

C O N C I S E
H O R N B O O K S



PRINCIPLES OF
Tort Law

THIRD EDITION

MARSHALL S. SHAPO

WEST[®]

PRINCIPLES OF TORT LAW

Third Edition

By

Marshall S. Shapo

Frederic P. Vose Professor

Northwestern University School of Law

CONCISE HORNBOOK SERIES®



WEST®

A Thomson Reuters business

Thomson Reuters created this publication to provide you with accurate and authoritative information concerning the subject matter covered. However, this publication was not necessarily prepared by persons licensed to practice law in a particular jurisdiction. Thomson Reuters does not render legal or other professional advice, and this publication is not a substitute for the advice of an attorney. If you require legal or other expert advice, you should seek the services of a competent attorney or other professional.

Concise Hornbook Series and Westlaw are trademarks registered in the U.S. Patent and Trademark Office.

© West, a Thomson business, 1999, 2003

© 2010 Thomson Reuters

610 Opperman Drive

St. Paul, MN 55123

1-800-313-9378

Printed in the United States of America

ISBN: 978-0-314-19538-8

West's Law School Advisory Board

JESSE H. CHOPER

Professor of Law and Dean Emeritus,
University of California, Berkeley

JOSHUA DRESSLER

Professor of Law, Michael E. Moritz College of Law,
The Ohio State University

YALE KAMISAR

Professor of Law, University of San Diego
Professor of Law Emeritus, University of Michigan

MARY KAY KANE

Professor of Law, Chancellor and Dean Emeritus,
University of California,
Hastings College of the Law

LARRY D. KRAMER

Dean and Professor of Law, Stanford Law School

JONATHAN R. MACEY

Professor of Law, Yale Law School

ARTHUR R. MILLER

University Professor, New York University
Professor of Law Emeritus, Harvard University

GRANT S. NELSON

Professor of Law, Pepperdine University
Professor of Law Emeritus, University of California, Los Angeles

A. BENJAMIN SPENCER

Associate Professor of Law,
Washington & Lee University School of Law

JAMES J. WHITE

Professor of Law, University of Michigan

**For Helene,
*The Nonpareil***

For Nat and Robin For Ben and Jackie

For Aaron, Gabrielle, Josh, and Noah

To the memory of my parents

Mitchell Shapo Norma S. Shapo

Preface

This book principally aims to capture the core of tort law for law students. It provides a critical summary and discussion of issues that, during more than forty years of torts teaching, have seemed to me the most troublesome to those first wrestling with the subject. In significant part, it deals with issues about which students most consistently seek aid during term time and especially when examinations are imminent.

I have sought to maintain a tight focus on the things that appear to count the most in tort law. Although I have paid my basic debts to scholarship, I have tried to give a fairly spare treatment of the law. With that goal, I have sought to select authorities aimed at evocative and graphic illustrations of the most challenging problems in the field.

Because lawyers speak in terms of legal doctrine, I write in those terms. But because a principal function of lawyers is to penetrate doctrine to reality, I also have sought to go behind the labels of theory to what courts do in fact. And because American lawyers tend to relate law to policy, I seek to identify the bases of tort law in those policy considerations that most often appear to engage courts, both consciously and subconsciously.

Tort law is a fascinating study. It is a means of dispute resolution, a body of rules for governing conduct, and a social symbol. I hope that this book captures these aspects of the law in a way that is informative to students, and indeed, to lawyers and judges.

Acknowledgments

I can only begin here to record the debts I have accumulated along the way to colleagues and students who have criticized my work, sympathized with it, and generally aided my understanding of law.

It was my particular good fortune to begin professional life with two of the titans of the twentieth century in the field of torts, Leon Green and Page Keeton. Each—Green as my teacher at Miami and colleague at Texas, and Keeton as my dean and colleague at Texas—nurtured me in a way that would be fortunate for any young teacher.

Many other people have provided creative irritants and general inspiration. These include my colleagues at Texas, Virginia, and for thirty-one years now at Northwestern, as well as the extended community of torts teachers across the country. I have profited always from discussions with them—sometimes fierce verbal battles—and those conversations have set rigorous standards for me. Without attempting to list individuals by name, I note my obligations to dozens of men and women whose criticism, challenges, and praise have contributed to my development as a teacher and scholar. Before I became a law professor, my teachers at the University of Miami School of Law provided memorable instruction.

For research support that aided in the writing of this book, I thank the Northwestern University School of Law and the deans with whom I have served: David Ruder, Robert Bennett and David van Zandt. I acknowledge, in particular, support during my year as the Stanford Clinton Sr. Research Professor, and also grants from the Julius Rosenthal Fund, the Charles C. Linthicum Fund, the Seder Corporate Research Fund, the Edwin Walsh Fund, the Clemens and Jane Werner Faculty Enrichment Fund and the Corporate Counsel Center of Northwestern University School of Law.

