TORT AND INJURY LAW
Carolina Academic Press
Law Casebook Series
Advisory Board

¶

Gary J. Simson, Chairman
Dean, Case Western Reserve University School of Law

Raj K. Bhala
University of Kansas School of Law

John C. Coffee, Jr.
Columbia University Law School

Randall Coyne
University of Oklahoma College of Law

John S. Dzienkowski
University of Texas School of Law

Paul Finkelman
University of Tulsa College of Law

Robert M. Jarvis
Shepard Broad Law Center
Nova Southeastern University

Vincent R. Johnson
St. Mary's University School of Law

Michael A. Olivas
University of Houston Law Center

Kenneth Port
William Mitchell College of Law

Michael P. Scharf
Case Western Reserve University School of Law

Peter M. Shane
Michael E. Moritz College of Law
The Ohio State University

Emily L. Sherwin
Cornell Law School

John F. Sutton, Jr.
Emeritus, University of Texas School of Law

David B. Wexler
John E. Rogers College of Law
University of Arizona
TORT AND INJURY LAW

THIRD EDITION

Marshall S. Shapo
Frederic P. Vose Professor of Law
Northwestern University School of Law

Richard J. Peltz
Professor of Law
William H. Bowen School of Law
University of Arkansas at Little Rock

Carolina Academic Press
Durham, North Carolina
For Helene

For Nat and Robin  For Ben and Jackie

For Noah  For Gabrielle, Aaron and Joshua

To the memory of my parents

Mitchell Shapo  Norma S. Shapo

—M.S.S.

In memory of my grandparents
John & Tonina Rocchi
Sam & Althea Peltz

My godmother
Renée Peri Shank

And my torts professor
Jerome Culp

—R.J.P.
CONTENTS

Preface xxi
Preface to the Third Edition xxiii

Chapter 1 · Introduction 3
  A Maxim 3
  Note 3
  A Problem 3
  Introduction to the Nader Case 3
  Nader v. General Motors Corp. 4
  Epilogue: A Settlement 10
  Roscoe Pound, Interests of Personality 11
  Notes 12
  Problem: Jones v. Clinton 13
  Questions 15
  Note 16

Chapter 2 · Intentional Interference with the Person 17
  Preliminary Note
  § 2.01 Assault 18
    Read v. Coker 18
    Notes 19
    Special Note on Street Harassment 21
    Special Note on Stalking 21
    Navratil v. Parker 22
    Notes 26
  § 2.02 Battery 26
    [A] Generally 26
      Problem 26
      Vosburg v. Putney 27
      Mark Twain, Adventures of Tom Sawyer 28
      Historic Functions of Tort-Like Law 28
      Notes 29
    [B] The Culpability Standard in the “Intentional Torts” 31
      Problem 31
      Garratt v. Dailey 31
      A Transcript 34
      Notes 37
    [C] Battered-Woman's Syndrome: A Modern Battery-Related Tort 39
      Cusseaux v. Pickett 39
Douglas D. Scherer, *Tort Remedies for Victims of Domestic Abuse* 43
Note 44

[D] Constitutional Dimensions of Intentional Violations of Individual Rights 44
*Graham v. Connor* 44
Notes 48
Note on Police Brutality 49

§ 2.03 False Imprisonment 49
The *Restatement* on False Imprisonment 49
Donald S. Cohen, *False Imprisonment: A Re-Examination of the Necessity for Awareness of Confinement* 50
Notes 51

§ 2.04 Intentional Infliction of Emotional Distress 52
Problem 52
*Russell v. Salve Regina College* 52
Note 57
*Shaffer v. National Can Corporation* 57
Notes 60
*Jones v. Clinton* 63
Notes 66

§ 2.05 Fraud 68

§ 2.06 Developing Concepts of Tort 70
*Morrison v. National Broadcasting Co.* 70
Notes 75
Problem 76
*Burns Jackson Miller Summit & Spitzer v. Lindner Restatement (Second) of Torts §870 (1979)* 77
Notes 79

Chapter 3 · Defenses to Claims of Intentional Tort 81

§ 3.01 Self-Defense 81
Problem 81
*Restatement (Second) of Torts §65 (1965)* 81
Former Texas Penal Code § 220 82
Notes 82

