

EPSTEIN

Cases and Materials
on
TORTS

*Seventh
Edition*



ASPEN LAW & BUSINESS

CASES AND MATERIALS ON TORTS

Seventh Edition

Richard A. Epstein

James Parker Hall

*Distinguished Service Professor of Law
The University of Chicago*



ASPEN LAW & BUSINESS

A division of Aspen Publishers, Inc.

Gaithersburg

New York

Copyright © 2000 by Richard A. Epstein

All rights reserved. No part of this publication may be reproduced or transmitted in any form or by any means, electronic or mechanical, including photocopy, recording, or any information storage and retrieval system, without permission in writing from the publisher. Requests for permission to make copies of any part of this publication should be mailed to:

Permissions
Aspen Law & Business
1185 Avenue of the Americas
New York, NY 10036

Printed in the United States of America

2 3 4 5 6 7 8 9 0

Library of Congress Cataloging-in-Publication Data

Epstein, Richard Allen, 1943—

Cases and materials on torts / Richard A. Epstein.—7th ed.
p. cm.

Includes bibliographical references and index.

ISBN 0-7355-1213-2 (hc)

1. Torts — United States — Cases. 2. Liability (Law) —
United States — Cases. 3. Damages — United States —
Cases. I. Title.

KF1249.E67 2000

346.7303 — dc21

99-089735

CASES AND MATERIALS
ON TORTS

Editorial Advisory Board

Aspen Publishers, Inc.

Legal Education Division

Richard A. Epstein

James Parker Hall Distinguished Service Professor of Law
University of Chicago

E. Allan Farnsworth

Alfred McCormack Professor of Law
Columbia University

Ronald J. Gilson

Charles J. Meyers Professor of Law and Business
Stanford University
Marc and Eva Stern Professor of Law and Business
Columbia University

Geoffrey C. Hazard, Jr.

Trustee Professor of Law
University of Pennsylvania

James E. Krier

Earl Warren DeLano Professor of Law
University of Michigan

Elizabeth Warren

Leo Gottlieb Professor of Law
Harvard University

Bernard Wolfman

Fessenden Professor of Law
Harvard University

About Aspen Law & Business, Legal Education Division

With a dedication to preserving and strengthening the long-standing tradition of publishing excellence in legal education, Aspen Law & Business continues to provide the highest quality teaching and learning resources for today's law school community. Careful development, meticulous editing, and an unmatched responsiveness to the evolving needs of today's discerning educators combine in the creation of our outstanding casebooks, coursebooks, textbooks, and study aids.

ASPEN LAW & BUSINESS
A Division of Aspen Publishers, Inc.
A Wolters Kluwer Company
www.aspenpublishers.com

To the memory of two great men,
and great men of torts:

Charles O. Gregory

Harry Kalven, Jr.

munity to the end of the book, on the ground that immunity pertains to all torts, not just those involving physical injuries or emotional distress. Otherwise my intention has been to update the materials while seeking to preserve the continuity with the earlier editions. In so doing, I have sought to keep one of the distinctive features of this casebook, which is to stress the alternative visions of tort law as they developed in the nineteenth (and now complete) twentieth centuries. Toward that end, I have retained those great older cases, both English and American, that have proved themselves time and again in the classroom, and which continue to exert great influence on the modern law. But by the same token working through these revisions has made it clear to me that today neither the law of torts, nor this casebook, are shaped so heavily by the great transformation in tort law that took place between 1968 and 1980. Although those developments continue to remain important, they have in some instances been turned back. It is no longer likely that strict liability rules will exert greater sway in medical malpractice cases, nor that market share liability will expand beyond the original DES cases. By the same time new and important developments on the liability of HMOs for refusing to authorize treatment, the application of the new Supreme Court law on the use of expert witnesses in tort cases, and the potential exposure of tobacco companies to suit by health care organizations and unions have come on the scene in recent years. I have sought to keep pace with these new developments both through common law, and, increasingly, through legislation.

