

Studies in American Tort Law

Fourth Edition

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Studies in American Tort Law

Fourth Edition

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and

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To my parents,
Harry Paul Johnson (1927–2007) and Anna Ruth Johnson
for providing a world of support



To the memory of my mother,
Helen Whitnall Gunn

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Fourth Edition Preface and Acknowledgments

The fourth edition of *Studies in American Tort Law* reflects the highly dynamic nature of the torts field. Twenty-two new principal cases address cutting-edge issues, such as liability relating to clergy sexual abuse, negligent enablement of identity theft, and loss of a chance damages in medical malpractice. Some of the new decisions deal with injuries caused by lead-based paint, videotaping of marital relations, recreational drug use, and coerced placement of a child for adoption.

The latest United States Supreme Court decisions on federal preemption of state law and punitive damages are examined in the text. The fourth edition also incorporates comprehensive citations to the emerging Restatement, Third, of Torts, including the new sections on intentional and negligent infliction of emotional distress.

Statutory excerpts consider important new legislative developments, including state laws changing the duty to retreat, as it relates to self-defense, and federal legislation greatly limiting the liability of handgun marketers and distributors. Notes, referring to scores of recent decisions, address contemporary issues, such as the tort liability of study abroad programs and legal recognition of credit monitoring damages.

Students are introduced to the hotly debated issues concerning the extent to which tort law provides relief for purely economic losses, such as harm caused by negligent mis-scoring of standardized tests. As the text notes, so great is the ferment that one state chief justice remarked, “at the current pace, the economic loss doctrine may consume much of tort law if left unchecked.”

A PowerPoint file for *Studies in American Tort Law* is available to law professors adopting the book. Contact: vjohnson@stmarytx.edu. Students may wish to use the companion volume: Vincent R. Johnson, *Mastering Torts: A Student’s Guide to the Law of Torts* (Carolina Academic Press, 4th ed. 2009).

Alan Gunn was my excellent co-author on the first three editions of *Studies in American Tort Law* (1994, 1998, and 2005). Following the completion of the third edition, he assumed emeritus status at the University of Notre Dame and did not participate in the preparation of the fourth edition. Alan’s contributions to the text are still very much a part of this book. His language informs the discussion of virtually every important topic. In particular, *Studies in American Tort Law* continues to be enriched by Alan Gunn’s lucid explorations of how law and economics scholarship sometimes illuminates the study of tort issues.

Work on the fourth edition was assisted by several groups of students at the University of Notre Dame (where I served as a visiting professor in spring 2009) and at St. Mary’s University.

At Notre Dame Law School, the group included: Jennifer Lisa Clancy, Michael Edwards II, Yi Fang, Jeremy Kemper, Justin A. Macke, Rachel Perkins, Adam A. Sabet, Vincent Stark, Taylor Wilson, and Samantha Winter. My secretary at Notre Dame, Sharon Loftus, provided excellent assistance with a variety of tasks relating to the manuscript.

At St. Mary's University School of Law, the initial work on the fourth edition was performed by Francesco A. Savoia, S. "Collanne" Bramblett, Christopher M. West, and Chase W. Butler. That group undertook the Herculean task of checking the more than 3000 cases and statutes cited in the third edition for continuing validity. A different group of students assisted the final stages of the publication process by reviewing the page proofs and working on the tables and index. That group included Stratos L. Apostolou, Jane R. Dure, Joseph R. Ecke, Jessica Estorga, Christopher L. Gordon, Christopher R. Konneker, Jahannah C. Lemay, Eminence Northcutt, Mark S. Poling, and Kayla Wells. Special recognition goes to Allen K. Lowe II and Laura Long (daughter of my former research assistant, Armistead M. Long, who worked on the third edition). Allen and Laura put in long hours and made a valuable contribution to the new book.

I am deeply grateful to all of the persons mentioned above for their work on the fourth edition, and to Dean Charles E. Cantu and St. Mary's University School of Law for supporting this project. Frequent discussions with my faculty colleague, Chenglin Liu, have enhanced in numerous ways the manuscript for this book and the teacher's manual.

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Vincent R. Johnson
San Antonio, Texas
June 11, 2009

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First Edition Preface

Tort law is a prime battleground in the ongoing debate over social policy. This book attempts to illuminate that debate through the use of cases and materials that clearly reflect not only the current rules on injury compensation, but also the policy choices underlying those rules.

Lawyers must know what the law is now, and how to apply it to the facts of a client's case. But they must also understand public policy, if they are to effectively participate in the important (and inevitable) legal processes through which existing rules are continually challenged, reaffirmed, discarded, and replaced.

