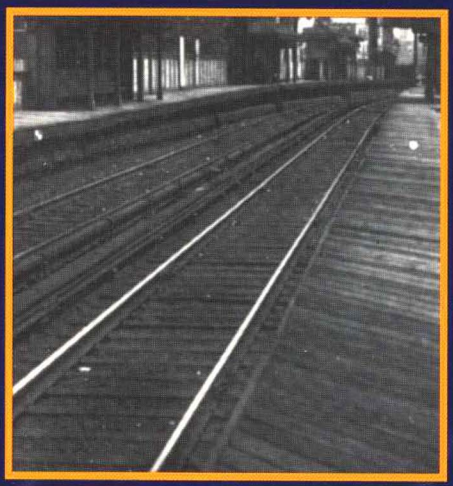
CONCEPTS AND INSIGHTS SERIES

# The Forms and Functions of Tort Law

Fourth Edition

Kenneth S. Abraham



Foundation Press

# THE FORMS AND FUNCTIONS OF TORT LAW

FOURTH EDITION

By

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CONCEPTS AND INSIGHTS SERIES®

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*For Vincent Blasi and Andrew Delbanco*

# PREFACE TO THE FOURTH EDITION

This book is designed to provide a concise analysis of the conceptual foundations of tort liability. Although the book is designed to be used mainly by first-year law students, it is also of use to upper-class students and practitioners seeking an overview of particular areas of tort law. Having taught courses in Tort Law for almost forty years, I have come to recognize students' need for something beyond the typical casebook to help them understand what is going on in the cases and in class. Yet the kind of books that are traditionally available do not always satisfy this need. Books of rules don't explain what lies behind the rules; and treatises are both too long and, often, not sufficiently analytical. What first-year students need is a book that helps them to think about "what the Professor was getting at" without spoon-feeding it to them. I hope that this book does exactly that.

The organization and strategy of the book are as follows. I have found that students often are much better able to understand the cases they study during their first few weeks in law school if they appreciate something about the procedure that has brought the case to the point where it can be decided on appeal. In addition, often some part of the earliest classes is devoted to discussion of the purposes served by the imposition of tort liability. Therefore, Chapter One provides a primer on procedure and discusses the functions of tort liability. Thereafter the book follows the pattern of most of the major casebooks, beginning with material on intentional physical injury and then moving on to negligence, causation, defenses, products liability, affirmative and limited duty, and damages. This material pretty well coincides with what is taught in the typical one semester course in Torts. There follow Chapters on subjects that are usually taken up in a second-semester or Torts II course, on tort reform and alternative compensation systems, defamation, invasion of privacy, misrepresentation, and interference with contract and prospective contractual advantage.

My strategy throughout the book is to provide a brief summary of the rules that govern a particular area, but then to devote the majority of the analysis to an examination of the purposes the rules serve and the arguments that can be made for and against the rules as they stand. Where some knowledge of the way the law has developed over time can help the reader to appreciate the current

state of the law, I have tried to provide a capsule history that puts things in context. In short, the reader will find a conceptual analysis of virtually all the major issues in tort law. Ideally, the student who has read the material on a particular subject before he or she goes to class will be prepared to discuss not only what the cases hold, but their implications as well. Although I have discussed most of what would be covered in two semesters of tort law, inevitably there have been a few omissions. I have barely talked about the torts of trespass to land and conversion of property, for example, and have entirely omitted malicious prosecution.

I have dedicated this book to two people who have meant a lot to me, both intellectually and personally. The greatest help I have had in writing this book has come from my friend and former colleague, Vincent Blasi. Over the years we have had countless discussions about torts, as we both taught first-year torts classes, and for a decade as we co-taught a seminar on Tort Theory. He has pushed, stimulated, and puzzled me with his questions and insights, and he gave me very detailed comments on the fourth edition of this book. I am grateful not only for his help, but for the way he has single-handedly raised the level of my intellectual satisfaction. Andrew Delbanco has been a great professional and personal friend, acquainting me with ways of thinking that would never have occurred to me, and providing me with emotional sustenance both on and off the golf course. We have smiled at fate together, agonized about our children together, and, most importantly, consistently laughed out loud together. Both Vince and Andy have enriched my life.

