

美国经典案例选读

美国侵权法原理及案例研究

Torts: Fundamentals, Cases and Materials

李响·编著

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*To my mother – Your optimism, enthusiasm,
and strength of character have always
been an inspiration .*

PREFACE TO TORTS

Barry C. Feld
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Every society must develop rules to prevent one person from injuring another and to provide redress for the harms caused. Whenever a person is injured, the law of torts asks the question whether the costs of damages should remain with the injured party (plaintiff) or whether those costs should be shifted to the person who caused them (defendant). The initial inclination is to allow the loss to lie where it falls, unless some positive reason exists to shift it to another. This reflects a reluctance to invoke coercive governmental power unless legal intervention will advance the public good by ordering one party to pay money to another.

Torts constitute those civil wrongs which the legal system recognizes as the basis for a lawsuit for damages and which allow the victim to recover money – judgments from a wrongdoer. Deciding the content of those rules raises difficult questions about individual choice, personal fault, compensation, and social control. The evolution of liability reflects historical changes, specific tort doctrines, and social policies. The law of torts deals with the ways in which American society allocates economic loss caused by

intentional misconduct, or negligence behavior, or sometimes even when the defendant has not been at fault, but society, through the legal process, imposes liability on the defendant anyway.

A tort is a civil wrong or a private wrong. Torts derive from the Latin word *torquere* —to twist, to bend, or to turn — but has the general meaning of a civil wrong. At the most elementary level, torts simply are those wrongs recognized by law as grounds for a civil lawsuit. There is no law of tort, but rather there is a law of torts — largely discrete torts that have grown up independently. There is no general legislative codification of tort law comparable to that of the criminal law. There are many types of torts — automobile accidents, falls, fist — fights, bursting pipes, medical malpractice, serving tainted food, commercially making or distributing a harmful or defective product, swindles and frauds, slanders, etc., etc. — which cause injuries and for which the injured party seeks redress. The list of tortious wrongs is as long and variable as improper human behavior. If the law characterizes a particular harm as a legal injury, then the plaintiff has a “cause of action” which allows her to file a claim against the person who caused the injury. The three major areas of tort law are: intentional torts, negligent torts, and strict liability torts.

Some tortious conduct also may be criminal. For example, the state may criminally prosecute a defendant who punched a person in the nose and the defendant also may be liable to the plaintiff for the injuries caused by the blow. While the law of crimes and torts sometimes may overlap, they are by no means identical. The state prosecutes and enforces the criminal law to vindicate public interests, while private parties use tort law to protect individual interests and to redress private harms. Criminal law refers to public wrongs, torts refer to civil, or private wrongs, although the same conduct may be both criminal and civilly wrong, and the legal principles developed

in one area may be carried over into the other.

Some torts also may bear a relationship to contract law. When a party breaches a contract, it involves a private wrong, but arises in a consensual context. In contrast, torts refers to private wrongs that arise out of behavior that is not contractual or consensually based. Because torts are not based on mutual consent, it represents a decision by the legal process to require someone to pay money to someone else with whom the first person had no voluntary relationship. Unlike contracts where the duty is mutually agreed upon, the law of torts imposes the duty whether or not the defendant agreed to undertake them. Usually, a person does not agree to be punched in the nose or run over by a drunken driver. But as with the criminal law, there may be some overlap between torts and contracts. For example, if a party enters into a contract, never intending to perform it and then refuses, that is breach of contract, and also may be the tort of fraud because the defendant intentionally misled the plaintiff into acting to her detriment. The law of torts also imposes legal standards on many consensual relationships. For example, a person may voluntarily agree to medical treatment, but the law defines the minimum standards of professional conduct, the deviation from which may be medical malpractice. It is important to understand whether to characterize conduct as a crime, a breach of contract, or a tort because the statute of limitations for bringing an action may differ and the measures of damages may differ.