Richard A. Epstein

Chicago
February 2000

PREFACE

This is now the seventh edition of this casebook, and the fifth one that I have undertaken myself. The origins of the casebook go back to the 1950s, when Charles O. Gregory and Harry Kalven, Jr., prepared the first edition, which was published in 1959. A second edition followed some ten years later, and was in fact the book from which I first taught torts at the University of Southern California in 1969. In 1972 I came to the University of Chicago. In January 1974, with Gregory in retirement, my colleague, Professor Kalven, asked me to collaborate with him on the third edition of Gregory and Kalven, *Cases and Materials on Torts*. Kalven's tragic death in October 1974 cut short our brief collaboration just as we were beginning our work. Thereafter Professor Charles O. Gregory was kind enough to reenter the lists and to read and comment on the drafts of the third edition, which appeared in 1977. The work on the fourth edition of Epstein, Gregory and Kalven, which appeared in 1984, I did alone. Gregory died in April 1987, after a rich and full life. The fifth edition (1990), the sixth edition (1995), and this seventh edition both bear my name alone, for the change of the guard between generations has now long been completed. Even so, the case selection and organization of this book continue to owe much to Gregory and Kalven, who brought a pioneering spirit and rich imagination to the study of torts. I shall always be in their debt.

The seventh edition blends new with old elements. On structural matters I have decided to leave well enough alone with only two exceptions. By popular user demand I have returned the material on alternative causation and market share liability to Chapter 6, Section B, where it had previously been located. In addition, I moved the chapter on im-

manuscript. Louise Bloomfield, Melody Davies, Elizabeth Kenny, and Carol McGeehan provided welcome logistical and moral support.

I should also like to thank the authors and copyright holders of the following works for permitting their inclusion in this book:

Abraham, Individual Action and Collective Responsibility: The Dilemma of Mass Tort Reform, 73 Va. L. Rev. 845, 860, 867-868 (1987). Reprinted with permission.

Abraham and Jeffries, Punitive Damages and the Rule of Law: The Role of Defendant's Wealth, 18 J. Legal Stud. 415, 417, 418 (1989). Reprinted with permission.

American Bar Association, Special Committee on Automobile Insurance Legislation, Automobile No-Fault Insurance (1978). Reprinted with permission.

American Law Institute, Restatement (Second) of the Law of Torts §§18, 46, 46(2), 315, 323, 324, 324A, 332, 339, 402A, 431, 478, 480, 494. Copyright © 1965 by the American Law Institute. Reprinted with permission of the American Law Institute.

American Law Institute, Restatement (Second) of the Law of Torts §§504, 519, 520, 520A, 522, 523, 524, 524A, 525, 538, 549, 559, 560(3), 575C, 577, 577A, 652B-E. Copyright © 1977 by the American Law Institute. Reprinted with permission of the American Law Institute.

American Law Institute, Restatement (Second) of the Law of Torts §826. Copyright © 1979 by the American Law Institute. Reprinted with permission of the American Law Institute.

Arnold, Accident, Mistake and Rules of Liability in the Fourteenth Century Law of Torts, 128 U. Pa. L. Rev. 361 (1979). Reprinted with permission.

Bender, A Lawyer's Primer on Feminist Theory and Tort, 38 J. Legal Education 34-35 (1988).

Bovbjerg, Sloan and Blumstein, Valuing Life and Limb in Tort: Scheduling "Pain and Suffering," 83 Nw. U.L. Rev. 908, 923-924 (1989).

Calabresi and Hirschhoff, Toward a Test for Strict Liability in Tort, 81 Yale L.J. 1055 (1972). Reprinted by permission of the Yale Law Journal Company and Fred B. Rothman & Company from the Yale Law Journal, Vol. 81, pp. 1055, 1059, 1060-1061.

Calabresi and Melamed, Property Rules, Liability Rules and Inalienability: One View of the Cathedral, 85 Harv. L. Rev. 1089 (1972). Copyright © 1972 by the Harvard Law Review Association. Reprinted with permission.

Epstein, Automobile No-Fault Plans: A Second Look at First Principles, 13 Creighton L. Rev. 769 (1980). Reprinted with permission.

Fletcher, Fairness and Utility in Tort Theory, 85 Harv. L. Rev. 537 (1972). Copyright © 1972 by the Harvard Law Review Association. Reprinted with permission.

ACKNOWLEDGMENTS

In preparing the seventh edition of this casebook I have been fortunate enough to draw on the comments of many teachers and students who have used the book. Although in many cases the source of a casual comment has long been forgotten, the point has usually been retained. To all these students and teachers, my thanks. At this point in time, the comments I have received from different editions have blended together in my mind. I should therefore like to thank all the casebook users who have filled in their forms to explain what they did and did not like about the earlier editions of the book. In addition, the book continues to benefit from the comments, both large and small, that I have received from Kenneth Abraham, Jennifer Arlen, Vincent Blasi, William Cohen, Michael Corrado, Richard Craswell, Theodore Eisenberg, Robert Ellickson, Stephen Gillers, James Henderson, Gail Heriot, Morton Horwitz, Jason Johnston, Spencer Kimball, Alvin Klevorick, Stanton Kraus, William Landes, Fred McChesney, Mark Miller, Cornelius Peck, Malla Pollock, Richard Posner, Glen Robinson, Howard Sacks, Gary Schwartz, Perry Sentell, Ken Simons, Geoffrey Stone, Alan Sykes, Aaron Twerski, Ernest Weinrib, and the late J. Jerry Wiley. I also owe an inordinate debt to my research assistant Jonathan F. Mitchell whose superhuman labors allowed me to complete the revisions for this edition in record time, and to Martha Apalsch who came along in the home stretch to provide help on recent breaking topics. Once again my secretary Katheryn Kepchar proved herself equal to putting the manuscript into final form notwithstanding the best efforts of its author to frustrate her endeavors. Sandra Doherty did a splendid job on copyediting the