§ 3.02 Defense of Property 84
Problem 84

[A] The Spring Gun as a Symbol of Rights in Conflict 86
*Katko v. Briney* 86
Notes 92

[B] The Merchant's Privilege 94
*The Merchant, the Shoplifter and the Law* 94
Note on Merchants’ Responses to Rules on Shoplifting 96
Notes 96

§ 3.03 The Privilege to Arrest 97
*Mcintosh v. Arkansas Republican Party-Frank White Election Committee* 97
Notes 100
Problem 101
*Tennessee v. Garner* 101
<table>
<thead>
<tr>
<th>CONTENTS</th>
<th>ix</th>
</tr>
</thead>
<tbody>
<tr>
<td>Notes</td>
<td>111</td>
</tr>
<tr>
<td>§ 3.04 Consent</td>
<td>111</td>
</tr>
<tr>
<td>[A] Generally</td>
<td>111</td>
</tr>
<tr>
<td>Problem</td>
<td>112</td>
</tr>
<tr>
<td><em>Kathleen K. v. Robert B.</em></td>
<td>112</td>
</tr>
<tr>
<td>Notes</td>
<td>115</td>
</tr>
<tr>
<td>Special Note on Consent and Tort Doctrine in Medical Malpractice</td>
<td>117</td>
</tr>
<tr>
<td>Notes</td>
<td>117</td>
</tr>
<tr>
<td>[B] The Special Case of Sports</td>
<td>118</td>
</tr>
<tr>
<td>Problem</td>
<td>118</td>
</tr>
<tr>
<td><em>Hackbart v. Cincinnati Bengals, Inc.</em> (trial court)</td>
<td>118</td>
</tr>
<tr>
<td><em>Hackbart v. Cincinnati Bengals, Inc.</em> (appellate court)</td>
<td>123</td>
</tr>
<tr>
<td>Notes</td>
<td>125</td>
</tr>
</tbody>
</table>

**Chapter 4 · Negligence**

<table>
<thead>
<tr>
<th>§ 4.01 Introduction</th>
<th>127</th>
</tr>
</thead>
<tbody>
<tr>
<td>[A] Negligence in the Courts</td>
<td>127</td>
</tr>
<tr>
<td>Problem</td>
<td>127</td>
</tr>
<tr>
<td><em>LaPlante v. Radisson Hotel Co.</em></td>
<td>127</td>
</tr>
<tr>
<td><em>Tolbert v. Duckworth</em></td>
<td>130</td>
</tr>
<tr>
<td>Notes</td>
<td>131</td>
</tr>
<tr>
<td>[B] Negligence in History</td>
<td>132</td>
</tr>
<tr>
<td>Holmes, <em>The Common Law</em></td>
<td>132</td>
</tr>
<tr>
<td>Notes</td>
<td>135</td>
</tr>
<tr>
<td>[C] The Role of Insurance</td>
<td>136</td>
</tr>
<tr>
<td>Mehr, Cammack &amp; Rose, <em>Principles of Insurance</em></td>
<td>136</td>
</tr>
<tr>
<td>Special Note on Loss Spreading</td>
<td>139</td>
</tr>
<tr>
<td>Notes</td>
<td>139</td>
</tr>
</tbody>
</table>

<table>
<thead>
<tr>
<th>§ 4.02 Specific Features of Negligence Doctrine</th>
<th>140</th>
</tr>
</thead>
<tbody>
<tr>
<td>[A] Foreseeability</td>
<td>140</td>
</tr>
<tr>
<td>[B] Industry Custom; Expert Testimony; Safer Alternatives</td>
<td>140</td>
</tr>
<tr>
<td>[C] Higher Standards of Care for Highly Dangerous Activities and Things</td>
<td>141</td>
</tr>
</tbody>
</table>

<table>
<thead>
<tr>
<th>§ 4.03 Quantifying Tort Standards</th>
<th>143</th>
</tr>
</thead>
<tbody>
<tr>
<td>[A] The <em>Restatement</em> on Risk/Utility</td>
<td>143</td>
</tr>
<tr>
<td><em>Restatement (Second) of Torts</em> §§291, 292 (1965)</td>
<td>143</td>
</tr>
<tr>
<td>[B] Economic Analysis of Tort Law</td>
<td>143</td>
</tr>
<tr>
<td>Notes</td>
<td>145</td>
</tr>
</tbody>
</table>

