法律概论影印系列
Introduction to Law Series

侵权法

Torts

[美]理查德·A·爱泼斯坦 (Richard A. Epstein)/著

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总　序

吴志攀

加入世界贸易组织表明我国经济发展进入了一个新的发展时代——一个国际化商业时代。商业与法律的人才流动将全球化，评介人才标准将国际化，教育必须与世界发展同步。商业社会早已被马克思描绘成为一架复杂与精巧的机器，维持这架机器运行的是法律。法律不仅仅是关于道德与公理的原则，也不单单是说理论道的公平教义，还是具有可操作性的精细的具体专业技术。像医学专业一样，这些专业知识与经验是从无数的案例实践积累而成的。这些经验与知识体现在法学院的教材里。中信出版社出版的这套美国法学院教材为读者展现了这一点。

教育部早在2001年1月2日下发的《关于加强高等学校本科教学工作提高教学质量的若干意见》中指出："为适应经济全球化和科技革命的挑战，本科教育要创造条件使用英语等外语进行公共课和专业课教学。对高新技术领域的生物技术、信息技术等专业，以及为适应我国加入WTO后需要的金融、法律等专业，更要先行一步，力争三年内，外语教学课程达到所开课程的5%-10%。暂不具备直接用外语讲授条件的学校、专业，可以对部分课程先实行外语教材、中文授课，分步到位。"

引进优质教育资源，快速传播新课程，学习和借鉴发达国家的成功教学经验，大胆改革现有的教科书模式成为当务之急。

按照我国法学教育发展的要求，中信出版社与外国出版公司合作，瞄准国际法律的高水平，从高端入手，大规模引进畅销外国法学院的外版法律教材，以使法学院学生尽快了解各国的法律制度，尤其是欧美等经济发达国家的法律体系及法律制度，熟悉国际公约与惯例，培养处理国际事务的能力。

此次中信出版社引进的是美国ASPEN出版公司出版的供美国法学院使用的主流法学教材及其配套教学参考书，作者均为富有经验的知名教授，其中不乏国际学术权威或著名诉讼专家，历经数十年课堂教学的锤炼，颇受法学院学生的欢迎，并得到律师实务界的认可。它们包括诉讼法、合同法、公司法、侵权法、宪法、财产法、证券法等诸多法律部门，以系列图书的形式全面介绍了美国法律的基本概况。

这次大规模引进的美国法律教材包括：

伊曼纽尔法律精要（Emanuel Law Outlines）美国哈佛、耶鲁等著名大学法学院广泛采用的主流课程教学用书，是快捷了解美国法律的最佳读本。作者均为美国名牌大学权威教授。其特点是：内容精炼，语言深入浅出，独具特色。在前言中作者以其丰富的教学经验制定了切实可行的学习步骤和方法。概要部分提纲挈领，浓缩精华。每章精心设计了简答题供自我检测。对与该法有关的众多考题综合分析，归纳考试要点和难点。

案例与解析（Examples and Explanations）由美国最权威、最富有经验的教授所著，这套丛书历经不断的修改、增订，吸收了最新的资料，经受了美国成熟市场的考验，读者日众。

这次推出的是最新版本，在前几版的基础上精益求精，补充了最新的联邦规则，案例也是选用当今人们所密切关注的问题，有很强的时代感。该丛书强调法律在具体案件中的运用，避免了我国教育只灌输法律的理念与规定，而忽视实际解决问题的能力的培养。该丛书以简洁生动的语言阐述了美国的基本法律制度，可准确快捷地了解美国法律的精髓。精心选取的案例，详尽到位的解析，使读者读后对同一问题均有清晰的思路，透彻的理解，能举一反三，灵活运用。该丛书匠心独具之处在于文字与图表、图例穿插，有助于理解与记忆。

案例教程系列（Casebook Series）覆盖了美国法学院校的主流课程，是学习美国法律的代表性图书，美国著名的哈佛、耶鲁等大学的法学院普遍采用这套教材，在法学专家和学生中拥有极高的声誉。本丛书中所选的均为重要案例，其中很多案例有重要历史意义。书中摘录案例的重点部分，包括事实、法官的推理、作出判决的依据。不仅使读者快速掌握案例要点，而且省去繁琐的检索和查阅原案例的时间。书中还收录有成文法和相关资料，对国内不具备查阅美国原始资料条件的读者来说，本套书更是不可或缺的学习参考书。这套丛书充分体现了美国法学教育以案例教学为主的特点，以法院判例作为教学内容，采用苏格拉底式的问答方法，在课堂上学生充分参与讨论。这就要求学生不仅要了解专题法律知识，而且要理解法律判决书。本套丛书结合案例设计的大量思考题，对提高学生理解概念、提高分析和解决问题的能力，非常有益。本书及时补充出版最新的案例和法规汇编，保持四年修订一次的惯例，增补最新案例和最新学术研究成果，保证教材与时代发展同步。本丛书还有配套的教师手册，方便教师备课。