Tort law tends to focus upon compensation to individuals for physical and property damages and personal injuries rather than indirect economic losses, although the measure of damage for physical injury is likely to be the amount of economic loss resulting from the injury. Tort damages are designed to "make the person whole" – to restore them to where they would have been in the absence of the misconduct – at least in so far as monetary

compensation can repair the harm done. Most torts claims involve physical injury to a person or property, but recovery also may be allowed for intangible injuries such as emotional harm or dignitary torts such as damage to reputation. Injured parties may recover for: physical injury and disability; past and future medical expenses and rehabilitation; loss of wages and reduced future earning capacity; pain and suffering, including mental distress; and some other forms economic losses, such as the diminished market value of the property. Because the law generally allows only one legal action for an injury, plaintiffs must prove not only the damages already incurred, but also the expected future damages as well. Awarding money damages to the plaintiff from the defendant achieves corrective justice by restoring the parties to the position that existed prior to the tortious injury. And, of course, tort rules also serve instrumental goals by creating incentives for people to act more carefully in the future.

Because torts involves the involuntary allocation of risks and losses among parties, a number of social policies and purposes underlie this allocation. A formal legal mechanism to redress grievances prevents self-help by injured persons. It also provides a method to punish wrongdoers, for example, the award of punitive damages for intentional torts such as assault or battery. The prospect of liability also will discourage socially undesirable behavior and deter wrongdoing. More broadly, tort liability may help to shape and regulate future behavior. Torts provide a mechanism to regulate risks in the private sector where the burden of preventing an injury is less than the likelihood of harm and the gravity or severity of the harm if it occurs. If the costs of avoiding accidents or expenditures for safety are less than the damages for which a defendant could be found responsible if that conduct causes an injury, an economically rational defendant will alter her behavior to avoid those risks. Finally, liability for torts provides compensation for victims of

wrongdoing.

The tort system emphasizes individual accountability and personal responsibility. A defendant who has done something wrong is held accountable to the person he injures. Similarly, a plaintiff is also responsible to exercise reasonable care on her own behalf, and if her actions contribute to her own injury, the amount she may recover from the defendant may be reduced accordingly. The law of torts also promotes individual freedom by allowing people to act freely as long as their conduct is not characterized as legal wrongdoing. One who is not at fault will not be held liable, even if her conduct does cause an injury to another person.

While the various policy reasons for tort law generally overlap, they may be inconsistent to some extent and tort law does not serve every goal completely. For example, as a system of compensation for injured parties, requiring plaintiffs to sue defendants is an inefficient way to compensate injured persons and imposes high costs of litigation and delay. Moreover, tort law only provides compensation to those injured by another's socially undesirable behavior or fault, for example, intentional misconduct or negligence, whereas a full compensation scheme would pay all persons injured by another's conduct or require everyone to insure themselves against injuries. While a system of compulsory self-insurance would better serve the compensation goal, it might undermine the goal of deterring undesirable behavior and might produce more injuries as a result. Because of the inefficiencies of the tort-litigation system, many other legal alternatives co-exist to deal with physical injuries in certain contexts. For example, workers compensation statutes require employers to carry insurance to compensate workers injured on-the-job for their medical expenses and lost wages. "No fault" legislation requires owners of automobiles to obtain insurance to protect themselves and their passengers against the costs of certain types of injuries.

Social security and governmental benefits provide some payments for individuals who suffer permanent and completely disabling injuries.

Several factors affect courts' decisions to impose tort liability. First, of course, is whether the defendant's conduct was socially undesirable or created an unreasonable risk of harm to others. But not every moral outrage that causes harm gives rise to tort liability. For example, no legal liability arises from passing a starving beggar on the street and refusing to give him money or food or from passively watching a child with whom you have no relationship drown in three feet of water even if you could have rescued him. Secondly, current tort law is the product of historical developments and reflects that checkered history. Because of historical accretions, courts have recognized a large number of discrete torts that have emerged at various times. Because no central principles or exclusive policy goals govern tort law, new torts emerge through a process of analogy. When a person has been wronged by a defendant, but the act does not constitute an established tort, creative attorneys attempt to show that these facts have a close analogical relationship to existing torts. Thus, new forms of torts or legal causes of action emerge as outgrowths or extensions of existing torts.