<table>
<thead>
<tr>
<th>§ 4.04 The Standard of Care for Owners and Possessors of Land</th>
<th>146</th>
</tr>
</thead>
<tbody>
<tr>
<td>[A] An Introduction to Legal Competition Between Landowners</td>
<td>146</td>
</tr>
<tr>
<td>Problem</td>
<td>146</td>
</tr>
<tr>
<td>Aristotle on Corrective Justice</td>
<td>147</td>
</tr>
<tr>
<td>Note</td>
<td>148</td>
</tr>
<tr>
<td>Questions</td>
<td>148</td>
</tr>
<tr>
<td>[B] The Status of the Visitor</td>
<td>149</td>
</tr>
<tr>
<td>Problem</td>
<td>149</td>
</tr>
</tbody>
</table>
Chapter 5 · Defenses in Negligence Law

§ 5.01 Express Assumption of Risk

[A] Generally

Henrioulle v. Marin Ventures, Inc. 199
Hulsey v. Elsinore Parachute Center 202
Notes 207

Notes 212

[B] In Medicine: The Doctrine of Informed Consent

Rizzo v. Schiller 212
A Judicial Note on the Development of Informed Consent 214
Notes 216
Note on Informed Consent in Attorney Malpractice 218
Problem 219

Hartke v. McKelway 219

Donald A. Redelmeier, Paul Rozin & Daniel Kahneman, Understanding Patients' Decisions: Cognitive and Emotional Perspectives 223

How Informed Must Consent Be? 229
Notes 229
Boyle v. Revici
Notes

§ 5.02 “Implied Assumption of the Risk”
[A] In Everyday Life
Gulfway General Hosp., Inc. v. Pursley
Notes
Problem

[B] At Play and in Sport
Problem
Turcotte v. Fell
Notes
Smith v. Seven Springs Farm, Inc.
Notes

[C] At Work
Problem
DiSalvatore v. United States
Notes

§ 5.03 Contributory Negligence
Garcia v. Bynum
Notes
Special Note: Does Gender Affect the Care That Is Due?
Notes
Baltimore & O. R. Co. v. Goodman
Notes

§ 5.04 “The Last Clear Chance”

§ 5.05 Comparative Fault Doctrines
Alvis v. Ribar
Notes
Gary Schwartz, Contributory and Comparative Negligence: A Reappraisal
Robert D. Cooter & Thomas S. Ulen, An Economic Case for Comparative Negligence

Chapter 6 · Subjective Standards for Injured Persons and Injurers

§ 6.01 Child Trespassers
Edwards v. Consolidated Rail Corp.
Notes

§ 6.02 The Legal Effect of Mental and Emotional Limitations
Problem
Robinson v. Lindsay
Martin v. Louisiana Power & Light Co.
Note, Tort Liability of the Mentally Ill in Negligence Actions
Notes
Chapter 7  ·  Strict Liabilities  303
§ 7.01  Landowners’ Activities  303
  Problem  303
  Rylands v. Fletcher  305
  Indiana Harbor Belt Railroad Company v. American Cyanamid Company  308
  George C. Christie, An Essay on Discretion  314
  George P. Fletcher, Fairness and Utility in Tort Theory  316
  Gerry Spence, How to Make a Complex Case Come Alive for a Jury  317
  Notes  318
§ 7.02  Product Manufacture and Sale: The Basic Theory of  320
  Strict Products Liability  320
  Ogle v. Caterpillar Tractor Co.  320
  Notes  325
§ 7.03  The Concept of Defect  326
  Introductory Note on Defect  326
  [A]  Strict Liability for Unknowable Defects  328
  Halphen v. Johns-Manville Sales Corporation  328
  Notes  329
  [B]  Vehicle Crashworthiness  330
  Larsen v. General Motors Corporation  330
  Notes  337
  [C]  Prescription Drugs and Vaccines  338
  Brown v. Superior Court  338
  Allison v. Merck and Company  346
  Notes  352
  [D]  Tobacco  354
  Burton v. R.J. Reynolds Tobacco Co.  354
  American Tobacco Company v. Grinnell  355
  Notes  363
  [E]  Product Spectrums  365
  Linegar v. Armour of America, Inc.  365
  Notes  368
§ 7.04  The Products Restatement’s Defect Definitions  368
  Restatement (Third) of Torts: Products Liability  368
  Notes  371
§ 7.05  The Duty to Warn in Products Cases  373
  Baughn v. Honda Motor Company  373
  Notes  377
§ 7.06  Defenses Based on the Plaintiff’s Conduct  378
  Austin v. Lincoln Equipment Associates  378
  Egelhoff v. Holt  381
  Notes  384