案例举要（Casenote Legal Briefs）美国最近三十年最畅销的法律教材的配套辅导读物。其中的每本书都是相关教材中的案例摘要和精辟讲解。该丛书内容简明扼要，条理清晰，结构科学，便于学生课前预习、课堂讨论、课后复习和准备考试。

除此之外，中信出版社还将推出教程系列、法律文书写作系列等美国法学教材的影印本。

美国法律以判例法为其主要的法律渊源，法律规范机动灵活，随着时代的变迁而对不合时宜的法律规则进行及时改进，以反映最新的时代特征；美国的法律教育同样贯穿了美国法律灵活的特性，采用大量的案例教学，启发学生的逻辑思维，提高其应用法律原则的能力。

从历史上看，我国的法律体系更多地受大陆法系的影响，法律渊源主要是成文法。在法学教育上，与国外法学教科书注重现实问题研究，注重培养学生分析和解决问题的能力相比，我国基本上采用理论教学为主，而用案例教学来解析法理则显得薄弱，在培养学生的创新精神和实践能力方面也做得不够。将美国的主流法学教材和权威的法律专业用书影印出版，就是试图让法律工作者通过原汁原味的外版书的学习，开阔眼界，取长补短，提升自己的专业水平，培养学生操作法律实际动手能力，特别是使我们的学生培养起对法律的精细化、具体化和操作化能力。

需要指出的是，影印出版美国的法学教材，并不是要不加取舍地全盘接收，我们只是希望呈现给读者一部完整的著作，让读者去评判。“取其精华去其糟粕”是我们民族对待外来文化的原则，我们相信读者的分辨能力。

是为序。

About Aspen Law & Business, Legal Education Division

In 1996, Aspen Law & Business welcomed the Law School Division of Little, Brown and Company into its growing business—already established as a leading provider of practical information to legal practitioners.

Acquiring much more than a prestigious collection of educational publications by the country's foremost authors, Aspen Law & Business inherited the long-standing Little, Brown tradition of excellence—born over 150 years ago. As one of America's oldest and most venerable publishing houses, Little, Brown and Company commenced in a world of change and challenge, innovation and growth. Sharing that same spirit, Aspen Law & Business has dedicated itself to continuing and strengthening the integrity begun so many years ago.

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J. Jerry Wiley
1934–1997
Gentleman, Teacher, and Friend.

Preface

This one-volume monograph on the law of torts has been a long time in the making. From the time that I prepared in 1977 the third edition of what was then Gregory and Kalven, CASES AND MATERIALS ON TORTS, I had toyed with the idea of writing a compact, discursive overview of torts that would set out in one place my own views of the subject. But for many years I was reluctant to undertake so massive an adventure. Even when I decided close to a decade ago to begin with this book, I kept putting it aside to complete what seemed to be more pressing academic or administrative work. But finally I decided to buckle down to the task, by embarking on a forced march through this manuscript in the summer and early fall of 1998.

The book will of course have to speak for itself. But in this brief preface I want to thank all those countless individuals who in one form or another have helped shape my views on common law subjects in general and tort law in particular. I should also like to thank the many people who helped to bring this project to fruition. Stephen Gilles for his close reading of an earlier draft of the first portion of this book. Richard Helmholz, Fred McChesney, Mark Miller, Gary Schwartz, and Gregory Siergenko for their advice on specific sections of the manuscript. I also received many useful comments from two anonymous referees who reviewed the volume for Aspen Law and Business.

