tension between cases is an invitation not only to work out the most that can be said to reconcile them but also to ask more broadly what underlying theory would make sense out of both results. On occasion the reader may conclude that there is no good distinction and that the cases just represent different approaches taken to the same question by two jurisdictions. But this is an argument of last resort for the lawyer, as it ought to be for the law student.

2. The book helps build skill in the lawyer's art of drawing intelligent distinctions between cases that are superficially similar and analogies between

cases that are superficially different. This is one of the aspects of legal method that a course on tort law most helpfully can teach. Despite the growing significance of statutory activity, torts remains one of the few areas of the curriculum that remains largely a matter of common law; it is an ideal place to learn how to think out arguments that the factual differences between cases ought to lead to different legal results. This approach also calls on students to infer for themselves the contours of doctrines and the policies behind them — another important practical skill to develop, and a richer way to reach an understanding of the law than by hearing the editors' views.

3. The process of sorting out decisions that are in at least superficial tension brings tort doctrines to life: conflict, including apparent conflict between cases, provides a motivation for thinking about legal problems and a basis for lively classroom discussion of them. The challenge of explaining the cases also has a puzzle-like quality that makes the process of learning the material more stimulating. The form of the question — "what is the distinction between X and Y?" — is repetitive, but the substance of it, and the thinking it calls for, is different every time it is asked.

4. The casebook's approach, properly used, yields an improved understanding of the relationship between doctrine and procedure. To grasp what it means to say that two cases conflict — to say that one was a case of liability ("L") and the other a case of no liability ("NL") — requires an appreciation of the procedural posture of each. The introduction to the book explains this in basic terms, but attaining complete comprehension of the intersection between the substance of cases and their procedural posture takes time. It is an ongoing project during the first year of law school that the book's approach is meant to support.

5. The book provides instructors with flexibility in deciding what normative ideas to explore in the course. Its presentation of cases is compatible with an emphasis on their economic logic, on matters of corrective justice, on other questions of policy, or on doctrine alone — or on some combination of these approaches.

This last point bears some elaboration. Our degree of emphasis on cases that reach different results on similar facts is unusual today, but it was more common 100 years ago in early casebooks written by Wigmore, Bohlen, Seavey and Thurston, and Ames and Smith. Those authors executed the idea quite differently, and of course they put it into the service of an intellectual agenda different from that of a twenty-first-century torts course. Indeed, the modern torts course has no consensus agenda; different instructors teach the course very differently. But we believe there was a kernel of pedagogical ingenuity in those early books that has outlived the intellectual priors they sometimes were written to advance. One of our goals has been to revive what was useful and interesting in those approaches and adapt it for use in the current environment of ideas about tort law. We have found that starting with inquiries into the distinctions between the cases serves well as a springboard for wide-ranging

discussions of the policy rationales behind the doctrines and the functions and interests they serve.

With that said, our emphasis on case analysis is not exclusive. One of the book's subthemes includes periodic attention to statutes and the institutional relationships between courts and legislatures. The chapters also are seasoned with excerpts from relevant scholarly work, particularly on questions of how judges, juries, and legal actors implement and think about various legal doctrines. The seasoning is judicious; we have not attempted a thorough presentation of scholarly perspectives on most issues in the book. The literature on the law of torts is too extensive to permit this while still achieving the book's other aims. Meanwhile instructors vary widely in which secondary sources they want to discuss, and there are many excellent collections of those materials that can be assigned on a supplemental basis for those seeking greater emphasis on the theoretical work.

The text also includes many problems to consider — several dozen, interspersed within the chapters, that present the facts of real cases without their resolutions. The format of these problems resembles in an abbreviated way the examination questions students usually are asked to solve at the end of the course, not to mention the format in which tort problems come to the practicing lawyer: facts and questions, but no answers. We believe there is value in preparing and working through problems of this kind during the course, as they develop a style of analysis a bit different from the skills built by thinking about cases where the court's answer is supplied, and a bit different as well from the immediate response called for by the in-class hypothetical.