Scholars run on fuel from libraries, and librarians I have known are among the best. Among Northwestern's splendid crew of reference librarians, Marcia Lehr has been stellar, and I appreciate also the consistent and cheerful aid of her colleagues, especially Pegeen Bassett, Irene Berkey, and Heidi Kuehl. The librarians who run the ship set the course for their complicated institutions, and I have had the best of luck at my law schools from the initial stewardship of the late Roy Mersky through that of George Grossman, Chris Simone, and now Jim McMasters.

Thousands of students have served as sounding boards for my ideas about torts, and in turn have contributed ideas to me. Of the few

dozen who have been my student assistants over the years, I particularly thank Cristina Carmody Tilley, formerly editor-in-chief of the Northwestern University Law Review, for helpful initial criticism of the manuscript.

I am especially grateful to my faculty assistants, Derek Gundersen for his extensive labors on the first two editions of this work, and Michael Sobczak, for shepherding through this edition.

* * *

This book, and my study of tort law, represent a family project. A half century ago, in a gem of a letter, my father wrote me, “When I studied law, it was my ambition to fight injustice.” Because tort law provides such a fine measure of our views about injustice, and justice, those words are a polestar for me.

My children, Ben and Nat, probably cannot count the times that I teased them with the *Palsgraf* case and other hypotheticals at dinner. Both now accomplished analysts—Nat of law and Ben of science—they have been teaching me about the fundamentals of my subject since they were very young.

Helene Shapo, my boon companion with whom I have now shared our golden wedding anniversary, is also a nonpareil among editors. Her sense of organization, her insistence on precision, and her moral authority as a critic have given this book much of whatever quality it has to offer.

Chicago and Evanston
November 2009

**PRINCIPLES
OF
TORT LAW
Third Edition**

Summary of Contents

	Page
PART ONE. INTRODUCTION	
SECTION ONE. Tort Law and Its Purposes	2
Chapter One. An Overview of Tort Law.....	2
[Chapters 2-5 are reserved for supplementary material.]	
PART TWO. THEORIES OF LIABILITY AND DEFENSES	
SECTION TWO. Intentional Torts	20
Chapter Six. Assault.....	20
Chapter Seven. Battery.....	26
Chapter Eight. Intrusion.....	41
[Chapter 9 is reserved for supplementary material.]	
Chapter Ten. False Imprisonment.....	48
Chapter Eleven. False Arrest.....	53
Chapter Twelve. Intentional Infliction of Emotional Distress.....	57
Chapter Thirteen. Fraud.....	69
Chapter Fourteen. Varieties of Intentional Torts.....	75
Chapter Fifteen. Frontier Theories.....	79
Chapter Sixteen. Defense of Property.....	84
Chapter Seventeen. Consent.....	91
SECTION THREE. The Standard of Care in Negligence	96
Chapter Eighteen. Introduction to Negligence.....	96
Chapter Nineteen. Doctrine and Terminology of Negligence ..	101
Chapter Twenty. Possessors of Land: Classifications.....	120
Chapter Twenty-One. Liability of Possessors of Land for Third Party Acts.....	131
Chapter Twenty-Two. Statutory Violations.....	141
Chapter Twenty-Three. Professional Standards of Care.....	150

	Page
[Chapters 24–25 are reserved for supplementary material.]	
SECTION FOUR. Defenses to Negligence Claims	160
Chapter Twenty-Six. Express Assumption of Risk	160
Chapter Twenty-Seven. Informed Consent	166
[Chapters 28–29 are reserved for supplementary material.]	
Chapter Thirty. Implied Assumption of Risk: Generally	177
Chapter Thirty-One. Contributory Negligence	201
Chapter Thirty-Two. Classifying Defenses Based on Plaintiff's Conduct	207
Chapter Thirty-Three. Comparative Fault	213
[Chapter 34 is reserved for supplementary material.]	
SECTION FIVE. Strict Liability and Analogues for Environmental Damage	222
Chapter Thirty-Five. Strict Liability for Activities	222
Chapter Thirty-Six. Private Nuisance	230
Chapter Thirty-Seven. Public Nuisance	242
SECTION SIX. Products Liability	248
Chapter Thirty-Eight. Strict Liability for Products	248
Chapter Thirty-Nine. Defect in Products Liability	260
[Chapters 40–41 are reserved for supplementary material.]	
SECTION SEVEN. The Boundaries of Fault	274
Chapter Forty-Two. Private Necessity	274
PART THREE. PROBLEMS IN CAUSATION AND LIMITATION OF LIABILITY	
SECTION EIGHT. Proof and Causation	282
Chapter Forty-Three. Proof: An Overview	282
Chapter Forty-Four. Circumstantial Evidence Generally	289
Chapter Forty-Five. Res Ipsa Loquitur	294
[Chapters 46–47 are reserved for supplementary material.]	
Chapter Forty-Eight. Expert Evidence and Professional Negligence	307
Chapter Forty-Nine. Proof of Causation and Scientific Evidence	312