Heartfelt thanks are also owed to my research assistants whose steadfast labors helped me so much both on points of principle and matters of detail. Countless times, they found just the right source for a particular point or caught some error of reporting or analysis that crept into the text. It was a great pleasure to work over the years with Michael Call, Paul J. Karafiol, Michael Maimin, Jonathan Mitchell, Camille Orme, Mythili Ramachandran, L. Rex Sears, Edward Siskel, and Daniel Sommers. In addition, I owe a debt of gratitude to the staff of first Little, Brown & Co. and now Aspen Law and Business for gently pushing me toward completion of this project, which began when Timothy Robinson and Richard Heuser were still in charge of law school books at Little, Brown & Co. Since that time Carol McGeehan and Elizabeth Kenny have kept me focused and on track, especially with deadlines looming. Terese Palumbo cheerfully took on the heavy burdens of copyediting. In addition, my thanks go out to my secretary Katheryn Kepchar who helped in the preparation of the manuscript and prepared the table of cases and authorities at the end of the book. And as ever I stand in the debt of the library staff of the University of Chicago Law School, led by Judith Wright, which did so much to find the sources I needed to complete this work.

Finally, I should say a word of fond remembrance to J. Jerry Wiley to whom I dedicate this book. Jerry and I worked together at the University of Southern California from 1968 to 1972. He served as both professor and administrator at the University of Southern California until his death in 1997, where he was loved and respected by everyone with whom he worked. A fine and dedicated teacher of torts, he was always ready with a sharp response and a helping hand. He is sorely missed.

May 1999

Richard A. Epstein
Chicago, Illinois

Introduction

Torts is one of the oldest areas of the common law. Every legal society from the most primitive to the most modern must develop some set of rules that prevents one individual from harming another, and to offer redress for harms once inflicted. Deciding what rules are appropriate, and why, quickly raises controversial questions about the proper relationship between individual choice and social control. The early synthesis of the law of tort tended to offer the individual strong protection against a limited class of invasions from without. Yet by the same token, it generally withheld legal relief from risks that an injured party voluntarily incurred or which resulted from his failure to exercise reasonable care on his own behalf, even if the defendant had been careless as well. The earlier common law, armed with these twin defenses of assumption of risk and contributory negligence, has often been said to embody the individualism associated with the philosophy of laissez-faire and the system of competitive markets in both goods and services that it championed.

With the rise of industrialization, a different set of voices was heard. The language of freedom of contract was matched with that of exploitation of first employees and then consumers, owing to the perceived imbalance of power between mighty industrial combinations and ordinary individuals. As a general political matter, laissez-faire capitalism gave way to the state regulation. There were antitrust laws and workers' compensation statutes around the turn of the century, and the major regulatory initiatives of Franklin Roosevelt's New Deal and Lyndon Johnson's Great Society. The broad changes in political outlook also had their effect on judges who, like their legislative compatriots, became more uneasy with the earlier judicial hands-off attitude toward economic affairs. To be sure, many of the strands of nineteenth century law are with us today. Broadly speaking, however, the tort landscape has been transformed by American judges, who, after breaking from the earlier English laissez faire tradition, mounted a frontal assault on virtually every outpost of the classical nineteenth century tort theory. To some extent, the judicial response lagged behind the shifts in attitude in both legislation and public opinion. But it gained strength by mid-century and reached its peak, roughly speaking, between the mid-1960s and mid-1980s.

During this time liability for physical injuries underwent a rapid expansion. The most obvious change came from the much more chilly reception for the defenses of assumption of risk and contributory negligence, both stalwarts of the older individualist order of the common law judges. But the legal developments were not confined to a single doctrinal category. One line of cases expanded the definition of proximate cause, then another relaxed the requirements for res

ipsa loquitur; a third opened up recovery for nervous shock; a fourth dramatically increased liability for professional malpractice; a fifth did the same for product liability; a sixth cut back on some of the traditional immunities enjoyed by land owners; and a seventh imposed duties on the owners and operators of business establishments and public accommodations to protect their customers and users against criminal attacks by third persons. The cases from that period read like war bulletins, as one classical redoubt after another fell before the onslaught of reform-minded judges. Ironically perhaps, just as liability for physical injury and emotional loss was growing, the strong protections against defamation and invasion of privacy were eroding as judges, ever conscious of the constitutional guarantees of freedom of speech and the press, cut back on traditional protections for reputation and privacy.

As the years rolled by, however, the newer trends crested. Over the last 10 or 15 years, tort doctrine has, if anything, reversed field. The more recent cases have retreated cautiously from the great transformations of the 1960s and 1970s. Stabilization and modest retrenchment were brought on in part by judicial decision, and in part by legislative intervention that addresses, in addition to basic standards of liability, such important topics as joint and several liability, defenses based on plaintiff's conduct, and damages. No one could say with a straight face that tort law at the end of the 20th century returned to its secure confines of 1960, much less to those of 1900. But, for better or worse, since roughly 1985, doctrinal issues were more closely contested and the direction and pace of legal innovation were no longer preordained. No one dramatic innovation makes the legal landscape of 1999 so different from that of, say, 1983. But the accretion of small advantages makes for substantial movement in the tide of battle. New obstacles reduce the number of suits and the dollars obtained in settlement. The torts crisis of one generation transmutes itself into the risk management challenge of the next.