Finally, we have made a particular effort to fill the book with interesting and memorable cases. One of the rewards of studying tort law is the chance to see how various sorts of human dramas, conflicts and calamities — many of them commonplace, many others rather *outré* — have been translated into judicial accounts and given legal meaning. The cases thus include a generous sampling of the legal responses to various terrors of modern life: spilled coffee, the wreck of the *Exxon Valdez*, intrusive telemarketers, and defamation on the internet. But they also offer a good look at the law's responses to great challenges of times past: the train robbery, the marine monster, and the egg-sucking dog. Thinking about the application of similar doctrines to situations old and new alike is instructive in its own right.

The book is meant to be assigned flexibly. Starting at Chapter 3 will be the preference of many instructors; some may wish to assign Chapter 4, on duties and their limitations, later or earlier in the course than its placement indicates, or to take up the chapter on defenses based on the plaintiff's conduct earlier than its late location in the book suggests. None of this need be considered cause for alarm on the reader's part. The chapters of the book are written deliberately to be usable in various orders.

Omitted language in the cases is indicated by bracketed ellipses. Many footnotes, citations, and headings within the cases are omitted without notice.

The Table of Contents lists all the note cases within each chapter that are presented at enough length to support discussion; it does not mention secondary materials, including excerpts from the Restatements of Torts, unless they comprise leading material in a chapter.

Ward Farnsworth
Mark F. Grady

February 2004

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— W.F.

My contribution to this casebook evolved over a period of years at a number of law schools: the University of Iowa, Northwestern University, UCLA, and George Mason University. My own mentor was former UCLA law professor Wesley J. Liebeler, whose incisive teaching made my part in this project possible. The students in the various torts classes I have taught helped me work out

the relationships between the cases. A number of able research assistants have made substantial contributions. They are (in chronological order): Margery Huston (Iowa), Debra Ann Haberkorn (Northwestern), Jacqueline Bares (Northwestern), Erik Dyhrkopp (Northwestern), Pamela Holz (Northwestern), Jacques LeBoeuf (Northwestern), Scott Rozmus (Northwestern), Phil Mann (UCLA), and Paul Mills (UCLA).

— M.F.G.

INTRODUCTION

The purpose of this introduction is to provide the newcomer to tort law with a sense of orientation and context for the materials that follow and for a typical first course on the subject. Part 1 describes the scope of the law of torts and some major distinctions used to organize the field. Part 2 sketches the historical development of tort liability. Part 3 explains the procedural steps involved in bringing a tort suit; it also explains the use of the "liability" (L) and "no liability" (NL) designations often used in this book to describe the outcomes of the cases. Part 4 introduces some major theoretical perspectives and analytical tools used by students and scholars of tort law. All of these issues are treated only briefly; the explanations here are just meant to give the reader a nodding acquaintance with issues that will be explored in more detail during the rest of the course.

1. *The Scope of the Law of Torts*

The word "tort" is derived from the Latin word "tortus," meaning crooked or twisted. In French the word "tort" continues to have a general meaning of "wrong," and this remains its meaning in English legal usage as well. Tort law governs legal responsibility, or "liability," for wrongs that people inflict on each other by various means: assaults, automobile accidents, professional malpractice (for example, errors by doctors or lawyers), defamation, and so forth. Torts is the body of law that furnishes the victim of any of these forms of conduct with a remedy against the party responsible for them. The person bringing the suit (the plaintiff) claims that the defendant should be required to pay for the

damage done. That is a practical and nonlegalistic description of the office of tort law, and it is incomplete in various ways; but it provides a general sense of what the subject of torts is about and suggests how this branch of law differs from others such as criminal law. Let us consider that distinction and some others in more detail.

Torts vs. crimes. Some of the conduct addressed by the law of torts also is addressed by the criminal law; indeed, in early English law the two branches were unified, with damages to the victim of a wrong awarded as part of a criminal proceeding against the wrongdoer. Today, however, there is a broad division in the law between criminal liability on the one hand and civil liability on the other. Civil actions generally refer to lawsuits brought by one party against another seeking compensation for a wrong. Criminal prosecutions are brought by a government seeking to punish the defendant. Some key distinctions between these two types of proceedings may be summarized as follows.