	Page
SECTION NINE. Multiple Tortfeasors	327
Chapter Fifty. Joint and Multiple Liabilities.....	327
Chapter Fifty-One. Apportionment Among Multiple Defendants	335
[Chapters 52–53 are reserved for supplementary material.]	
Chapter Fifty-Four. Settlement.....	344
SECTION TEN. Duty and Proximate Cause	353
Chapter Fifty-Five. Duty and Proximate Cause: An Introduction	353
Chapter Fifty-Six. Statutory Violations and “Cause”	364
Chapter Fifty-Seven. Intervening Criminal Acts and Other Tortious Behavior of Third Parties	371
[Chapter 58 is reserved for supplementary material.]	
Chapter Fifty-Nine. Negligently Inflicted Emotional Distress	381
[Chapter 60 is reserved for supplementary material.]	
Chapter Sixty-One. Bystanders	389
[Chapter 62 is reserved for supplementary material.]	
Chapter Sixty-Three. Rescuers.....	398
Chapter Sixty-Four. Economic Loss	404
Chapter Sixty-Five. Duty to Act	415

PART FOUR. THE TORT LIABILITY OF PUBLISHERS

SECTION ELEVEN. Defamation and Invasion of Privacy	426
Chapter Sixty-Six. Defamation: The Basic Law	426
Chapter Sixty-Seven. Constitutional Defamation Law	438
Chapter Sixty-Eight. Fact and Opinion	448
Chapter Sixty-Nine. Media and Privacy.....	457

[Chapter 70 is reserved for supplementary material.]

	Page
PART FIVE. VALUING THE INTERESTS	
SECTION TWELVE. Damages in Tort Law	470
Chapter Seventy-One. Quantifying Economic Losses for Personal Injury	470
Chapter Seventy-Two. Assessing Intangibles	483
Chapter Seventy-Three. Punitive Damages	494
[Chapters 74–75 are reserved for supplementary material.]	
PART SIX. TORT LAW AND ITS NEIGHBORS	
SECTION THIRTEEN. Relation to Contract Law	508
Chapter Seventy-Six. Torts Involving Contracts	508
End Notes	517
TABLE OF CASES	565
INDEX	583

Table of Contents

	Page
PART ONE. INTRODUCTION	
SECTION ONE. Tort Law and Its Purposes	2
Chapter One. An Overview of Tort Law	2
¶ 1.01 The Province of Tort	2
A. The subjects of tort law	2
B. Working definition	3
¶ 1.02 Competing Approaches to Tort Law	5
A. Unification vs. pluralism	5
B. Doctrinal versus functional	6
C. The practical and the theoretical	6
D. The particular and the comprehensive	6
¶ 1.03 Tort Doctrines	7
A. The culpability spectrum	7
B. A catalog of tort theories	8
¶ 1.04 Rationales	8
¶ 1.05 Tort Law as a System	14
¶ 1.06 Relation to Other Systems	15
¶ 1.07 Tort Law and Society	17
[Chapters 2–5 are reserved for supplementary material.]	
PART TWO. THEORIES OF LIABILITY AND DEFENSES	
SECTION TWO. Intentional Torts	20
Chapter Six. Assault	20
¶ 6.01 Definition	20
A. The act	21
B. Intent	22
C. Apprehension	23
D. Harmful or offensive contact	24
¶ 6.02 Policy Considerations	24
Chapter Seven. Battery	26
¶ 7.01 Elements	26
A. Contact	27
B. Unconsented	27