Jaffe, *Damages for Personal Injury: The Impact of Insurance*, 18 *Law & Contemp. Probs.* 219 (1953). Reprinted with permission from a symposium on the Federal Employers' Liability Act appearing in *Law and Contemporary Problems*, Vol. 18, No. 2, published by the Duke University School of Law. Copyright © 1953 by Duke University.

James, *The Qualities of the Reasonable Man in Negligence Cases*, 16 *Mo. L. Rev.* 1 (1951). Copyright © 1951 by the Curators of the University of Missouri. Reprinted with permission.

Kronman, *Mistake, Disclosure, Information and the Law of Contracts*, 7 *J. Legal Stud.* 1 (1978). Copyright © 1978 by the University of Chicago Press. Reprinted with permission.

Posner, *Economic Analysis of Law* 192 (Aspen Law & Business, 5th ed. 1992). Copyright © 1992 by Richard A. Posner. Reprinted with permission.

Posner, *Epstein's Tort Theory: A Critique*, 8 *J. Legal Stud.* 457 (1979). Copyright © 1979 by the University of Chicago Press. Reprinted with permission.

Schuck, *Rethinking Informed Consent*, 103 *Yale L.J.* 899, 957-958 (1994).

Schwartz, *Tort Law and the Economy in Nineteenth-Century America: A Reinterpretation*, 90 *Yale L.J.* 1717 (1981). Reprinted with permission of the *Yale Law Journal* and Fred B. Rothman & Company from the *Yale Law Journal*, Vol. 90, pp. 1717, 1759-1762.

Seavey, *Negligence — Subjective or Objective?* 41 *Harv. L. Rev.* 1 (1927). Copyright © 1927 by the Harvard Law Review Association. Reprinted with permission.

Seavey, *Reliance upon Gratuitous Promises or Other Conduct*, 64 *Harv. L. Rev.* 913 (1951). Copyright © 1951 by the Harvard Law Review Association. Reprinted with permission.

Shavell, *Suit, Settlement and Trial: A Theoretical Analysis under Alternative Methods for the Allocation of Legal Costs*, 11 *J. Legal Stud.* 35, 58-60 (1981). Reprinted with permission.

Shukaitis, *A Market in Personal Injury Tort Claims*, 16 *J. Legal Stud.* 329, 329-330, 339-340 (1987). Reprinted with permission.

Sloan, *Suing for Medical Malpractice* 9-10 (1993).

Thomson, *The Trolley Problem*, 94 *Yale L.J.* 1395, 1395-1396 (1985).

Viscusi, *Risk by Choice* 43-44 (Harvard University Press, 1983). Reprinted with permission.

Weiler, *The Case for No-Fault Medical Liability*, 52 *Md. L. Rev.* 908, 919, 928-929, 931 (1993).

INTRODUCTION

The seventh edition of this casebook appears five years after the fifth edition and some 41 years after the publication of the original Gregory and Kalven casebook. It also marks the turn of a new millennium that promises to bring new challenges to a field that is as old as the law itself. These last four decades have been marked by both continuity and change in the law. From the late 1950s until the mid 1980s, these changes tended to be largely in one direction. With the exception of the law of defamation and privacy, tort liability had been expanding on all fronts. Today, however, the picture is far more clouded. In the traditional areas of physical injuries, tort liability appears to have reached its high water mark, and in some jurisdictions — California and perhaps New York — the tides have been receding. Ironically, at the same time the law of defamation and privacy seems to have expanded, if not doctrinally, then surely in the frequency and intensity of suits.

In the midst of these ebbs and flows in tort liability, certain questions have remained with us in more or less the same form in which they were faced by the earliest of common law lawyers. The tension between the principles of negligence and strict liability in stranger cases surely falls into this class. The debates framed in the nineteenth-century cases have largely dictated the subsequent analysis in such important areas of the law dealing with abnormally dangerous activities and with ordinary nuisances, both of which continue to assume greater importance in an age that shows greater preoccupation with environmental harms and toxic torts.

