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CASES AND MATERIALS ON TORTS

Tenth Edition

Wolters Kluwer
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Wolters Kluwer
Law & Business

Published by Wolters Kluwer Law & Business in New York.

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Printed in the United States of America.

1 2 3 4 5 6 7 8 9 0

ISBN 978-0-7355-9992-5

Library of Congress Cataloging-in-Publication Data

Epstein, Richard Allen, 1943-
Cases and materials on torts / Richard A. Epstein, Catherine M. Sharkey.—10th ed.
p. cm.
Includes index.
ISBN 978-0-7355-9992-5
1. Torts—United States—Cases. 2. Liability (Law)—United States–Cases. 3. Damages—United States—Cases. I. Sharkey, Catherine M. II. Title.

KF1249.E67 2012
346.7303—dc23

2011053422

SFI label applies to the text stock

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To the next generation

Bella Catherine Pianko
Noah David Pianko
Caleb Emmett Sharkey
Phoebe Lila Sharkey

PREFACE

The tenth edition of this casebook marks a major change from the previous seven editions, as Catherine Sharkey has joined Richard Epstein as a full partner in the preparation of the revision of a casebook that has now been continuously on the market for 53 years. The initial edition of the casebook was prepared in 1959 by Professors Charles O. Gregory and Harry Kalven, Jr., both exceptional and imaginative scholars. Their second edition followed some ten years later, and was in fact the book from which Professor Epstein first taught torts at the University of Southern California in 1969. In 1972, he joined the faculty of the University of Chicago Law School. In January 1974, with Gregory in retirement, Professor Kalven asked Epstein to collaborate with him on the third edition of the casebook. Kalven's tragic death in October 1974 cut short that brief collaboration before it began. Thereafter Professor Gregory reentered the lists to read and comment on the drafts of the third edition that Epstein prepared, which appeared in 1977. The work on the fourth edition of Epstein, Gregory and Kalven, which appeared in 1984 was done by Epstein alone. Gregory died in April 1987, after a rich and full life. Epstein then prepared the fifth (1990), sixth (1995), seventh (2000), eighth (2004), and ninth (2008) on ever shorter cycles. Even after so much time passed, much of case selection and organization of this book reflect the initial judgments of Gregory and Kalven, whose pioneering spirit and rich imagination brought so much to the study of torts.

This tenth edition reflects a new partnership and contains some changes in organization from the ninth edition. The material on joint and several

liability has been merged with the chapter on causation. The material on vicarious liability has been inserted at the end of the now-chapter 7 on strict liability, to which has also been added the materials on trespass to chattels and conversion that had formerly been included in chapter 1. As a new feature of the book, we have added a set of problems which should allow students to test their knowledge of the material presented in each of the chapters. Extensive references are made to the key provisions of the Third Restatement of Torts: Liability for Physical and Emotional Harm, which are now working their way to final approval at the American Law Institute. The book also carries over many of the features from the ninth edition, including extensive historical materials on the evolution of tort law, an expanded treatment of public nuisance law, recent developments in products liability law, expansion of the materials on various types of injuries in damage cases, and the heavier emphasis on web-based communications under the law of defamation and privacy.

Throughout, however, our intention has been to update the materials while preserving continuity with the earlier editions. In so doing, we 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 the now complete) twentieth centuries. Toward that end, we 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, we have taken a look at the many major changes in tort law that took place in the years between 1968 and 1980. Although many of those developments continue to remain important, others have been either modified or rejected in favor of more traditional doctrines. It is no longer likely today that strict liability rules will exert greater sway in medical malpractice cases, or that market share liability will expand much beyond the original DES cases. At the same time, new and important developments on the liability of HMOs for refusing to authorize treatment, the application of U.S. Supreme Court precedent 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. We have sought to keep pace with these new developments both through common law and, increasingly, through legislation.