As an instructional text, *Studies in American Tort Law (SATL)* does not speak from an ideological perspective. In that sense, the book is intended to be both "balanced" and "mainstream." Within a clear doctrinal framework (which is undoubtedly influenced by the work of the late William Prosser), a range of views is presented, reflecting dominant themes and issues in tort law, such as fault, proportionality, deterrence, internalization of costs, and distribution of losses. These views are then linked, juxtaposed, and explored with the purpose of assisting students in the task of assessing the merits and limitations of these positions. In the end, however, the evaluation of the public policies which have shaped the current tangle of rules on liability for personal injury and property damage is left to the reader. This book attempts to promote a better understanding of the values advanced and the interests sacrificed by the adoption or application of particular rules in given contexts.

In terms of organization, *SATL* moves from simple concepts and elementary rules to ones that are more complex or elusive. The book has a strong doctrinal framework and strives for clarity, to the extent that clarity is possible, on the assumption that if simple points are dealt with efficiently, time can then be profitably spent on difficult or uncertain questions.

In selecting or writing material for the book, students and professors have been foremost in mind. At each juncture, the test has been whether the selection is both readable and teachable. The goal has been to include material that is vivid, provocative, and worthy of the reader's time.

A few features of *SATL* deserve mention. First, although cases are used as the principal vehicle for teaching torts, a special effort has been made to integrate statutory law into the text. In particular, careful attention has been paid to the give-and-take process through which judge-made law and legislation influence one another. Second, the significance of liability insurance is highlighted, for students must come to appreciate the critical role that insurance (or the lack of it) plays in the resolution of real cases. Third, "ethics notes" have been included throughout the book for the purpose of sensitizing students to the difficult ethical questions that practicing lawyers face each day. These notes demon-

strate, in part, that lawyers are subject to higher standards than persons in other callings. Fourth, the materials in SATL explore a number of issues associated with the law and feminism movement. These issues raise questions of social justice that should be of concern to all lawyers.

SATL introduces students to—but is careful not to overwhelm them with—law and economics. At appropriate junctures in SATL, economic issues are explored, as in connection with the negligence balancing test and the materials discussing computation of damages, liability for nuisance, and strict liability. The goal is not to view all of tort law through an economic lens, but to employ economic analysis when it is particularly useful. This approach allows professors from the law-and-economics “school” to use the materials in the text as a starting point for classroom discussions; those faculty members who eschew economic analysis can allow the economic commentary to stand on its own, without need for in-class elaboration.

By emphasizing doctrinal clarity and the role of public policy, SATL seeks to afford professors maximum flexibility in teaching the law of torts. At the same time, it endeavors to ensure that all students develop a firm foundation in both what the law is and what it can be. We hope that SATL will prove to be a book that can be productively taught by professors and readily grasped by students.

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June 18, 1994

First Edition Acknowledgments

This book has been long in the making—so long, in fact, that it is almost embarrassing to recount the tale. The book began in the summer of 1985, when, after three years of teaching, and with a long career ahead of me, I decided that I wanted to use in my classes a set of materials which I truly enjoyed, and which my students could enjoy and benefit from, too. The first rough draft of SATL was made available to my classes at St. Mary’s University in installments during the 1985-86 academic year. Those students were infinitely patient for allowing the manuscript to be parceled out piece-meal as it became available throughout the year, and I owe each of those persons a debt of gratitude for allowing the project to get started.

During the ensuing years, successive drafts appeared, with the work progressing in fits and starts. The manuscript grew and was continually refined, but the task was interrupted by all manner of diversions: the writing of law review articles; the founding of an international law program in Innsbruck, Austria; a year at the Supreme Court of the United States as the Judicial Fellow; a visitorship at Vermont Law School; and the renovation of a home in a San Antonio historic district.

By spring of 1991, it became clear that I should bring the project to completion; the draft then ran about 1000 pages, but still needed substantial work. With the help of Dean David T. Link of Notre Dame Law School, I began what I regard as an extraordinarily effective collaboration with a professor I had never met before, Alan Gunn. Alan brought to the text perspectives on tort law that complemented my own, as well as the experience and discipline of a seasoned author. His work on all parts of the manuscript has added immeasurably to the quality of the book. Alan is principally responsible for the law-and-economics gloss on the text.

There are both advantages and disadvantages to a project covering a long span of time. In this case, the advantages have included the opportunity to test and hone the materials over a span of years. If the cases are tightly edited (as I hope they are), that is due in part to the fact that they have been re-edited, at least annually, over the course of many seasons. In addition, the fact that the text of SATL has been taught at least nine times (in various versions) at St. Mary’s, Vermont, and Notre Dame has allowed it to benefit from the comments and insights of many students.

In fairness, the disadvantages of an extended project should not be understated. Aside from the annoyance of having an unfinished task hanging over one’s head, there are more practical problems. In this case, the word processing software with which the project began became obsolete, secretaries changed, and the “blue book” revised the rules on parallel state citations, all of which necessitated seemingly endless tinkering with the manuscript format.

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Since before this project began, I have had the friendship and counsel of my dear wife Jill Torbert, an attorney whose intelligence, independence, and integrity brings honor to the practice of law.

Vincent R. Johnson
June 18, 1994