These shifts in tort theory do more than influence the behavior of judges, lawyers, and litigants; they also alter the plans and preconceptions of law professors. As legal doctrine becomes more stable, the fear of instant obsolescence looms less large. It is now possible to summarize and examine tort law as a loyal citizen of the realm who from time to time registers his dissent from the established wisdom. In approaching this subject matter, I have searched for the golden mean. This book is not an impressionistic study that hits the high points of tort law; nor is it a multi-volume treatise that seeks to make accurate reckoning of all recent cases. Rather my hope is to fill for the next generation the niche that Prosser on Torts has filled since the publication of its first edition in 1941.

My plan is to write a book that first presents the law, both past and present, in concise, clear, and coherent fashion, and then evaluates its soundness by examining its social and economic consequences in light of the modern developments in tort theory. At every point, I examine tort law not in isolation, but in context. It is critical to see how the tort law joins forces with other systems of social control—social pressures, reputation, contract, direct regulation—to curb asocial behavior and to preserve a sphere of action that allows individual creativity and talents to flourish. In the modern environment, the basic task of legal re-

search is not finding the relevant materials. If anything, both author and reader today face the converse problem of *too much information*. No lawyer or law student can hope to keep up with the legal output of 50 states, thirteen federal circuits and, on occasion, the United States Supreme Court. No one can master all the detailed statutory reforms of tort doctrine. No one can grasp the multiple tentacles of federal law that touch everything from toxic torts to fraud on the market. And no lawyer without specialized training in economics can be comfortable with the sophisticated mathematical models of tort rules and principles.

The only way to circumvent these difficulties is to outline the main features of the subject and to point the diligent reader to sources of possible refinement. Toward that end, I have radically altered the ratio of text to footnotes. String citations are out, even—or perhaps, especially—for well-established points. In organizing the relevant literature, I treat the various Restatements of Torts as one key focal point. When I started working on this project, the Restatement (Second) of Torts controlled the field. But in the past three years the American Law Institute has prepared two parts of a Third Restatement, one addressing the general principles of intention and negligence (references herein do not reflect the revisions in the April 1999 draft), and the second updating the law of product liability. It is far too early to know how these volumes will be received, so I have chronicled the innovations of the freshly-minted Third Restatement alongside those of the venerable Second Restatement, throwing in occasional references to the First Restatement for good measure. Anyone with access to the Restatement provisions can easily use its annotation to trace down further developments on the matters they cover.

The Restatements are only a compilation of the received tort wisdom. To round out the overall picture, I have included discussions of the classic cases that have helped organize legal doctrine and have generally cited one or two key cases for any important proposition. On historical or theoretical matters, I refer to only a small fraction of the vast secondary literature on tort law and tort theory. I have no illusion that these references are complete or that the sources cited are necessarily the best for the point. No one can read and digest all the relevant literature and still hope to write a manageable book. The references given should allow both student or lawyer to point and click to obtain more comprehensive information from the excellent on-line services now available. They should be sufficient to supply an easy point of entry into the overall literature. But unfortunately, any single-volume treatise must exclude much excellent material.

That said, an analysis of tort law must supply more than accurate renditions of the key doctrinal issues. One major source of added value has to be the theoretical overview it brings to the subject. It is therefore appropriate to say a few words about how tort law fits into the larger scheme of legal relations. The private law begins not with tort, but with property. The first task of any legal system is to assign rights to persons and things that are good against the rest of the world. That task cannot be done by agreement because of the evident transactional obstacles that prevent all individuals, present and future, from coming together to set out the basic ground rules of the system. Setting the basic legal rules must by default be done by some sort of centralized system, by fiat backed with wisdom.

On this matter, dealing with the assignment of rights in persons is easier than is the assignment of rights over things. The bedrock proposition of all modern legal systems is that each person owns his or her body and has the exclusive right to use his or her talents in the manner that he or she sees fit. This basic autonomy assumption explains why individuals normally have the right to accept or refuse medical treatment or for that matter to accept or refuse proposals of marriage or employment. The law must also explain how autonomous individuals acquire property rights in external things: not only in land and chattels, but also in intangible property such as name, likeness, trademarks, copyrights, and patents. Once acquired, these rights can normally be exchanged by contract, but that system as well will only work if individuals have the right to use and dispose of their own labor and the further right to exclude others from the use of their property.

