# MORRIS ON TORTS

SECOND EDITION

CLARENCE MORRIS
C. ROBERT MORRIS, JR.

University Textbook Series

# MORRIS ON TORTS

## Second Edition

By

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To
Bill
and
Sandy

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# PREFACE TO SECOND EDITION

The first edition of this book was published in 1953. It, like this edition, was written primarily for first year law students taking a course in Torts. As "outside reading" this book may help them to understand better some of the topics covered in class and may orient them to some topics not otherwise covered. Since some stress is placed on advocacy, the book may be of interest to practicing lawyers as well.

Contemporary studies in the law of Torts have increasingly stressed procedure and policy. Perhaps these trends are advanced a little in this book. In addition to the usual emphasis on division of functions of judge and jury and on the importance of jury charges, we have stressed the problems and processes of proof. A policy analysis of all topics covered is stated; it may prove orienting and useful.

The book covers most of the central, traditional subjects; it is not intended to be exhaustive. It cites many of the leading cases and, as illustrative of the current state of the law, many quite recent ones. It is not a search book, although it may prove to be useful as a starting point for research. Few references will be found to the voluminous literature on Torts (from which we have learned most of what we know) because once we started, we would have covered too many pages before a stopping place was reached.

We are grateful to the many people who helped us whip this book into shape.

CLARENCE MORRIS
C. ROBERT MORRIS, JR.

Philadelphia, Pa.
Minneapolis, Minn.
February, 1980

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# MORRIS ON TORTS

## Chapter I

## INTRODUCTION

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### § 1. THE LAWYERS' ROLE IN TORT LITIGATION

Automobile accidents, falls in stores, fights, bursting water mains, bad food processing, swindling, slanders, and many other unpleasant events touch off tort litigation. Torts is a branch of private law; both the plaintiff and the defendant are usually either private citizens or business corporations. Most of the cases are damage suits—the plaintiff prays for a money judgment to compensate him or her for personal injuries or property damages inflicted by the defendant. No terse definition can meaningfully describe all that falls within the four corners of the law of torts; no short catalogue of misdeeds can exhaust the field. If a quick phrase is needed, torts can be called the law of private wrongs.

Clients seldom consult lawyers on tort problems before claims arise. Lawyers are rarely asked how to avoid committing torts. Sometimes governmental agencies, large private enterprises, safety engineers, and liability insurance underwriters undertake preventive work in special fields. The lawyer's work usually starts when he or she is consulted by a claimant or a client resisting a claim.

The most spectacular part of a torts lawyer's work is advocacy in courtrooms. This role is a climax reached after a lot of time-consuming and unspectacular preparation. Painstaking investigation of the law and the facts, and careful sifting and planning must be done if courtroom advocacy is to be effective.

Most of the advocate's important work has been done before the trial begins. Nearly all of this book will be directed toward an understanding of the trial process and what the advocate does to get ready for it.

Many torts claims, however, are never referred to lawyers. The bulk of collectable claims run against persons or firms who are either insured or are corporations so large that they need no insurance. Soon after an accident, a claim adjuster investigates and often either settles with the claimant or convinces the claimant that the claim is groundless. Lawyers are brought in only when the claimant retains counsel. Tort lawyers' most important function is to champion their clients in negotiations for settlement. They meet with claim adjusters and discuss the cases with them, and advise their clients on what offers of settlement should be put forth, accepted, and rejected. A high percentage of all claims referred to lawyers are settled by them for their clients—sometimes after litigation is under way. Many plaintiffs' lawyers settle more than ninety percent of their clients' claims.

Defense counsel are not usually retained unless litigation seems likely. When claim adjusters think that a lawsuit may be unavoidable, defense counsel are brought in. Even at this late stage, negotiations for settlement are likely to continue, and defense counsel often advise and help in continued negotiation for settlement.

Forces that favor or block settlements are subtle and hard to analyze, but some of the more obvious can be sketched.

A major factor is the lawyers' estimate of the case—their guesses on the plaintiff's chances to win if it is tried, and their guesses on the probable size of the judgment if the plaintiff does win. Experienced advocates after fully investigating the law and the facts can often make canny evaluations. Of course settlement is more likely when plaintiff's and defendant's lawyers make about the same estimates of the worth of the claim. The number of instances in which they reach similar estimates is quite high; a fact which may account for the prevalence of settlements.

Even when the lawyers are not far apart in sizing up the value of the claim, settlement is not assured. Other factors affect negotiations.

It costs money to defend a lawsuit. In American litigation defendants must pay their own lawyers even when defendants win. Rather than spend a thousand dollars fighting an unfounded claim, a defendant may be willing to pay the plaintiff

five hundred. So almost any claim is said to have at least a "nuisance value." But a defendant who buys peace may attract a flood of demands. Sometimes defendants spend many times the small sum for which a claim could be settled in resisting it—to discourage those who might otherwise press weak or fraudulent demands. Certain kinds of businesses become special prey if they give in to nuisance claimants. A lawyer who defends bottlers of soft drinks against claims for injuries alleged to have come from foreign matter in their product said long ago (when the price, as well as the product, both were more modest than they now are) that he never recommended a settlement. "After all," he said, "all a man needs to go into business against us is a bug and a nickel."