Chapter 8  ·  Necessity  387
  Vincent v. Lake Erie Transp. Co.  387
  Robert E. Keeton, Conditional Fault in the Law of Torts  389
  Richard A. Epstein, A Theory of Strict Liability  393
  Notes  396
Chapter 9 · Damages
§ 9.01 General Considerations
  DePass v. United States 399
  Fleming James, Jr., Damages in Accident Cases 406
  Special Note: Basic Rationales of Tort Damages 407
  Notes 409
  J. Michael Veron, Evaluating the Economic Impact of Personal Injuries 411
  Notes 414
§ 9.02 Intangibles
  Flannery v. United States 415
  Analytical Frameworks for Assessing Tort Damages 420
  Notes 420
  D’Amato v. Long Island Railroad Company 422
  Notes 424
  Notes 429
  Consorti v. Armstrong World Industries, Inc. 429
  Geressy v. Digital Equip. Corp. 434
  Notes 436
  Haley v. Pan American World Airways 436
  Notes 440
§ 9.03 Punitive Damages
  Wangen v. Ford Motor Company 441
  Notes 444
  Note on Constitutionality of Punitive Damages 446
§ 9.04 Death Cases
  [A] Wrongful Death Statutes
    Stang v. Hertz Corp. 450
    Stuart M. Speiser and James E. Rooks, Jr., Recovery for Wrongful Death and Injury 452
    Witty v. American General Capital Distributors, Inc. 453
    Notes 458
    Lowe v. United States 460
    Huff v. White Motor Corporation 466
    Notes 468
  [B] Survival Statutes; Contributory Negligence in Death Cases
    Texas Survival Statute 469
    Problem 469
    Mitchell v. Akers 469
    Notes 471

Chapter 10 · Proof
§ 10.01 Sufficiency of Evidence
  Hornyak v. Pomfret School 473
  Notes 474
  Note on the Federal Employers’ Liability Act 474
  Problem 476
| Notes | 477 |
| § 10.02 Circumstantial Evidence | 477 |
| Problem | 477 |
| Baker v. City of Festus | 478 |
| Notes | 480 |
| § 10.03 Res Ipsa Loquitur | 480 |
| [A] Generally | 480 |
| Problem | 480 |
| O’Connor v. Chandris Lines, Inc. | 481 |
| Londono v. Washington Metropolitan Area Transit Authority | 482 |
| Restatement (Second) of Torts § 328D (1965) | 485 |
| Notes | 486 |
| Dullard v. Berkeley Associates Company | 487 |
| Notes | 489 |
| [B] In Medical Cases | 489 |
| Problem | 489 |
| Jones v. Porretta | 490 |
| Spidle v. Steward | 496 |
| Notes | 502 |
| § 10.04 Requirement of Expert Testimony | 503 |
| Problem | 503 |
| Sitts v. United States | 505 |
| Notes | 509 |
| § 10.05 Physical Causation | 510 |
| Problem | 510 |
| Howard v. Mitchell | 511 |
| Thompson v. Southern Pacific Transportation Co. | 514 |
| Backes v. Valspar Corporation | 516 |
| Earon S. Davis, Ecological Illnesses | 519 |
| Ora Fred Harris, Jr., Toxic Tort Litigation and the Causation Element: Is There Any Hope of Reconciliation? | 520 |
| Notes | 521 |
| Daubert v. Merrell Dow Pharmaceuticals, Inc. | 522 |
| Note: Daubert Elaborated | 528 |
| Notes | 530 |