	Page
¶ 7.01 Elements—Continued	
C. Unprivileged	28
D. Intentionality	29
E. “Transferred intent”	32
F. The “everyday touching”	33
G. “Harmful or offensive”	33
H. Comparison and overlaps with assault	34
¶ 7.02 The Legal Consequences of a Battery	35
A. Unforeseen consequences	35
B. Statutes of limitations; punitive damages	35
¶ 7.03 Special Applications	36
A. Domestic violence	36
B. The Federal Tort Claims Act	37
1. Third party crimes	37
2. Pranks	37
C. Sexual harassment	38
¶ 7.04 Rationales	38
¶ 7.05 Conduct Bordering Intentional Torts	39
Chapter Eight. Intrusion	41
¶ 8.01 Definition	41
¶ 8.02 Methods of Intrusion and Protected Spheres	42
¶ 8.03 Policies	45
A. Interests protected	45
B. Balancing	46
[Chapter 9 is reserved for supplementary material.]	
Chapter Ten. False Imprisonment	48
¶ 10.01 Intended Act	48
¶ 10.02 Lack of Consent and Privilege	49
¶ 10.03 Confinement	50
¶ 10.04 Methods of Confinement	50
¶ 10.05 Knowledge of Confinement or Harm	51
¶ 10.06 Constitutional Dimensions	51
¶ 10.07 Interests and Rationales	52
Chapter Eleven. False Arrest	53
¶ 11.01 General Definition	53
¶ 11.02 Specific Rules	53
¶ 11.03 Section 1983	54
¶ 11.04 Social Goals, Behavioral Assumptions and Normative Premises	55
Chapter Twelve. Intentional Infliction of Emotional Distress	57
¶ 12.01 Introduction	57

	Page
¶ 12.02 Elements	58
A. Intentional or reckless	58
B. Severe emotional distress	59
C. Extreme and outrageous	60
D. Sexual harassment	63
E. Relationship among the elements of the tort	65
F. Effects on third parties	65
G. Distressing publications	66
¶ 12.03 Establishing Boundaries for a Developing Tort	67
A. Balancing	67
B. A problem of principle	67
C. Reprise: The role of the judge	67
Chapter Thirteen. Fraud	69
¶ 13.01 Overview	69
¶ 13.02 Requirement of Factual Representation	69
¶ 13.03 Nondisclosure	70
¶ 13.04 Scienter	71
¶ 13.05 Reliance, Materiality and Causation	72
¶ 13.06 Rationales	73
¶ 13.07 Other Theories Based on Representations	74
Chapter Fourteen. Varieties of Intentional Torts	75
¶ 14.01 Malicious Prosecution	75
¶ 14.02 Abuse of Process	76
¶ 14.03 Heartbalm Torts	77
Chapter Fifteen. Frontier Theories	79
¶ 15.01 Prima Facie Tort	79
¶ 15.02 Section 870 and the “Innominate” Tort	80
¶ 15.03 <i>Morrison v. N.B.C.</i>	81
¶ 15.04 The Struggle Over Tort Categories and “Formalism”	82
Chapter Sixteen. Defense of Property	84
¶ 16.01 The Prevailing Rule on Deadly Force: No Privilege ..	84
¶ 16.02 Reasonableness Test	85
¶ 16.03 A Spectrum of Rules	86
¶ 16.03A Statutory Immunities	87
¶ 16.04 Merchants’ Privilege	88
Chapter Seventeen. Consent	91
¶ 17.01 Definition	91
¶ 17.02 Limitations on Consent	93
¶ 17.03 Policies Concerning Fraudulently Procured Consent	94

	Page
SECTION THREE. The Standard of Care in Negligence	96
Chapter Eighteen. Introduction to Negligence	96
¶ 18.01 Negligence Law and Specific Activities	96
¶ 18.02 Procedural Aspects of Negligence	97
Chapter Nineteen. Doctrine and Terminology of Negligence	101
¶ 19.01 Doctrinal Definitions	101
¶ 19.02 Standard of Care: Concepts and Terminology	103
A. Ordinary prudence	103
B. Knowledge, actual and potential	105
C. Foreseeability; frequency of accidents	106
D. Varieties of terminology	107
E. The “Learned Hand test” and other economic standards	108
F. A multi-factored view of negligence	112
¶ 19.03 Guidelines for Deriving the Negligence Standard	114
A. Legislative rules	114
B. Violation of industry standards	114
C. Industry custom as a defense	115
D. Feasible alternatives	115
E. Especially high standards	116
F. Lay judgments	117
G. Multiple approaches	118
¶ 19.04 Gross Negligence	118
Chapter Twenty. Possessors of Land: Classifications ...	120
¶ 20.01 The Traditional Categories	120
A. Invitees	120
B. Licensees	122
C. Trespassers	124
D. Child trespassers	125
E. Trespassers at the boundary	127
¶ 20.02 The Categories Disputed	128
¶ 20.03 Competing Considerations of Justice	130
Chapter Twenty-One. Liability of Possessors of Land for Third Party Acts	131
¶ 21.01 The Functional Problem	131
¶ 21.02 The General Rules	132
¶ 21.03 Functional Applications	132
A. Public places	132
B. Multi-family residences: Apartments and condominiums	134
C. Social hosts	136
D. Prisons	136
E. Schools	137