Yet in other areas we have witnessed major transformations, both in the types of cases brought to litigation, and in the choice of legal theories

used to decide them. In 1959 — the year of the first edition — the paradigm tort action was still the automobile collision. When one thought of institutional tort defendants, the railroads came first to mind. The areas of products liability and medical malpractice cases were, when viewed with the benefit of hindsight, still in their early childhood, while mass torts and toxic torts (the two often go together) still lay in the future.

The emergence of new types of litigation has taken its toll on traditional tort theory. The question of “proximate cause” — could this remote consequence be properly attributed to the wrongful conduct of the defendant? — was the dominant issue of causation in 1959 and the major source of contention among academic writers. That is no longer true today. Increasingly, modern tort litigation concentrates on two other problems. The first involves the difficult questions of evidence and statistics necessary to establish the factual connection between, for example, the defendant’s drug or waste discharge and the medical injuries of the plaintiff. The second involves the rules designed to deal with multiple causation when two or more parties are charged with responsibility for all or part of the same harms. Both these shifts in emphasis have accelerated in the 1990s, and are duly taken into account in this edition.

Notwithstanding the enormous substantive changes, the educational aims of this casebook are much the same as those of the previous six editions. The primary goal remains one of giving to the student an accurate sense of the current legal position in this, one of the most active and important branches of the law. In this context, that means incorporating into the book the output of the American Law Institute, which has now published three separate volumes of a Third Restatement dealing with General Principles, Joint and Several Liability, and Products Liability. It also means taking into account the continuous set of legislative initiatives, which, not by coincidence alone, have taken place in the same areas that have generated new Restatement editions.

This casebook, however, would fail in its essential mission if it did not accomplish two other tasks. First, it should provide the student with an opportunity to examine the processes of legal method, legal reasoning, and the impact of legal rules on social institutions. Second, it should give the student some sense of the different systematic and intellectual approaches that have been taken to the law of torts over the years.

The importance of method cannot be underestimated in legal education. A casebook — certainly this casebook — is not a reference book, much less a treatise. The standard legal curriculum, of necessity, touches on only a small fraction of the huge and ever-growing body of substantive rules, and even many of those will change with time. The education of the lawyer of the future therefore rests on an ability to deal with a mass of legal materials, to identify the underlying assumptions, to de-

termine possible implications for analogous cases, and, above all, to deal with the persistent uncertainty, ambiguity, and at times downright confusion in the law. To help with these tasks it is essential to deal with the development of a legal principle over time, through a line of cases that illustrates its application and tests its limits. To that end this casebook contains many cases from the nineteenth century and before, even some that have long ceased to represent the current law. Likewise, in order to capture the nature of legal debate, in many principal cases I have reprinted not only the opinion of the court but those of concurring or dissenting judges. With *Fletcher v. Rylands*, at page 111 *infra*, for example, five separate opinions from three different courts are reproduced, because each adds something to the total picture.

A sound legal education requires more than attention to analytical skills. The law of torts in particular is one of the richest bodies of law, and it has been examined and explored from historical, philosophical, and institutional perspectives not only by the common law judges, but also by generations of academic writers. It is essential for all students to gain some sense of the diverse possible approaches to tort law, lest the constant probings of the Socratic method lead to an unhappy form of intellectual nihilism. The materials selected are designed, wherever possible, to allow torts to be confronted not only as a collection of discrete rules but also as a systematic intellectual discipline.

For the past several decades, judges and scholars have voiced fundamental disagreement about the proper orientation toward the tort law and about the proper choice of its key substantive rules. Speaking first to the question of general orientation, it is possible to identify three major positions. The traditional view — which had unspoken dominance at the time of the first two editions — looked upon the law of torts as a study in corrective justice, as an effort to develop a coherent set of principles to decide whether *this* plaintiff was entitled to compensation or other remedy from *this* defendant as a matter of fairness between the parties. Issues of public policy and social control were of course never absent, but they did not dominate judicial or academic attitudes toward either particular cases or general theory.

