EPSTEIN

Cases and Materials on TORTS

Sixth Edition

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Richard A. Epstein

James Parker Hall
Distinguished Service Professor of Law
The University of Chicago

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

Charles O. Gregory
Harry Kalven, Jr.

Preface

This is now the sixth edition of this casebook, and the fourth one I have undertaken myself. Its origins go back to the 1950s, when Charles O. Gregory and Harry Kalven, Jr. prepared the first edition, which appeared 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 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) and this sixth edition both bear my name alone, for the change of the guard between generations is now complete. 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 sixth edition blends new with old elements. There are two major changes in overall design. First, I have dismantled the old chapter on nervous shock and emotional distress that used to begin the second half of the book on nonphysical injuries. The increased importance of these cases in ordinary tort litigation has made it advisable to bring these questions to the attention of the student earlier in the course, so they are now paired with physical injuries in the treatment of both intentional and accidental torts. Second, I have created a new chapter on multiple parties, which brings together the materials on joint and

several liability, joint causation, and vicarious liability. But even with these organizational changes I have worked hard to preserve the continuity between the sixth edition and its predecessors. I have thus retained those great older cases, both English and American, that have proved themselves time and again in the classroom while incorporating the most important recent developments on both the judicial and legislative fronts.

In their preface to the second edition, Gregory and Kalven wrote that "the study of the tort law emerges as the great opportunity to watch the common law at work." These words remain as true today as they were when written over a quarter of a century ago.

Richard A. Epstein

Chicago
February 1995

Acknowledgments

In preparing the sixth edition of this casebook I have been fortunate enough to be able 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. In particular, I should like to thank Stanton Krauss, Kenneth Simon, and Jerry Wiley for their detailed written comments on the first part of the casebook, which I used as a guide for much of the revision. In addition, I profited from suggestions and comments by Jennifer Arlen, Richard Craswell, Michael Corrado, Stephen Gilles, Gail Heriot, William Landes, Mark Miller, Malla Pollock, Gary Schwartz, and Alan Sykes. The valuable comments on earlier editions from Kenneth Abraham, Vincent Blasi, William Cohen, Theodore Eisenberg, Robert Ellickson, James Henderson, Morton Horwitz, Jason Johnston, Spencer Kimball, Alvin Klevorick, Cornelius Peck, Richard Posner, Glen Robinson, Howard Sacks, Geoffrey Stone, Perry Sentell, Aaron Twerski, and Ernest Weinrib are still evident in the sixth edition.

I should also like to thank Isaac Barchas, Donna Côte, and Jay Wright for their assistance in preparing this edition. And a special note of thanks goes to omnipresent P. J. Karafiol who, with good cheer and great enthusiasm, reviewed and corrected virtually the entire manuscript, and whose work makes him a causa sine qua non of this book. 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.

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

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Introduction

The sixth edition of this casebook appears 5 years after the fifth edition and some 36 years after the publication of the original Gregory and Kalven casebook. That period of over nearly four decades has been marked by both continuity and change in the law. Until the late 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 as the rules dealing with abnormally dangerous activities and with ordinary nuisances, both of which have assumed greater importance in an age which shows greater concern 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. Torts against institutional defendants — products liability and medical malpractice cases most readily leap to mind — were, when viewed with the benefit

of hindsight, still in their infancy, 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, say, 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 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 five 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. But this casebook 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 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 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 120 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.

There is in the tort law today fundamental disagreement about the proper orientation toward its subject matter 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 — was to look at 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 from *this* defendant as a matter of fairness between the parties. Issues of public policy and social control were of course not 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, if accepted, 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 which 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. The 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 channelling 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) 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 di-

rect 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 material here also considers 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 negligence principle, which addresses not only the different interpretations that can be attached to the idea of unreasonable conduct, but also to the issues of how these cases are litigated before juries. Chapter 4 turns to plaintiff's conduct, including contributory negligence, assumption of risk, and comparative negligence. Chapter 5 deals with the many hard questions that arise when two or more parties may be held responsible for a single harm, and thus addresses questions of joint and several liability, joint causation, and vicarious liability. Chapter 6 then turns to two of the major issues of causation, cause in-fact and proximate cause. Chapter 7 addresses affirmative duties to strangers and to persons with whom the defendant stands in some special relationship. Chapter 8 then deals with the traditional strict liability torts: conversion, animals, ultrahazardous activities, and nuisance. Chapter 9 examines products liability from its nineteenth-century origins to its modern applications. Chapter 10 completes the exposition of the elements of the basic tort with an analysis of the rules for governing

damages, both compensatory and punitive. Chapter 11 deals with immunities, both for private persons and for public bodies and officials. Chapter 12 goes beyond the tort system narrowly defined and deals with the role of insurance in dealing with tort cases, including the major coverage disputes that have arisen in connection with toxic and mass torts. Chapter 13 examines two alternatives to the tort system, workers' compensation and the various forms of no-fault insurance for automobiles, products, and medical accidents, as well as the comprehensive no-fault scheme now in place in New Zealand.

The last four chapters of this book are concerned primarily with nonphysical injuries. Chapter 14 covers defamation from its common-law origins to its constitutional complications. Chapter 15 then takes up the closely related issue of rights of privacy, both as they relate to the right of individuals to control the use of their name and likeness, and to resist the intrusions from the external world. The last two chapters of the book deal with more traditional economic relationships: Chapter 16 is devoted to the law of misrepresentation (with a peek at modern securities law) and Chapter 17 is directed to the general subject of economic harms, here defined as those harms that do not flow from either bodily injury or property damage to the plaintiff.

I have edited the materials with an eye toward smoother reading. The male pronoun has generally been used to include both genders. Citations to cases (and to cases within cases), footnotes, and other quoted material have been eliminated or simplified without any special indication in order to remove clutter and preserve readability. Those footnotes that have been retained have their original numbering. The editor's footnotes are indicated by an asterisk.

References to W. Prosser and W. Keeton on Torts (5th ed. 1984) are simply to Prosser and Keeton on Torts. References to F. Harper, F. James, and O. Gray, The Law of Torts (2d ed. 1986) are simply to Harper, James and Gray, Torts.