Five previous editions of this book were dedicated to the memory of Charles Gregory and Harry Kalven. Time has moved on. In 2004, Epstein dedicated the eighth edition of the book to the memory of his contemporary, the late Gary Schwartz, who died in 2001, but who remains one of the most insightful, learned and fair-minded tort professors of any generation. For many years his kindness, generosity and insight helped improve the earlier editions of the case book. The ninth edition was dedicated to the

late Bernard D. Meltzer, himself a casebook author of great distinction, who passed away at age 92 in 2007. In the tenth edition, we move from the past to the future, and dedicate jointly this edition to the next generation, our grandchildren and children, respectively.

Richard A. Epstein
Catherine M. Sharkey

New York
September 2011

ACKNOWLEDGMENTS

In preparing the tenth edition of this casebook, we have been fortunate enough to draw on the comments of many teachers and students who have used the book. Over the years we have received additional assistance and suggestions on various points of this volume 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, Keith Hylton, Jason Johnston, Spencer Kimball, Alvin Klevorick, Stanton Kraus, William Landes, Fred McChesney, Thomas Miles, Mark Miller, Cornelius Peck, Malla Pollock, Richard Posner, Glen Robinson, Howard Sacks, Gary Schwartz, Paul Schwartz, Perry Sentell, Ken Simons, Geoffrey Stone, Alan Sykes, Aaron Twerski, Ernest Weinrib, and Jerry Wiley. We should also like to thank in addition all the unnamed casebook users who have filled in their forms to explain what they did and did not like about earlier editions of the book.

Our largest debt, however, goes to the team of diligent research assistants who helped in the preparation of this book. Sean Childers, Christopher Dodge, Margo Hoppin, Tyler Jaeckel, Lauren Hume, Elizabeth Jordan, Christopher Lang, and Jared Roscoe of NYU Law School and Samuel Eckman and Taylor Rausch of the University of Chicago provided immense assistance in gathering materials and working on the revisions of the Tenth Edition. Ms. Hume of NYU Law School also tackled the heroic task of proofreading the entire book manuscript, and Jeremy Heilman provided key administrative assistance. We also thank Carol McGeehan and John Devins for seeing this project through at Wolters Klouwer, and Gretchen Otto for her diligent copyediting.

We would also like to thank the authors and copyright holders of the following works:

Abraham, Custom, Noncustomary Practice, and Negligence, 109 Colum. L. Rev. 1784, 1802, 1818-20 (2009).

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

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INTRODUCTION

The tenth edition of this casebook appears four years after the ninth edition, and some 53 years after Charles O. Gregory and Harry Kalven, Jr., published the first edition of this casebook in 1959. Those 53 years have been marked by both continuity and change in the law. From the late 1950s until the mid-1980s, these changes tended to move largely in one direction. With the exception of the law of defamation and privacy, tort liability expanded on almost 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 New York—the tides have been receding. There are now many cases in which eyebrows should be raised because liability has been denied, not because it has been established.

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 shaped the subsequent analysis in important areas of the law, such as those dealing with abnormally dangerous activities and with private and public nuisances, all of which continue to take on additional 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 paradigmatic 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 a decade or more in the future.

The emergence of new types of litigation has taken its toll on traditional tort theory. The question of "proximate cause"—whether a remote consequence could properly be 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 of these shifts in emphasis have accelerated in the past generation, 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 nine editions. The primary goal remains one of giving to the student an accurate sense of both the legal evolution and the current legal position of tort law. In this context, that means incorporating into the book the output of the American Law Institute, which has now published multiple volumes of a Third Restatement dealing with Liability for Physical and Emotional Harm, Apportionment of Liability Among Multiple Defendants, and Products Liability. It also means taking into account repeated rounds of legislative initiatives, which, not by coincidence alone, have taken place in the same areas that have generated the new Restatement output.