KENNETH S. ABRAHAM

Charlottesville, Virginia
October, 2011

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# THE NATURE AND FUNCTIONS OF TORT LAW

The law of torts (a name derived from the Latin word for "twisted" and from the French word for injury or "wrong") mainly concerns the rights of private parties to obtain monetary compensation from those who have caused them injury or damage. Most of tort law is "common law," that is, law made by courts rather than legislatures. Legislatures enact statutes, whereas courts decide individual cases. A series of judicial decisions based on the same principle—usually at the appellate level—then comes to stand for a rule of law. Most tort law is made by state rather than federal courts. So although reference often is made to "the" law of torts, in fact there are fifty separate state regimes of tort law. These different bodies of state tort law are nonetheless sufficiently similar in important respects to constitute one body of law with variations within it.

It is useful to begin at a general level before addressing particular areas of tort law and specific legal doctrines. This Chapter starts with a brief discussion of the nature of tort law in order to introduce the subject. As in many areas of the law, however, it is impossible to obtain the fullest appreciation of substance if one does not understand the procedural setting in which a substantive rule has been made. The Chapter therefore turns next to the procedural context in which tort law is made, surveying the points of procedure that arise most frequently in tort cases. Finally, the Chapter takes up the functions of tort law, surveying briefly the different functions that have been attributed to tort law and that figure prominently in the Chapters that follow this one.

## I. Introduction

Courses in Torts often begin with the question, "What is a tort?" Students give puzzled responses until the correct answer, "A civil wrong not arising out of contract," eventually emerges. This answer is a good enough starting point, but it is both overinclusive and underinclusive. Not all civil wrongs that do not arise out of contract are torts. For example, many statutory schemes that

create civil liability, such as Civil Rights statutes, involve neither contract nor tort liability, although they resemble tort in an attenuated way. And some torts actually do "arise" of out contract, at least in a loose sense. Certain legal actions for bodily injury or property damage caused by defective products, as well as claims for bad-faith breach of contract, are examples. But these are, so to speak, exceptions that prove the rule. For the most part tort law is in fact a residual category of civil liability. Legally cognizable wrongs that are not part of another discrete field of law tend to fall under the rubric of tort law.

Tort law itself can be subdivided into two general categories, based on the "standard of care" whose breach may result in liability. What might be called *accident law* is comprised of cases imposing strict liability or negligence liability, usually for physical injury—bodily injury or property damage. Strict liability is imposed without regard to the degree of care that the defendant, or "tortfeasor," exercised. Negligence liability is imposed only upon proof of some kind of carelessness—technically, the failure to exercise reasonable care under the circumstances. In contrast, in what are sometimes called the *intentional torts*, liability is not imposed for negligence, but only upon proof of the defendant's intention to invade the legally protected interest of another. The intentional torts involve a wide variety of non-accidental behavior. Some of this behavior obviously merits the name "intentional" in the sense of an intention to cause harm. A good deal of what falls in the category of the intentional torts, however, does not necessarily require or involve an intent to cause harm. Certain forms of defamation and some invasions of privacy, to give just two examples, can result in liability even in the absence of intent to cause harm, as long as the defendant intended to take the action that caused the plaintiff harm. Nonetheless, this rough distinction between the torts that fall in the general area of accident law and those informally classified as intentional is worth recognizing.

The distinction between tort liability for accidental and intentional harm, however, goes only to the standard of care at issue. Proof that the defendant violated the applicable standard of care is not enough to warrant the imposition of tort liability. Breach of the standard of care is merely one element of any "cause of action"—basis for imposing liability—in tort. There must be proof that the plaintiff suffered actionable harm, and that the defendant's conduct in breaching the applicable standard of care caused that harm. Combining these requirements yields the four elements of any cause of action in tort: 1) Duty (i.e., the legal duty to comply with a particular standard of care); 2) Breach of Duty (i.e., failure to

comply with the applicable standard of care); 3) Causation; and 4) Damages.