Chapter 11 • Liability and Apportionment of Damages Among Multiple Defendants

| § 11.01 Joint Liability and Other Multiple Liabilities | 533 |
| Problem: An Indivisible Injury | 533 |
| Price v. Halstead | 533 |
| Notes | 537 |
| Special Note on Industrywide Liability and Related Issues | 539 |
| Notes | 542 |
| § 11.02 Apportionment of Liability Among Multiple Tortfeasors: Contribution, Indemnity, and Comparative Responsibility | 543 |
| Introduction | 543 |
| Problem | 544 |
| Wrobel v. Trapani | 544 |
Chapter 12  ·  Extended Causation and Duty  557

§ 12.01 Statutory Violations  557
Read v. Buckner  557
Restatement (Second) of Torts §§ 286, 288 (1965)  559
Notes  561
Problem  562
Klein v. Herlim Realty Corp.  566
Notes  564

§ 12.02 Introduction to the Duty Concept  565
Duncan v. Rzonca  565
Notes  570
Brown v. Channel Fueling Service, Inc.  571
Notes  572

§ 12.03 Intervening Criminal Acts  572
[A] Generally  572
Problem  572
Romero v. National Rifle Association of America, Inc.  573
Notes  578
Braun v. Soldier of Fortune Magazine, Inc.  578
Notes  584

[B] Mentally Ill Persons  585
Tarasoff v. Regents of University of California  585
Brady v. Hopper  590
Terry Wuester Milne, ”Bless Me Father, for I Am About to Sin…”: Should Clergy Counselors Have a Duty to Protect Third Parties?  591
Notes  592
Special Note on the Provision of Alcohol  594

§ 12.04 Negligently Inflicted Emotional Distress  595
[A] Generally  595
Boyles v. Kerr  595
Peter Bell, The Bell Tolls: Toward Full Tort Recovery for Psychic Injury  603
Richard Pearson, Liability for Negligently Inflicted Psychic Harm: A Response to Professor Bell  606
Notes  608
Special Note on the Snowmen of Grand Central Terminal  609
Notes  611
Molien v. Kaiser Foundation Hospitals  612
Notes 617
Special Note on an Actor’s Responsibility for Religiously Motivated Behavior by Another 618
Notes 618
[B] The Bystander Problem 619
   *Thing v. La Chusa* 619
   Notes 634
§ 12.05 Rescuers and Firefighters 635
   *Day v. Waffle House, Inc.* 635
   Notes 637
   *Zanghi v. Niagara Frontier Transportation Commission* 640
   Notes 643
§ 12.06 The *Palsgraf* Case 644
   *Palsgraf v. Long Island R. Co.* 644
   Ernest Weinrib, *Legal Formalism: On the Immanent Rationality of Law* 652
   Notes 654
§ 12.07 “Wrongful Birth” and “Wrongful Life” 658
   *Greco v. United States* 658
   Notes 664
§ 12.08 Economic Loss 665
   *Mattingly v. Sheldon Jackson College* 665
   *In Re TMI Litigation Governmental Entities Claims* 670
   Notes 672
   Economic Loss in Products Liability 674
   Notes 679

Chapter 13 · The Duty to Act 681
   Problem 681
   *McClure v. United States Lines Co.* 681
   Vermont’s “Duty to Aid the Endangered Act” 683
   Ernest Weinrib, *The Case for a Duty to Rescue* 684
   Notes 685

Chapter 14 · Tort Law and the Environment 689
§ 14.01 Private Nuisance 689
   Problem 689
   *Copart Industries, Inc. v. Consolidated Edison Company of New York* 690
   *Page County Appliance Center, Inc. v. Honeywell, Inc.* 695
   Notes 698
   Shootout Over a Feedlot; A Disagreement Between Idaho Appellate Courts About What’s in a Nuisance 700
   *Carpenter v. Double R Cattle Company* (Appellate Court) 700
   *Carpenter v. Double R Cattle Company* (Supreme Court) 708
   Mitchell Polinsky, *Resolving Nuisance Disputes: The Simple Economics of Injunctive and Damage Remedies* 711
   Notes 712
§ 14.02 Public Nuisance 714
Chapter 15 · Media and Communication Torts

§ 15.01 Defamation

[A] Generally

Introduction to Defamation

[1] Identification of the Plaintiff

Loeb v. Globe Newspaper Co.