This casebook, however, would fail in its essential mission if it did not accomplish two other tasks. First, it should provide the student an opportunity to examine the processes of legal method and legal reasoning, with an eye to understanding the evolution of legal rules, and the huge impact that these changes have had on our 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 understanding method and historical evolution cannot be underestimated in legal education. A casebook—certainly this casebook—is not a reference book, much less a treatise. Indeed with the rise of the online services, internal case and page references are cut back to a minimum, often without an explicit indication of omitted citations, in order to ease the flow of the text. The great problem of legal work today does not lie in finding too little law, but in being overwhelmed by too much. A click on a single principal case puts you on a trail that branches off in a thousand directions. Faced with this surfeit of information, the standard legal curriculum,

by necessity, touches on only a small fraction of the huge and ever-growing body of judicial decisions, Restatement provisions, and statutory material, much of which 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 determine 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 trace 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. Much of the material in the tenth edition does not represent modern cases, but earlier decisions whose intellectual value has survived the passage of decades, or even centuries, including one short but insightful passage from the Lombard laws on comparative negligence that dates from 733 A.D! Likewise, in order to capture the nature of legal debate, in many principal cases we have reproduced not only the opinion of the court but those of concurring or dissenting judges. With *Fletcher v. Rylands, infra* at 103, for example, five separate opinions from three different courts are reproduced, because each adds something to the total picture. These cases are often of exceptional value because their interesting facts invite subtle variations in judicial reasoning. The quality of the arguments has made these cases focal points for analysis in subsequent judicial opinions. Likewise in legal scholarship, modern articles tend to gravitate to the discussion of the classic cases that have already been studied by previous generations of scholars.

A sound legal education requires more than attention to doctrinal and 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 by judges and scholars alike. 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 four or five 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 when the first two editions appeared in 1959 and 1969—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

from the judicial or academic discourse, but they did not dominate judicial or academic attitudes toward either particular cases or general theory. Fairness, justice, and equity, however elusive, were the dominant themes. Most laypeople, and many judges, instinctively approach most tort cases in just this fashion.

Over the past 40 or 50 years, the traditional approach has been 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 risk of "inevitable accidents" was usually borne by the plaintiff under the dominant view from the late nineteenth to the mid-twentieth century, both for private and institutional defendants. Yet once the presumption shifts, especially with institutional defendants (corporations, hospitals, professional practice groups), the risk of inevitable accidents tends to be shifted to defendants for both physical and emotional harm. Charging institutional defendants with tort liability, it is said, allows for the orderly shift of these individual losses to society at large, either by altering the nature and type of products sold and services provided, or by spreading the risk through liability insurance. Second, in suits against institutional defendants, defenses based on plaintiff's conduct—notably contributory negligence and assumption of risk—receive a narrower interpretation and rarely bar, but typically 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, the costs of their prevention, and the administrative costs of running the legal system. 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 also contains criminal laws and legislative and administrative regulation, not to mention contractual and customary limitations on proper conduct. Given its systematic orientation, this economic approach tends to downplay both 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 first-party insurance arrangements, such as ordinary life, health or disability insurance. Until very recently, its importance was largely academic, but today its influence in the decided cases is increasing. But it would be a mistake to state that in the decided cases the law and economics approach has overtaken the traditional intuitive reliance on fairness—except perhaps with the hardy band of law professors turned judges.

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 the defendant on the person or property of the 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 we 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 first and foremost the cases of physical injuries to the person and to land. We have postponed the discussion of conversion and trespass to chattels to Chapter 7, where they are linked with other specific forms of strict liability. Once the analysis of the prima facie case is completed, the book addresses such distinctive defenses as consent, insanity, self-defense, and private and public necessity. Once that is completed the chapter addresses the various harms associated with wrongful imprisonment and the intentional infliction of emotional distress.

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 negligence principle, which addresses the different interpretations that can be attached to the idea of unreasonable conduct, the role of custom and statute, and the issues of proof, with special attention to the doctrine of res ipsa loquitur, and to the role of judge and jury in trying negligence cases.

Chapter 4 turns to plaintiff's conduct, including contributory negligence, assumption of risk, and comparative negligence.

Chapter 5 then deals with two of the major issues of causation, cause-in-fact and proximate cause, as seen through both traditional and modern theories.

Chapter 6 addresses affirmative duties to strangers and to persons with whom the defendant stands in some special relationship, which includes the full range of entrants onto land, and other persons over whom the defendant exercises some degree of control, including everyone from children, to students, to tenants and to psychiatric patients.

Chapter 7 then deals with strict liability torts: animals, trespass to chattels, and conversion, ultrahazardous activities, and nuisance.