

TORT AND INJURY LAW

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SECOND EDITION

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*For Helene
For Ben For Nat
For Ronny*

*To the memory of my parents
Norma S. Shapo Mitchell Shapo*

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PREFACE

Torts is, I think, the best subject to initiate learning about the law. It features human conflict, often at a raw level. It is chock full of interesting stories, but it also requires students to look underneath the stories to do the form of analysis that distinguishes lawyers.

This book presents the fundamentals of torts—theories of liability and duty and of defenses based on the plaintiff’s conduct, theories of duty and causation, and damages. It offers those materials, which are rooted in ordinary tort litigation, against the broad fabric of society’s many responses to the problems caused by injuries. These include compensation systems like workers compensation and regulatory systems.

Besides introducing material on those subjects, the book explores what are now basic tort law issues that arise from the application of health and safety statutes and regulations to personal injury actions. The next to last chapter poses the ultimate question of whether we should have a tort system at all. Throughout, the overarching question is the first one in the book: what should society do when A injures B?

The book also introduces the role of tort law as a response to imbalances in power and illustrates how law and science interact, uneasily, at the dawn of a new millennium.

In this twenty-first century, torts teachers are taking quite diverse approaches to their subject. This book offers points of departures for several of those approaches, including law and economics and feminism. At base, however, it is a book about the law. Its audience is students who seek to earn a law degree, mindful that there is a wide variety of professions and businesses in which they ultimately may live their working lives. In focusing on the law, as well as on various modes of thinking about the law, these materials are designed to instruct students in diverse ways of analyzing legal problems. Believing that legal education is generally a good and versatile education, I hope this approach will help to give students perspectives and tools that will enable them to work successfully in a variety of occupations.

* * * * *

After thirty-five years in law teaching, I cannot hardly list all my debts to people who have helped me to understand the law, and to produce this book. I can mention just a few.

It was my great good fortune to begin my teaching career at the University of Texas School of Law in the mid-nineteen sixties. It was a clinic for a young teacher to be with two certified giants of torts teaching: Page Keeton, an incomparable dean who found time to be a formidable scholar, and Leon Green, a transcendent legal mind. Russell Weintraub was a vital mentor. Charles Alan Wright, who, sadly, died as this book went to press, gave me welcome support. Roy Mersky, still a leader in librarianship, provided a beacon for service that still holds up in an electronic world.

I have had the immeasurable benefit of continuing seminars in the law, both the law of tort and the law generally, with many other colleagues at each of my institutions—at Texas, at Virginia and now at Northwestern. I want to mention, in particular, two present colleagues: David Ruder, who provided me great encouragement to expand my horizons in mid-career; and Victor Rosenblum, truly a man for all seasons, for his sage comments on torts and a world of other issues, and for his friendship.

Students at all my schools—now thousands of them—have provided continuing stimulation in the quest for the elusive and provisional truths that challenge Torts students and teachers. Generations of student assistants have helped me, directly and indirectly, with the development of materials for this book. Among my most recent assistants, I particularly thank Cris Carmody.

Librarians at Northwestern, under the directorship of Chris Simoni, have been equal to every task I have assigned them. I especially appreciate the help of a splendid reference librarian, Marcia Lehr, whose good cheer and patience matches her ability and industry. I also thank Northwestern librarians Steve Miller, David Daskal, Irene Berkey and Pegeen Bassett.

I appreciate all the aid I have received from the Northwestern University School of Law, under Deans David Ruder, Bob Bennett, and David Van Zandt. Many Northwestern grantors have provided financial support for the work that has gone into this book, with the most recent support coming from the Clemens and Jane Werner Faculty Enrichment Fund.

My association, of counsel, with Sonnenschein Nath and Rosenthal has been for me continuing legal education of the highest order. I am grateful to many members of that firm for instruction. Its former chair, Harold Shapiro, also my colleague at Northwestern, upholds a standard of excellence in both practice and teaching, and gives me continuing, provocative commentary on the classic law school curriculum. The firm's current chair, Duane Quaini, has a particularly perceptive understanding of how academic training for the law serves clients.

My secretary, Derek Gundersen, has been invaluable in his work on this book. Threading his way through the mysteries of various softwares, and enduring many revisions, he has earned my great thanks.

My parents, Mitchell Shapo and Norma S. Shapo, were my first teachers. I have often quoted to my classes from a letter I received from them in 1959. In particular, I quoted a sentence written by my father, who, studying law at night in the depths of the Depression while working full time, was able to produce the Note, *Recent Trends in Housing Legislation*, 8 *TEMPLE L.Q.* 99 (1933). He wrote to me, "When I studied law, it was my ambition to fight injustice." These words I do not forget. My brother, Ronald A. Shapo, has been a constant source of wisdom concerning the current practice of law on the front lines.

My sons, Ben and Nat, have proved that you can be exposed to Torts hypotheticals from the time you are a toddler and still grow up to become productive citizens. Whenever I finish a book, however much I have labored to make it seamless, I am humbled by a definition that Ben, now a research engineer, offered of "files" when he was five years old: "Files are something you put papers in, and then you staple them together and put a cover on them, and you have a book." Ben, a humanist who is a scientist, has helped to convince me that computers, properly handled, are an author's friend. And I carry forward into this edition research on sports torts that Nat, a lawyer and currently Director of Insurance for the State of Illinois, provided at age 11.

Finally, I most gratefully thank Helene S. Shapo, who read and criticized the manuscript, and who as a spouse and as a standard setter for law and for writing is a nonpareil.

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