Notes


Problem

Note on Slander Per Se and Special Damages

Notes


Problem

Menefee v. Codman

Looking at Libel and Its Consequences

Notes

[B] Constitutional Defamation Law

Defamation and the Constitution

Gertz v. Robert Welch, Inc.

Notes

[C] “Opinion”

Henderson v. Times Mirror Company

Note

Problem

Ollman v. Evans

Notes

§ 15.02 Privacy and Publicity Rights

Problem

Time, Inc. v. Hill

Notes

Special Note on the Publication of Truthful Material

Notes

Douglass v. Hustler Magazine, Inc.

Notes

White v. Samsung Electronics America, Inc.: The Panel Decision

White v. Samsung Electronics America, Inc.: On Petition for Rehearing

Notes

Chapter 16 · Interference with Economic and Other Relations

§ 16.01 Torts Involving Contracts and Refusals to Deal—Generally

Problem

Restatement (Second) of Torts §§766, 767
Chapter 17 · Compensation Systems and Other Alternatives to Tort Law 837

§ 17.01 Automobile Accidents 837
Prefatory Note 837
[A] Is There a Need for Change? 838
Robert E. Keeton, Basic Protection and the Future of Negligence Law 838
Notes 841
[B] Compensation Plans 842
How Traditional and No-Fault Systems Work 842
Types of No-Fault Statutes 845
Notes 845
[C] Effects of Plans 846
Problem 846
Overview 847
Conclusions of a Department of Transportation Study 848
Economic Effects of No-Fault 851
Effects of No-Fault on Accidents 855
Frank Sloan, Bridget Reilly & Christopher Schenzler, Effects of Tort Liability and Insurance on Heavy Drinking and Drinking and Driving 858
Notes 860
[D] Summary: Alternatives to Tort for Vehicle Injuries 860
A “Consumer Choice” Plan: Jeffrey O’Connell et al., The Comparative Costs of Allowing Consumer Choice of Auto Insurance in All Fifty States 861
A Pluralistic Solution: Alfred Conard, The Economic Treatment of Automobile Injuries 861
Alma Cohen & Rajeev Dehejia, The Effect of Automobile Insurance and Accident Liability Laws on Traffic Fatalities 862
Walter J. Blum & Harry Kalven, Jr., Public Law Perspectives on a Private Law Problem 864
Conclusions of the A.B.A. Special Committee on the Tort Liability System 867
Alfred Conard, Macrojustice: A Systematic Approach to Conflict Resolution 869
Notes 870

§ 17.02 Workers’ Compensation 871
[A] The Concept of Accidental Injury 871
Johannessen v. New York City Department of Housing Preservation and Development 871
Notes 874
Peoria County Belwood Nursing Home v. Industrial Commission 875
## CONTENTS