Most plaintiffs' lawyers accept cases on a contingent fee basis —they get a percentage of the sum collected, and nothing at all if nothing is realized. Both plaintiffs and their lawyers are willing to settle for less than what can be won by going to trial. No lawsuit is a sure thing—witnesses die or give unexpected testimony, unanticipated prejudice affects juries, defendants develop proof of some fact that catches the plaintiff totally by surprise, and so on. Rather than run such risks, nearly all plaintiffs and their lawyers are willing to take less in settlement than they believe they would get from the jury.

Furthermore, lawsuits take time. Cases often hang fire for months and years before a valid claim is reduced to final judgment. Money available only in the remote future is rarely as attractive as a solid but smaller sum in hand. Most claimants are people of small means and are especially pinched when they have suffered a severe injury. Need may be so urgent that the claimant is willing to take a great deal less than his or her due to get it immediately. Even when a claimant's lawyer thinks that the poor client is almost sure to recover a much larger judgment than the defendant offers, the lawyer often hesitates to recommend that the client forego a substantial settlement.

Personal interests of lawyers and their clients do not always coincide. Lawyers should, of course, put their clients' interests above their own, and no doubt a great many do. But not all of them always defer to their clients' interests. A busy plaintiffs' lawyer may be able to make more money by bringing about a large volume of substantial but inadequate settlements than he or she would make by pressing fewer claims more effectively. Some stubborn plaintiffs' lawyers may subject needy clients to unwise risks of litigation on the ground that the lawyers' total take will be greater if they litigate a large

fraction of their cases. Contingent fee contracts sometimes provide that the claimant's counsel fee will be higher if a suit is filed, and these contracts give the lawyer an incentive to stall negotiations until the case is docketed. Defense counsel fees usually depend, at least in part, on the amount of time spent on their cases, and a defendant's lawyer can make more out of a trial than out of a settlement. But even utterly selfish lawyers want good reputations. This desire for respect probably tends to check flagrant abuses by lawyers who otherwise might not be sensitive to their professional obligations.

The art of negotiating settlements is different from the art of courtroom advocacy, but both arts are built on the same sort of preliminary work. By readying for trial, a lawyer also acquires the information needed to negotiate settlements soundly. Only when the lawyer knows what proof can be marshalled and how the courts will apply the law to it can the lawyer estimate the value of a claim properly and negotiate a settlement soundly. So the approach to an understanding of the process of settlement is through an understanding of the process of litigation. However undergraduate law students seldom see trial advocates in action and do not study firsthand reports of trials. Legal education in America converges with advocacy by an indirect route.

## § 2. THE LAW STUDENT'S APPROACH TO STUDY OF TORTS

The practice of law is learned by practicing, but the untutored would seldom know where to start. Legal education should supply a base for learning how to be a lawyer. At its best it gives students some understanding of the processes in which lawyers function and some clues about the way lawyers act.

The standard course in torts relies in lart part on reports of appealed cases, and therefore throws most of its light on the workings of appellate courts; but the materials are better than they seem. Students who try only to reduce case materials to rules of substantive law (which is, of course, an important part of their work—though doomed to prove somewhat disappointing), tend to overlook the trial process in which those rules must function, and thus fail to grasp even the appellate process as well as they should. Appellate courts focus only on the correctness of rulings that were made by the trial judge at various stages of the trial. Each of these rulings was made in a procedural setting which affected the problem raised. Unless

that setting is appreciated, neither the trial nor the appellate process can be understood. As that understanding ripens, students begin to learn about both the trial and the appellate processes. The first and most important advice to novice case-readers is this: Learn to read cases with due attention to procedure.

There is, of course, a substantive law of torts. Procedure is only a means to an end. If a claim is utterly without merit no honest use of procedure can make it meritorious. If a claim is soundly founded, procedure indicates the approved method of getting it recognized. But lawyers' arts are built on use of the substantive law, and substantive law cannot be understood completely apart from its use. No client wants a treatise. Clients want favorable results.

Law students are eager to know "what the law is." A questioner who asks, "What is the substantive law of torts?" normally makes two unfounded assumptions: (1) that there is a clear, recognized, complete, and static set of rules, readily applicable to any set of facts that occur, and (2) that the facts of cases can be authoritatively and readily described, once and for all, and in only one way.

Rules and principles of tort law are a changing body of materials. This does not mean that all rules are good for one case only. In 1348 when a rowdy customer wielded a hatchet at a tavern keeper who refused to open up and serve him in the middle of the night, he committed an assault and had to pay damages. Similar facts would produce a similar holding today or a hundred years from now. But only a few years ago manufacturers' liability for harms caused by defects in their products was much more limited than it is now; and only in the last thirty-two years has any defendant been held liable for bodily injuries inflicted on a child before its birth.

Law students are not going to practice in the past, or even in the present. They are going to practice in the future. They are primarily concerned with what will happen when they appear in court and how they can properly serve clients who will retain them later on. What courts have done (precedents) and what courts and learned authorities say the law is (rules and principles) are good, but not infallible, guides to what courts will do. When past decisions or pre-formulated rules are poor guides to the wise solution of problems, they may still control decisions of judges, but they are less sure to do so. In the last half century judges have often (without the intervention of legislatures) changed tort law.