Although tort liability is imposed, under various circumstances, for bodily injury, property damage, emotional harm, and economic loss, liability for bodily injury and property damage dominates tort law in practice. Consequently, it also dominates introductory courses in tort law. The reason is that tort liability is much more likely to be imposed when conduct causes physical harm than when only emotional or only economic loss occurs. Bodily integrity is central to people's ability to benefit from all the other goods of life. Greater obligations of safety therefore attach to conduct that risks bodily injury, and tort law affords greater protection against such risks. It would be much harder to justify also affording greater protection against the risk of damage to property, except for the fact that conduct that risks property damage typically simultaneously risks bodily injury. It is often a matter of serendipity whether the conduct results in bodily injury, property damage, or both.

Tort law in the United States has four features that are so fundamental to its operation, even though their existence is not logically necessary to it, that they are worth noting at the outset:

*Jury Trial.* In all state and federal courts there is a right to a trial by jury in almost all tort cases. This produces a body of rules about the allocation of authority between courts and juries. Much of tort law emerges in decisions about this allocation of authority. In addition, there is more potential for emotion and sympathy for the plaintiff to influence the outcome, and less concern for consistent treatment of similar cases, than there would be if ultimate decisions were made by professional judges rather than by lay juries. It is worth noting, however, that over ninety percent of all tort suits are settled. Settlements typically are reached in anticipation of what would happen at trial. But many routine, small and medium-sized claims are handled in a somewhat bureaucratic fashion by lawyers and liability insurance companies, without careful consideration of factual and legal nuances that would be relevant at trial.

*Liability Insurance.*[1] Beginning in the second half of the nineteenth century there was a significant increase in the incidence of accidental injuries. This resulted from industrialization, the mechanization of transportation and a consequent increase in the risk

1. A brief, introductory primer on insurance, including liability insurance, is set out at the beginning of Chapter Twelve. Interested readers may wish to review these paragraphs now.

of injury from railroads, trolley cars, and airplanes, and a political and cultural shift that favored the greater socialization of risk generally. In part to respond to the increased liability that resulted, late in the nineteenth century liability insurance was introduced. It has grown exponentially since then. Today, virtually all defendants in bodily injury and property damage suits, and many defendants in other kinds of suits, have at least some liability insurance. The availability of liability insurance influences the decision whether to sue and whom to sue. Moreover, over a period of more than a century, the availability of insurance and the scope of tort liability have influenced each other. The more tort liability expanded, the more liability insurance became available. And often tort liability expanded at least in part because liability insurance was, or could be expected to become, available.[2]

*The Contingent Fee System.* Plaintiffs' attorneys almost always take cases on a "contingent-fee" basis. That is, the plaintiff's attorney receives a percentage of the plaintiff's recovery if the suit is successful, and charges nothing if the suit is unsuccessful. The result is that plaintiffs are not required to be able to pay their attorneys in order to bring suit. In addition, the contingent fee approach affects the selection of cases in which suit is brought, because plaintiffs' attorneys are heavily influenced by their prospects of success and by the magnitude of the plaintiff's alleged losses.

*The "American Rule" for Costs.* In our tort system, each party pays its own costs, including counsel fees, win or lose. In contrast, in many other systems, a loser-pays approach is applied. Under our system, plaintiffs are less discouraged from bringing suit, because they do not risk incurring a sizeable personal cost if they lose their suits, and defendants must pay their own counsel fees and costs even if they win. Obviously, fewer suits would be brought, whether involving strong or weak claims, and some suits might be more vigorously defended, under a loser-pays system.

These four features of tort law and liability have heavily influenced its development. Together they help to account for the great transformation of tort law that took place in the twentieth century. From a comparatively obscure field of law with little economic importance even in the late nineteenth century, the scope and incidence of tort liability expanded substantially. Tort law had become a major legal specialty of considerable economic importance by the beginning of the twenty-first century. That is one reason

**2.** *See* Kenneth S. Abraham, THE LIABILITY CENTURY: INSURANCE AND TORT LAW FROM THE PROGRESSIVE ERA TO 9/11 (2008).

that virtually every law school requires the study of tort law in the first year. The other reason is that tort law is a near-perfect vehicle for studying the legal process. And that is where we now turn.