As a result of social changes, when something happens that can not fit neatly into some other legal category, it may become a tort. In responding to these new situations, courts look for, but cannot find, some underlying principle of tort law by which to measure whether they ought to recognize the new situation as a tort. In deciding whether or not to recognize harmful conduct as tortious, courts consider a number of factors. One factor is the ease of administering a new legal rule. Courts cannot solve all social problems and they generally address those that they can handle most easily in the limited amount of time and with the limited expertise they possess. Courts attempt to strike a balance between focusing on the fault of the defendant and

compensating victims and may impose liability based on the ability of the parties to bear the loss or to prevent or avoid the risks. Often defendants will be in a better position to spread the risks of loss throughout society by charging more for items or by purchasing insurance, which is the classic risk-spreader. Courts also attempt to balance personal and social responsibility with institutional responsibility. While the law reflects a strong belief in individual responsibility, the evolution of torts reflects the growing recognition of the institutional responsibility of large, artificial entities, such as corporations and governments. In a crowded world of complex mechanisms, innocent people constantly are exposed to risk and injuries from institutional and mechanical malfunctions. Human and institutional errors harm innocent people almost at random and the law of torts recognizes the unfairness of imposing those costs on the individual.

The two earliest common law forms of action involving actions in trespass and trespass on the case emerged in the English common law in the 1300 and 1400s. An action for trespass would lie for all direct injuries, whereas an action on the case would lie for consequential or indirect injuries. In the early common law, the distinction between the two types of actions was based on the causal sequence of the injury, not on whether the injury was intentional or not. For example, the two forms of action would distinguish between a falling beam that hit the plaintiff (trespass), and a fallen beam lying in the road over which the plaintiff later stumbled and sustained injuries (case). Actions in trespass started as an adjunct to the criminal law; and because of this early association, the plaintiff did not need to prove damages as a part of the cause of action because the breach of peace itself was sufficient "harm" to justify court action. In contrast, because the cause of action for trespass on the case reflected an indirect injury, the common law required the plaintiff to prove the actual damages incurred. The

early common law of torts imposed strict liability upon the person who caused harm to another even if the person acted without fault. This strict liability was designed to maximize compensation for the injured person and to simplify proof, although most injuries in fact occurred as a result of defendants' intentional or negligent acts. The requirement that the plaintiff plead and prove the "fault" of the defendant, that is, that the defendant's conduct departed from the standard of care of a reasonable, prudent person under the circumstances, emerged in the common law tort system during the 19th Century.

In England initially and in the American states today, judges rather than legislatures created and modify the common law of torts. Although legislation may change or even reverse judicial decisions, the law of torts is quintessentially a judge-made body of law. Judicial opinions or cases are the explanations that judges give for the legal decisions they make based on the facts presented. Their reasoning attempts to justify the decision in the larger body of cases dealing with similar subjects. As a result, law students and lawyers learn to read cases to extract the governing rule, to understand the underlying legal reasoning, and to learn to use the interplay of facts and the law to extend rules to new fact patterns. Because the law of torts is comprised largely of judicial decisions, lawyers must learn how to analyze these primary sources. Judges make the common law of torts in little bits as cases come before them - bricks building a body of law. While the legal rules governing simple, recurring fact-patterns of tort law are well-settled, many real legal issues continue to arise as life and circumstances generate new fact-patterns that courts have not previously encountered. The rules derived from earlier cases may not satisfactorily resolve today's disputes. When lawyers reason by analogy from prior cases, often there are no clear answers, but only good arguments based on facts, law, and public policy.



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