Today the traditional approach is under attack from two flanks. On the one hand there is renewed insistence, which today is often expressly articulated in the cases, that the compensation of injured parties is in itself a valid end of the tort law and that the doctrines of tort law that frustrate that objective must be hedged with limitations or totally eliminated unless strong justification is given for their retention. The older presumption that the plaintiff had to show “good cause” to hold a defendant liable (roughly speaking) has yielded in some quarters to a new presumption that the defendant who has demonstrably caused harm must show why liability should not be imposed. That shift in presumptions, which is today hotly contested, has two major implications. First,

the class of “inevitable accidents” that usually fell outside the tort law under the older view is more likely to be brought within it under the new. The defendant charged with tort liability, it is said, can shift the loss to society at large, either by altering the nature and type of products sold and services provided, or by spreading the risk by way of liability insurance. Second, defenses based on plaintiff’s conduct — notably contributory negligence and assumption of risk — receive a narrower interpretation and no longer bar, but at most reduce, the plaintiff’s recovery.

The second critique of the traditional approach comes from a different quarter, that of economic theory. Looking first at the tort law as a system of social control, advocates of the economic approach have generally argued that the proper function of the tort law is to lay down workable liability rules that create incentives for both individuals and firms to minimize (the sum of) the costs of accidents and the costs of their prevention. In this view of the subject, the compensation of individual parties is not an end in itself, but only a means to enlist private parties to help police the harmful activities of others. Tort law is thus understood as a part of a complex system that contains criminal laws and legislative sanctions, not to mention contractual and customary limitations on proper conduct. Given its systematic orientation, this economic approach tends to downplay the importance of corrective justice in the individual case and compensation for individual victims of accidents, treating the first as largely question-begging and the second as better achieved through voluntary insurance arrangements. Until very recently its importance was largely academic, but today its influence in the decided cases is increasing.

The diversity of opinions on the proper approach to the tort law carries over to disputes about the proper substantive basis of tort liability. From the earliest times until today courts have entertained three main theories — each subject to many variants — for recovery in tort. There is, first, recovery for harms intentionally inflicted by defendant on plaintiff. Second, there is recovery for harms negligently inflicted, that is, through the want of reasonable or ordinary care. Last, there is recovery under a theory of strict liability, that is, for harms inflicted on the plaintiff by a defendant who acts without negligence and without any intention to harm.

In dealing with these three theories it is important to keep in mind several important themes that reassert themselves throughout the law of torts. One set of issues concerns the relationships between the general approach to the law of torts and the choice of specific theories of liability in particular cases. When does a concern for corrective justice require the use of a strict liability principle, a negligence principle, or an intentional tort principle? What about theories based on the need for individual compensation or on the use of the tort law as a device for

minimizing accident costs by channeling scarce resources to their most efficient use? Conversely, it is important to ask which *limitations* on recovery are consistent with the basic theories of liability and with their basic orientation to the subject matter. In this connection it is important to ask the extent to which recovery should be denied because of (to use the standard classification) the plaintiff's own conduct — be it called contributory negligence or assumption of risk — the conduct of a third party, or an act of God when plaintiff has otherwise made out a good cause of action.

Finally, it is crucial to consider what might conveniently be termed the “boundary” questions in the law of torts. As stated, any of the three theories of liability — strict liability, negligence liability, or liability for intentional harms — could apply to any case involving harm. How do these different theories coexist across the full range of tort cases? To anticipate for a moment, does, for example, the commitment to a theory of strict liability in classical trespass cases — those involving the direct application of force on the person or property of another — require (or allow) the use of a similar theory in cases involving slips and falls on business or residential premises or for the harm caused by those engaged in ultrahazardous activities or the manufacture of dangerous products? Similarly, it must be asked whether the choice of a negligence theory in medical malpractice cases commits us to that theory for routine traffic accidents or whether a theory of intentional harms in assault cases commits us to that theory in defamation cases.

With our major conceptual dimensions identified, it is perhaps desirable to close this introduction with a word about the organization of this book. The subject matter of the law of torts can be approached from a large number of different perspectives, and the order of organization is by no means “neutral,” since instructors with one outlook are apt to use certain materials in one order while those with a different outlook are apt to use somewhat different materials in yet another order. Here I have tried to adhere to traditional modes of presentation that can, it is hoped, be varied with minimum confusion to suit the tastes of different instructors.

Chapter 1 begins with an exploration of the principles of intentional harms that can be conveniently concluded before turning to the bulk of the materials, which deal with accidentally caused physical harm. The chapter covers not only the cases of physical injuries but also the closely associated harm associated with wrongful imprisonment and the intentional infliction of emotional distress. The materials here also consider the full range of justifications for such conduct, including consent, self-defense, and necessity. Chapter 2 introduces the recurrent tension between negligence and strict liability in the context of accidental physical injuries by examining the two alternatives in both their historical and analytical aspects. Chapter 3 then undertakes a detailed analysis of the