## II. Procedure in a Tort Suit: Where Tort Law Comes From

Tort law does not simply spring spontaneously out of the mouths of judges. Tort law is created through rulings that courts make in lawsuits. These rulings are made when a lawyer for the plaintiff or defendant requests that a judge do or not do something as part of a lawsuit—e.g., when a lawyer makes a motion, objects to the admissibility of evidence, or requests a particular instruction to the jury. Often the substantive rules of tort law determine the proper procedure to be followed by a court in ruling on such requests, and the applicable rule of tort law can be inferred from a court's procedural ruling. Thus, to understand substance, one must understand procedure; and to understand procedure, one must understand substance. Turning your mind off when you encounter a procedural issue in the course of examining a judicial opinion usually is a big mistake, for it is in the resolution of procedural issues that substantive law emerges.

There are five major phases of a tort suit: pleadings; pre-trial motions; discovery; trial; and appeal. The pleadings initiate the suit. Pre-trial motions raise legal issues that may clarify or narrow the range of the dispute. Discovery is the process by which, prior to trial, the parties obtain information about each side's position and about the facts as they will be presented at trial. At trial evidence is introduced, the judge instructs the jury about the relevant legal rules, the jury makes findings of fact, and the jury applies the rules about which it has been instructed to its factual findings, yielding a verdict from the jury and a consequent judgment issued by the trial court either for the plaintiff or for the defendant. On appeal the party who was unsuccessful at trial identifies what it contends were legal errors committed by the trial judge, and the appellate court determines whether any of these errors were committed.

### A. *Initial Pleadings*

Tort suits proceed much like other civil actions. A lawsuit, or action, is commenced when the injured party, or *Plaintiff*, files a *Complaint* or *Declaration*, alleging facts giving rise to a *cause of action*. The Complaint is said to contain "allegations" because the assertions in it do not count as facts unless and until the defendant

admits them, or a jury finds them to be true at trial. A "cause of action" is the plaintiff's legally actionable claim, the basis upon which he asserts a right to damages or other relief. Typically a cause of action is the name of a particular tort, such as negligence, battery, or defamation.

The *Defendant* is then served with the Complaint and a summons requiring the filing of an *Answer*, which admits or denies the allegations of the Complaint. The answer also may state what are known as *Affirmative Defenses*—defenses that the defendant is required to raise specifically and prove at trial. Commonly the defendant admits some of the plaintiff's allegations, denies others, and indicates that it possesses insufficient information as to still others. By comparing the Complaint and the Answer the parties can determine what is initially disputed and what is not. All the documents mentioned thus far, as well as pre-trial motions filed later, are typically referred to as the *Pleadings*.

## B. *Discovery*

In the *Discovery* stage of the suit the parties are permitted to seek information from each other about the nature of their positions and the evidence supporting them. Through written *Interrogatories* the parties may propound questions to be answered in writing, and through oral *Depositions* witnesses (including the plaintiff and the defendant) may be examined under oath to determine the scope and details of their possible testimony at trial. The information sought in discovery need not be admissible in evidence to be discoverable, as long as it has the potential to lead to admissible evidence. For example, through discovery the defendant may learn the precise nature of the injuries the plaintiff claims to have suffered, and the basis for the plaintiff's claim that the defendant was negligent. Similarly, the plaintiff may learn what features of her claim the defendant contests and the basis for the defendant's contentions. Discovery reduces the element of surprise at trial, thereby permitting the parties to prepare and focus only on the issues actually in dispute, and promotes settlement before trial by helping to inform the parties of the strengths and weaknesses of each side's position.

In the simplest of cases there is little discovery, but these days discovery is an important part of virtually all cases. A single deposition may take a day, two days, or even occasionally a week, and may be preceded or followed by written interrogatories. Even in a simple auto accident case discovery can take some time if there are eye witnesses and medical experts who are in the possession of

potentially relevant information. On the other hand, in a complicated tort suit discovery may take months or even years, if there are large numbers of documents to be obtained and many witnesses to be deposed. For example, think of how many people may have information that is potentially relevant when the manufacturer of a prescription drug is sued for negligently failing to warn of a side effect that injured the plaintiff. Research scientists, marketing personnel, financial analysts, and management officials all may know something relevant to the decisions that led to the failure to warn. The plaintiff is likely to depose many, and perhaps all, of these individuals.