At its core, these are the rights that the tort law protects. Although its role has expanded in modern times, the primary function of the tort law was, and is, to protect innocent (usually passive) individuals from external aggression to their person and property. The law of trespass, nuisance and defamation were all primarily directed against these forms of abuse. It is quite inconceivable to see how society could prosper if individuals were free to maim, rob, and destroy at will. The tort law, not to mention the full apparatus of the criminal law, is directed to incursions against the person or property of other individuals. It retains that key function today, but its importance is measured less by the volume of litigation than by the deterrent effect from the successful administration of its legal rules.

Yet by the same token, no one today believes that the tort law is limited to intentional forms of aggression against the person and property of other individuals. By far the greater volume of tort litigation involves accidental losses, that is, those which were neither intended, planned, nor expected by the party who inflicted them. Yet here too the case for some social intervention is too strong to be denied. All individuals have some degree of generosity, but it is usually directed toward family and friends; sometimes toward neighbors; and less frequently toward strangers. Whenever generosity is the norm, the need for legal intervention is sharply reduced as people can work out the compensation for accidents by informal means.

In many cases, however, individual self-interest overwhelms the limited stores of human generosity. In these cases, legal intervention is needed to redress the fatal imbalance between costs and benefits of individual behavior. Too many accidents will occur if individuals can keep the benefits of their own action while imposing, if only through insufficient care, its costs on others. The object of the tort law is to bring back the costs of harm to the parties who inflicted it in the first place. Any individual who wrecks his own car or pollutes his own lands has a strong incentive to vary his level of precautions to reduce the probability of his loss. The individual who crashes into someone else's car or pollutes someone else's land has weaker incentives to work those costs into his calculations if kept immune from their financial consequences. Damage awards help force any actor to internalize the costs of harms inflicted on others.

One great dispute in this area involves the choice of rule to govern these accidental losses, including of course damage to reputation. Is it a rule that holds a party responsible whenever accidental damages are inflicted or is it a rule that holds that party responsible only if the level of care taken is below that for self-inflicted damage? The choice between negligence and strict liability in stranger cases is one of the great debated questions in tort law, and it is examined at length in chapters 3 and 4. The second great struggle is whether damages constitute the only form of relief against harm. Clearly no other remedy is possible for completed harms, but private injunctions and public licensing systems are efforts to stop threatened wrongs before they occur.

Taken in its largest sense, the tort law represents a distinct social preference for voluntary exchange over private coercion. The reasons for this preference are as valid today as they have ever been. The hallmark of any voluntary exchange is that it leaves both parties to the transaction better off than they were before it took place. The hallmark of any intentional imposition on another is that the benefit to the party who initiates the transaction comes at the expense of its victim. The prospect of mutual gain is, as a first approximation, socially beneficial. It therefore lies on those who want to prohibit a particular voluntary transaction to demonstrate its deleterious effects on the legitimate interests of third persons, or to show that the process of contract formation was undermined by force, fraud, incompetence, and perhaps mistake. Conversely, when one person harms the person or property of another without consent, the absence of mutual gain requires clear justification for that action.

The interaction between tort and contract law has become ever more important because the modern growth of tort law has not been in stranger cases, but with respect to harms that arise within the context of ongoing consensual arrangements. In this setting, the overlap between tort and contract poses the major challenge to the legal system. No one thinks today that the law can set out the details of every consensual arrangement. It cannot decide who will sell goods to whom, when delivery will take place, and at what price. But at the very least it can create a legal framework to insure that promises made today will be enforced tomorrow.

In principle, no set list determines the topics in any complex transaction to which a comprehensive contract can respond. In principle, the private contract could also allocate the risk of loss that arises out of its underlying transaction. A contract of sale could allocate the loss that arises from the sale of defective goods. A contract for professional services could allocate the risk for bodily injury resulting from substandard care. A contract for employment could allocate the risk for workplace injuries. An admission ticket or a social invitation could allocate the risk from injuries that occur on the premises, whether from dangerous conditions or third party assault. If courts and legislatures honored the terms of these contractual agreements once accidental harm occurred, then much of the law of torts would be subsumed in the law of contract. The body of rules needed to deal with personal injury, property damage, and economic loss could be specified by the parties whose joint, public statement of intentions would establish the governing law of their transaction.