<table>
<thead>
<tr>
<th>Notes</th>
<th>876</th>
</tr>
</thead>
<tbody>
<tr>
<td>[B] Some Background on Workers’ Compensation</td>
<td>877</td>
</tr>
<tr>
<td>[1] History and Premises</td>
<td>877</td>
</tr>
<tr>
<td><em>Towards a Jurisprudence of Injury</em> 10-45 to 10-47</td>
<td>877</td>
</tr>
<tr>
<td>[2] Basic Data</td>
<td>878</td>
</tr>
<tr>
<td>[C] Injuries Arising “Out Of” Employment</td>
<td>880</td>
</tr>
<tr>
<td><em>United Parcel Service of America v. Fetterman</em></td>
<td>880</td>
</tr>
<tr>
<td><em>Olsten of Richmond v. Leftwich</em></td>
<td>881</td>
</tr>
<tr>
<td>Notes</td>
<td>882</td>
</tr>
<tr>
<td><em>Darco Transportation v. Dulen</em></td>
<td>882</td>
</tr>
<tr>
<td>Notes</td>
<td>888</td>
</tr>
<tr>
<td>[D] Stress</td>
<td>888</td>
</tr>
<tr>
<td><em>Kelly’s Case</em></td>
<td>888</td>
</tr>
<tr>
<td>Notes</td>
<td>892</td>
</tr>
<tr>
<td>[E] Relationship of Workers’ Compensation and Tort</td>
<td>894</td>
</tr>
<tr>
<td>Problem</td>
<td>894</td>
</tr>
<tr>
<td>Notes</td>
<td>894</td>
</tr>
<tr>
<td><em>Towards a Jurisprudence of Injury</em> 10-47 to 10-52</td>
<td>895</td>
</tr>
<tr>
<td>[G] The Frontiers of Compensation Law</td>
<td>897</td>
</tr>
<tr>
<td><em>American Mut. Ins. Co. v. Jones</em></td>
<td>897</td>
</tr>
<tr>
<td>Notes</td>
<td>901</td>
</tr>
<tr>
<td><em>Whetro v. Awkerman</em></td>
<td>901</td>
</tr>
<tr>
<td>Notes</td>
<td>905</td>
</tr>
<tr>
<td>Some Concluding Questions</td>
<td>906</td>
</tr>
</tbody>
</table>

### § 17.03 Medical Maloccurrences

<table>
<thead>
<tr>
<th>Medical Maloccurrences</th>
<th>906</th>
</tr>
</thead>
<tbody>
<tr>
<td>Injury in the Hospital: Statistics on Injuries in the Course of Medical Care</td>
<td>906</td>
</tr>
<tr>
<td>Issues Concerning “Reform”: Overview</td>
<td>907</td>
</tr>
<tr>
<td>Notes</td>
<td>911</td>
</tr>
<tr>
<td><em>A Proposed Alternative to the Civil Justice System for Resolving Medical Liability Disputes: A Fault-Based, Administrative System</em></td>
<td>912</td>
</tr>
<tr>
<td>Notes</td>
<td>915</td>
</tr>
</tbody>
</table>

### § 17.04 Social Insurance Solutions: An Introduction

<table>
<thead>
<tr>
<th>Social Insurance Solutions: An Introduction</th>
<th>917</th>
</tr>
</thead>
<tbody>
<tr>
<td>Richard Miller, <em>An Analysis and Critique of the 1992 Changes to New Zealand’s Accident Compensation Scheme</em></td>
<td>917</td>
</tr>
<tr>
<td>Notes</td>
<td>926</td>
</tr>
</tbody>
</table>

### § 17.05 Assessing Data and Policy Concerning the Tort Liability System

<table>
<thead>
<tr>
<th>Assessing Data and Policy Concerning the Tort Liability System</th>
<th>928</th>
</tr>
</thead>
<tbody>
<tr>
<td>Don Dewees, David Duff &amp; Michael Trebilcock, <em>Exploring the Domain of Accident Law</em></td>
<td>928</td>
</tr>
<tr>
<td>Note</td>
<td>931</td>
</tr>
<tr>
<td>Special Note on the September 11th Victim Compensation Fund Notes</td>
<td>931</td>
</tr>
<tr>
<td>Notes</td>
<td>932</td>
</tr>
</tbody>
</table>
Chapter 18 · The Final Battlements: Liability of Governments and Officials 933

§ 18.01 The Federal Tort Claims Act 933
The Federal Tort Claims Act 933
Dalehite v. United States 934
Notes 944
Problem 945
Notes 946

§ 18.02 Governmental “Duty to Act” 949
Problem 949
De Long v. County of Erie 951
Notes 955
Estate of Sinhasomphone v. City of Milwaukee 957
Notes 963
Problem 964
Special Note on Officials’ Immunities and Liabilities 965
Notes 966

§ 18.03 The “Constitutional Tort” 967
Monroe v. Pape 967
Note on the Development of Section 1983 through the Seventies 974
Notes 977
Special Note on the Bivens Remedy 977
Note on the Continuing Development of Section 1983 978
Notes 980

Table of Cases 981

Index 997
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 forty-one 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. The late Charles Alan Wright also 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 Northwestern colleagues: David Ruder, who provided me great encouragement to expand my horizons in mid-career; and the late 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 Kathryn H. Amato, Pegeen Bassett, Irene Berkey, David Daskal, Heidi F. Kuehl, and Jim McMasters.