## C. *Pre–Trial Motions*

Pre-trial motions may be made before or after discovery. This is the first stage at which the court makes important "procedural" decisions. For our purposes the important pre-trial motions are the *Motion to Dismiss* and the motion for *Summary Judgment*. The former tends to be made before discovery and the latter after discovery.

The function of a motion to dismiss the plaintiff's complaint is to test the legal sufficiency of the plaintiff's allegations. For purposes of the motion the plaintiff's allegations are accepted as true. By making the motion the defendant asserts that, even if the allegations are true, the plaintiff does not have a valid, legally cognizable claim. For example, suppose that the plaintiff alleged that he was walking down the street when the defendant frowned at him, and that as a result he experienced emotional pain and suffering. The defendant's motion to dismiss for failure to state a cause of action (or as it is described in the federal system, for "failure to state a claim upon which relief can be granted") would in effect admit that the defendant frowned at the plaintiff, and admit that the plaintiff experienced emotional pain and suffering as a result, but would deny that this behavior is actionable—i.e., deny that this behavior constitutes a tort.[3]

These motions are made prior to discovery. In contrast, after discovery a motion for *Summary Judgment* by either side asserts that 1) there is no genuine issue of material fact, and 2) based on the undisputed facts, the party making the motion is entitled to

**3.** A similar motion in some states is known as a *Demurrer*. But demurrers can be filed by either side, and simply test the legal sufficiency of the pleading to which they respond. For instance, a defendant's demurrer to the plaintiff's complaint is in effect a motion to dismiss; a plaintiff's demurrer to a defendant's answer is in effect a motion to strike the answer as a legally insufficient defense.

judgment "as a matter of law." For example, if discovery reveals no dispute between the parties that while driving blindfolded down Main Street the defendant struck and injured the plaintiff, the plaintiff would move for summary judgment. The only question would be whether the defendant was negligent "as a matter of law" or, on the contrary, a jury could legitimately conclude on the basis of the undisputed facts that the defendant was not negligent. In all probability the plaintiff would be granted summary judgment under these circumstances. Thus, whereas typically a motion to dismiss or a demurrer tests the legal sufficiency of mere *allegations*, a motion for summary judgment tests the legal sufficiency of a party's position based on undisputed and therefore established *facts*. But in other respects the two kinds of motions function in a very similar way: they take certain facts to be established, and then assert that on the basis of these facts (and sometimes notwithstanding these facts) the party making the motion is entitled to prevail as a matter of law, without the need for decision by a jury.

From these examples it should be obvious that these motions are not "mere" procedure. Rather, their proper resolution depends on the applicable substantive rule of tort law. The motion to dismiss a suit claiming damages for injury caused by being frowned at cannot be granted or denied without knowing whether frowning under those circumstances constitutes a tort (which of course it does not). And the motion for summary judgment cannot be granted or denied without identifying the applicable rule governing the role of the jury in determining whether driving blindfolded down Main Street is negligent. If the question whether the defendant was negligent must always be decided by a jury, then the plaintiff's motion for summary judgment must be denied. But if there are cases in which it can be said "as a matter of law" that the defendant is negligent (and as we shall see in Chapter Three there are such cases), and this is one of those cases, then summary judgment should be granted. Much of tort law, in fact, is made and applied through rulings on motions such as these.

## D. *Trial*

If a ruling on a pre-trial motion has not disposed of the case and the parties have not settled, then the case proceeds to trial. At trial the allocation of decision-making authority between the court (i.e., the trial judge) and the jury is of crucial significance: courts *only* decide issues of law; juries *only* decide issues of fact. When there is a trial without a jury—a "bench trial"—the trial judge wears two hats. Then the trial judge both rules on the law and serves as the "trier of fact."