First, tort and criminal law often differ in the conduct they govern. Some acts are both torts and crimes; a beating, for example, may result in both a criminal prosecution and a tort suit. But other crimes are not torts. Thus a crime may be committed without injury to anyone, as when a defendant is prosecuted for driving faster than the speed limit allowed. In this case there is no occasion for a tort suit by anyone seeking damages. Likewise, many torts are not crimes. A defendant who injures someone through an act of professional malpractice typically commits no crime and will not be prosecuted, but may be required by the law of torts to pay compensation to the injured party. Even where the same conduct does give rise to both tort and criminal liability, the legal doctrines governing the two types of case tend to be quite different, with different elements of proof and different defenses available.

Second, tort and criminal law differ in the procedures they involve. A crime is regarded by the law as an offense against the public; that is why it results in a prosecution brought by the government, not by the immediate victim of the wrong. A tort suit is brought by an injured party seeking compensation for damage the defendant has caused. And because the stakes of the two proceedings for the defendant are different, the standards of proof in the two proceedings differ as well. In a criminal prosecution the defendant must be proven guilty beyond a reasonable doubt; in a tort suit the plaintiff must establish the defendant's liability by a preponderance of the evidence, a weaker standard. A tort suit and a criminal prosecution based on the same conduct may go forward at the same time, or one after the other. The two proceedings generally have no effect on each other, though findings against a defendant made in a criminal case sometimes may be regarded as settled for purposes of the tort suit as well.

Third, tort and criminal law differ in their purposes. Both are partly concerned with deterring misconduct by attaching costs to it, but deterrence is just one of the purposes classically ascribed to the criminal law — along with

retribution, rehabilitation, and incapacitation of the criminal. Retribution and incapacitation rarely are thought to play any role in the law of torts; the immediate purpose of a tort suit is to secure compensation for the victim. There remains some overlap between even the apparently different purposes served by criminal and tort suits. A criminal prosecution may serve compensatory as well as punitive purposes by forcing a defendant to pay restitution to the victim of a crime, and a tort suit may serve a punitive as well as a compensatory function if the defendant is required to pay punitive damages. But the differences between the aims of tort and criminal law are large enough to result in quite different arguments about what rules and policies make sense in the two fields.

Common law vs. statutes. The law of torts comes from two principal sources: the common law and statutes. For our purposes, "common law" refers to the body of law created by judges over the course of many centuries in England and the United States. Judges deciding tort disputes in classic common law fashion reason from one case to the next, with the parties each arguing that their preferred result is the one most consistent with the decisions the court already has made. When the court decides the case it issues a written opinion explaining its decision; that opinion then becomes a precedent that can be used as authority in subsequent cases. Until well into the twentieth century most American tort law was common law — i.e., judge-made. To learn the law of torts was to know a great many cases.

Torts remains largely a common law field, but state legislatures now play a significant role in its development as well. During the past half-century it has become more common for judge-made tort doctrines to be codified, modified, or repudiated by statute, or for legislatures to make attempts to enact statutory "tort reform." Administrative agencies also supplement rules of tort liability with regulations that may cover some of the same ground. In this book we will examine a number of statutory contributions to the law of torts and consider the pros and cons of making tort law by judicial decision and by legislation. But in the main this book continues to treat torts as a common law subject, both because it largely remains so and because training in common law reasoning — the process of distinguishing cases and arguing about their precedential significance — is one of the distinctive pedagogical functions of a first-year course on tort law.

In the course of our studies we frequently will encounter the First, Second, and Third Restatements of the Law of Torts published by the American Law Institute (ALI). The ALI is an organization of lawyers, judges, and academics; the Restatements are a set of projects in which they attempt to clarify the content of the common law in various areas — torts, contracts, agency, and so forth. The creation of a Restatement begins with the appointment of a reporter (or more than one) responsible for drafting its various sections. The reporter has primary responsibility for the final result, but a Restatement is subject to comment, debate, and a vote by the membership of the ALI before it