At this point, the chief tasks of the law would be two: first, to honor these agreements to the same extent that other contracts are honored, and second, to supply default provisions that make the best guess of filling in terms where the parties themselves are silent. It is often said, and said incorrectly, that contracts are unable to do the job, owing to the inherent ambiguity of language, and the incredible diversity of circumstances that these contracts must govern. No one can doubt the possibility that some situations will be so novel that prevision is not possible; nor should one assume that people will draft contracts to control their routine social interactions. But large businesses, universities, government agencies, and charitable organizations do not face only the risk of random isolated losses. They are also exposed to the systematic risks of their own businesses for which they could draft serviceable terms if they knew these terms would be enforced by the courts.

The one key feature that sparks the growth of modern tort law in such areas as professional malpractice and products liability is the refusal, by legislation and judicial decision, to allow voluntary agreements to allocate loss. It is not that individuals are forced to supply services, goods, or employment. But if they do choose to enter into any of these standard transactions, the terms of trade must meet certain state-ordained minimums. Where these state norms are close to those for voluntary transactions, the dislocations that rise are likely to be small. But when the state norms deviate sharply from the customary patterns of private transactions, their impact is far greater. To the modern judge and scholar, the hardest questions revolve around the decision to override contractual decisions and to then decide what explicit legal norms, what new tort-like rules, should be used in their stead.

The source of much of my own uneasiness with tort law stems from its imperialist tendency at the expense of contractual norms. It is very difficult to run a business of any sort on a day-to-day basis. It is far more difficult to structure from afar the one set of terms that works well for all businesses of a given class. The range of internal variation within a class could be quite broad. Yet in setting a body of rules for warnings and design, the law necessarily presupposes that its external standards are better than those which the parties are likely to come up with for themselves. In some cases that might be true, but often the rules proposed are formulated only with an eye to the few disputes that go to appellate litigation. Frequently, these rules fit in poorly with the far larger class of accidents and injuries that never reach the courts at all. The majority of judges and lawyers are comfortable with judicial interference with contract on matters of safety and health. But to reveal biases early, I am aligned more closely with the embattled minority who presumptively favor respecting these contractual allocations of risk not only for economic losses (where they are generally upheld) but also for cases of physical injuries and property damage.

With this disclaimer, the outline of this book is as follows. The first chapter examines the full range of intentional torts that result in bodily injury, loss of liberty, emotional distress, and property damage. The second chapter looks at the flip side of the problem, by asking what defenses the presumptive wrongdoer can raise on his behalf. (For purposes of exposition, I generally, but not invariably,

use the abbreviation P for plaintiff, and assign it the pronoun "she," and likewise use the abbreviation D for defendant, and assign it the pronoun "he.") The intuition for this division between claim and defense is clear enough. The prima facie case allows P to say what D has done wrong. The defenses allow D to say what P has done wrong, or to introduce some excuse or justification for his asserted misconduct.

Once the law of intentional harms is covered, the book then addresses the larger tort issue of accidental harms. Chapters 3 and 4 address, first from a historical and then from an analytical perspective, the fundamental choice between negligence and strict liability. Chapters 5 and 6 explicate the negligence standard in a wide range of contexts. Chapter 7 addresses the general problem of proof of negligence. Chapter 8 flips over the inquiry and addresses in the context of accidental harms the role of plaintiff's conduct, most notably contributory negligence and assumption of risk, in determining tort liability. Chapter 9 examines suits against multiple defendants who are joined together by theories of market share liability, joint causation, or vicarious liability. Chapter 10 then tackles the perennial questions of causation, both as a matter of fact, and under the guise of proximate causation, as a legal conception. Chapter 11 looks at the group of affirmative obligations cast on defendants. Chapter 12 takes on the question of occupier's liability for a wide class of property-based mishaps. Chapter 13 examines the rules that govern liability for abnormally dangerous (or ultrahazardous) activities. Chapter 14 looks at the law of nuisance. Chapters 15 and 16 study both the historical origins and modern structure of product liability law. Chapter 17 then deals with damages in cases of personal injury and property losses.

The second and somewhat shorter portion of the book deals chiefly with harms to intangible interests. Defamation is examined in chapter 18. The various forms of privacy are covered in chapter 19. Chapter 20 covers both fraud and negligent misrepresentation. Chapter 21 examines a diverse group of economic harms both intentionally and accidentally inflicted. The volume closes with a study of immunities, both private and governmental. Throughout I have tried to distinguish between the law as it is and the law as I think that it should be. Both are part of any modern legal text, and it would be remiss to stress the one to the exclusion of the other.