

# LAW OF TORTS

CASES AND MATERIALS

FIFTH EDITION

HARRY SHULMAN

FLEMING JAMES, JR.

OSCAR S. GRAY

DONALD G. GIFFORD

FOUNDATION PRESS

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ON THE

# LAW OF TORTS

FIFTH EDITION

*by*

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## PREFACE

This is the fifth edition of a classic casebook first presented in 1942 by Harry Shulman and Fleming James, Jr. The first edition derived in part from materials previously used at Yale by Shulman and economist Walton Hamilton. Tort law has changed considerably since publication of the last edition to have been edited personally by Shulman and James, nearly sixty years ago. We have, naturally, attempted to reflect these changes in subsequent editions. At the same time, we have sought to be faithful to the goals of the original co-editors as stated in the preface to the first edition:

While the focus of tort law is the adjustment of relationships between individuals, the quality of the adjustment here, as in all law, is referred to its effects upon the social good. Otherwise it would seem wasteful to spend social wealth and energy merely to shift money from the pocket of the defendant to that of the plaintiff. Accordingly in tort cases, as elsewhere, liability or immunity is sought to be justified by its larger effects: maintenance of peace and order by quieting the desire for vengeance or satisfying the wish for fairness between men [and women], prevention of undesirable aggression or carelessness, encouragement of desirable activity, and so on. \* \* \*

In this casebook, though we have doubtless failed to accomplish all we wished, we have tried to present the material in such a fashion as to emphasize social consequences and to invite inquiry and criticism as to underlying assumptions. The student should be constantly aware that the law is concerned not so much with rule or doctrine as with problems in human relations, that the problem must be understood before rule or doctrine can be properly fashioned or applied.  
\* \* \*

\* \* \* We have concentrated largely on the untoward physical harms incident to more or less legitimate activity because they constitute a large part of the law of torts and because it is in this area that there is the greatest change both in the nature of the problem and in the choice of adjustment. It is primarily here that we are beginning to see the potentialities of tort liability as a means of distributing losses in the socially desirable manner contemplated by the more direct methods of social insurance. We have tried also in all the material to retain whatever light is shed on the way in which the judicial process actually operates,—the role of the judge, the jury, the lawyer, and the witnesses. This not merely because the readers will be training in law, but because the quality of the adjustments cannot be appraised without understanding as to the manner in which they are made.

Tort law has undergone dramatic change in the decades since these words were written, yet they seem strikingly contemporary. Tort law is not a frozen pond, but a stream flowing through time. Torts can be understood as the process through which courts address the issues of compensation for injuries from accidents and from wrongs in the face of changing economic and social conditions, ideologies, and scientific understandings. Accordingly, while many of the cases included in this edition were decided during the past decade, many others pre-date the twentieth century. Many of the newly added cases, even those in chapters addressing basic issues such as causation, arise in the contexts of products liability and environmental torts. Yet there is continuity between the most recent cases and the older cases. Frequently the newly added opinions discuss the older opinions contained within this casebook, and sometimes it is apparent that the cases presented in this fifth edition reflect the insights of judges and lawyers who once studied the earlier editions.

The edited opinions in this casebook generally are longer than the one- or two-page selections in some other current casebooks. Torts is an ideal course in which to teach the critical role of facts in the legal process, so we avoid the temptation to shorten the statement of facts too severely. Many opinions contain enough of the text of both the majority and the dissenting opinions to help the student recognize how the case fits with precedents and to demonstrate that both parties presented serious arguments to the court.

The Fifth Edition builds upon its predecessors in examining enterprise liability and the basic issue of whether there should be liability for accidental injuries even in the absence of fault. At the same time, the cases and other teaching materials have been selected to expose students to a wide variety of ideological perspectives on this issue and on other aspects of tort law instead of viewing them through a single ideological lens.

It is our privilege to keep this casebook and the names of its original co-editors, Harry Shulman and Fleming James Jr., before a new generation of students.

OSCAR S. GRAY  
DONALD G. GIFFORD

Baltimore, Maryland  
February, 2010

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## EXPLANATORY NOTES AND ACKNOWLEDGMENTS

This casebook consists largely of excerpts from judicial opinions and additional materials written by others. We have tried to represent these writings faithfully and accurately. Obviously they have been edited to include only relevant portions and to reduce the length of these materials. Deletions of text from a case opinion or from other materials are marked by triple asterisks (“\* \* \*”).

Legal opinions proceed from an analysis of legal authorities—generally previous cases thought to be binding or persuasive or both, statutes, regulations, law review articles and books—that are identified or “cited” in the opinions. To include every citation mentioned in these materials, however, would make them far too voluminous and might distract the student from the flow of the author’s reasoning. On the other hand, to delete all citations without any reference to them would create the appearance that the precedents have nothing to do with the conclusions reached by these authorities. For these reasons, citations to authorities are included when we think they may be important to a student’s understanding of the law. Where citations have been deleted, the deletions are marked by a single asterisk (“\*”). In some instances we have taken the liberty of changing the form of citations to make them more consistent with others in the book or to add the date of the opinion or citations to parallel reporters. In the notes throughout the book, the classic torts treatise, Fowler V. Harper, Fleming James, Jr. and Oscar S. Gray, *Harper, James and Gray on Torts* (2d ed. 2006–2010), is abbreviated as *Harper, James and Gray on Torts*. Finally, we have re-paragraphed a number of opinions in order to make them easier for the modern reader to follow.

We have been greatly assisted by a dedicated and competent group of Maryland student research assistants including Rachel Simmons, Peter Nicewicz, and Marc Korman. We also express our appreciation to Maxine Grosshans and Susan McCarty of the Thurgood Marshall Law Library for their reference and editorial services. Finally, we thank Dean Phoebe A. Haddon, former dean Karen H. Rothenberg, Assistant Dean for Library Services Barbara Gontrum, and Director of Information Technologies Gregory Smith for making available the facilities and support of the University of Maryland School of Law and of its Thurgood Marshall Law Library.

We also thank the authors and copyright holders of the following books, articles, and other materials for allowing their writings to be included in this text.



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