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 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 formerly 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.

MARSHALL S. SHAPO
Chicago and Evanston
April 2006
PREFACE TO THE
THIRD EDITION

The teacher familiar with this book in its preceding editions will note modest but important changes. Naturally, references to the Third Restatement of Torts, as its development continues, have been added where appropriate. A number of cases and some secondary materials have been cut as duplicative or outdated, replaced where needed by concise and updated notes. Developments have been recorded in areas including product liability litigation, punitive damages limitations, and compensation for terrorist acts. Overall, though, the book retains its familiar organization, format, and tone.

*** *** ***

I am grateful to Professor Shapo for bringing me on board to contribute to this third edition of his Tort and Injury Law. I selected this book in its second edition for my first Torts class, and never have I regretted it. Professor Shapo has a singular talent for winnowing the most salient and instructive passages from the vast body of primary and secondary materials on torts. He adds notes that are pointed and provocative, ample fodder for class discussion. The naturally colorful material that makes up our body of tort law demands a textbook writer who, like a landscape artist, can render boundless shades and tints for the secondhand observer, and Professor Shapo teaches through his texts with that capacity. Whether or not I have contributed with the same vision and zeal, it has been my privilege to make the endeavor.

My torts professor was Jerome M. Culp, Jr., at Duke Law School in 1993 and 1994. Professor Culp died in 2004, at age 53, after a long and courageous battle with kidney disease. He is widely well regarded and remembered for his prolific scholarship in areas such as critical race theory and law and economics. But to me as a timid first-year, Professor Culp was first and foremost a torts professor, and sometimes a scary one. Armed with a seating chart of cut-out faces, he was unhesitant to call on students. He once had the class wait in agonizing silence while an unprepared student silently read a case. He mystified us—well, me, at least—with graphs on the economic impact of different models of tort law. It seemed at times that he delighted in torturing students.

But if it was his design to make a Kingsfield-ian impression, he did not have the heart to finish the job. For Professor Culp outside of class was ever jovial, ever concerned over his students' tribulations, and ever proud of his students' accomplishments. He eagerly talked basketball, literature, and popular culture, all with acumen. He brought fruit for students during exams because he worried they were not eating healthily. If Professor Culp seemed stubborn and mystifying in class, it was because he had the highest expectations and refused to settle for less.
I am grateful to the many persons who supported me in the preparation of this work. In Little Rock, at the University of Arkansas, I am grateful for the friendship and professional support of my dean, Chuck Goldner, and of many colleagues, especially, but not exclusively, Coleen Barger, Mike Beaird, Terri Beiner, Jessie Burchfield, John DiPippa, Michael Flannery, Ken Gallant, Kelly Olson, Rob Steinbuch, and Tom Sullivan; for the kind support of our professional staff, including Laura Austin, Cheryl Bigelow, Gail Harris, and Glennis Jackson; for the aid of my capable research assistants, Elizabeth Dulong and Joi Leonard; and for the guidance of Andrew McClurg, now at Florida International University, and Glenn Pasvogel, retired.

I had the privilege while working on this project of visiting at The Catholic University of America, in Washington, D.C., where I was welcomed with the greatest warmth and kindness. I especially thank at CUA Deans Veryl Miles, Bill Fox, and Bill Wagner; librarian Greg Stack; faculty Sylvia Bacon, Sarah Duggin, Lisa Lerman, Rett Ludwikowski, the Rev. Ray O’Brien, Nerissa Skillman, Leah Wortham, and Harvey Zuckman; professional staff Stephanie Michael, Laurie Fraser, and Katie Aaron; and my teaching assistant, Elizabeth Cox. I thank as well my many students at UALR and CUA who have made this job the reward that it is.

Finally, and above all, I thank my family for their support of my education and career, especially my parents, Yvonne and Jack Serio, and Rich and Patricia Peltz, and my brothers and sisters, whether by law, blood, or heart, Andrea Serio, Nick and Spencer Peltz, and Chris and Sallie Crenshaw.

RICHARD J. PELTZ
Little Rock and Washington
April 2006