CHAPTER OUTLINE

- Scope
- Definitions and Purposes
- Elements of All the Torts
- Categories of Torts
- Introduction to Causation
- Relationship Between Tort Law and Other Areas of the Law
- Sources of Tort Law

CHAPTER OBJECTIVES

After completing this chapter, you should be able to:

- Understand the financial and human scope of unintended injuries in society.
- Define tort, damages, criminal law, civil law, and related concepts.
- Know the four purposes of tort law.
- Know what is meant by stating a tort cause of action.
- Distinguish among intentional torts, negligence, and strict liability.
- Know the meaning of proximate cause.
- State the two tests for actual cause (cause in fact).
- State the relationship between tort law and the following areas of the law: contract law, criminal law, civil procedure law, family law, constitutional law, estate law, state and local government law, real property law, insurance law, and environmental law.
- Define the primary authorities and state how they relate to a torts (personal injury) practice.
- Define the major secondary authorities and state how they can be helpful in a torts (personal injury) practice.
tort  A civil wrong (other than a breach of contract) that causes injury or other loss for which our legal system deems it just to provide a remedy such as damages. Injury or loss can be to the person (a personal tort), to movable property (a personal property tort), or to land and anything attached to the land (a real property tort).

damages  1. Monetary payments awarded to compensate someone for a legally recognized wrong (noun). 2. Causes harm or other loss (verb). (The word damage means injury, impairment, or other loss to person or property.)

diversity of citizenship  The disputing parties are citizens of different states. This fact gives jurisdiction (called diversity jurisdiction) to a United States district court when the amount in controversy exceeds $75,000.

remedy  1. The means by which a right is enforced or the violation of a right is prevented, compensated for, or otherwise redressed. 2. To correct.

jurisdiction  1. The authority or power of a court to resolve a dispute. Its personal jurisdiction is its power to order a particular defendant to do or to refrain from doing something. Its subject matter jurisdiction is its power to hear certain kinds of cases. 2. The geographic area over which a particular court has authority.

criminal law  The law that governs crimes alleged by the government. Criminal law defines crimes, punishments, and procedures for investigation and prosecution. Also called penal law.

civil law  1. The law that governs rights and duties between private persons or between private persons and the government concerning matters other than the commission of a crime. 2. Any law other than criminal law. 3. The statutory or code law applicable in Louisiana and in many Western European countries other than England.

DEFINITIONS AND PURPOSES

When someone harms or damages the person or property of another, the primitive instinct of the victim is often to strike back. Our legal system functions as a check against this instinct so that the peace of the realm is not disturbed. If a conflict is not resolved informally among the parties, society asks that the parties seek a remedy in court. In the medical world, a remedy is something that cures or treats an ailment. In the law, a remedy is a means by which the enforcement of a right is sought or the violation of a right is prevented, compensated for, or otherwise redressed.

There are two kinds of disputes over which courts have jurisdiction: criminal disputes and civil disputes. (Jurisdiction is the authority or power of a court to resolve a dispute.) These disputes are based on the two major categories of law:

- criminal law: The law that governs crimes alleged by the government.
- civil law: The law that governs rights and duties between private persons or between private persons and the government concerning matters other than the commission of a crime. (A separate meaning of civil law is the law that applies in Louisiana and some European countries.)

Criminal law covers those wrongs that are serious enough to be classified as crimes, e.g., murder and burglary. Civil law covers civil wrongs, which essentially consist of everything other than criminal wrongs. Tort law is one of the branches of civil law. Another familiar branch is contract law.

The word tort comes from the Latin word “tortus,” meaning twisted, and from the French word “tort,” meaning injury or wrong. As we have seen, the complete definition of tort is a civil wrong (other than a breach of contract) that causes injury or other loss for which our legal system deems it just to provide a remedy such as damages.

The same conduct can constitute both a tort and a crime. The proceedings in which torts and crimes are litigated, however, are separate and substantially different. A dramatic example of the difference can be seen in the O. J. Simpson trials.
<table>
<thead>
<tr>
<th>Type of tort trial characteristic</th>
<th>Year of trial collection</th>
<th>Percent change</th>
</tr>
</thead>
<tbody>
<tr>
<td>All tort trials</td>
<td>10,278</td>
<td>7,948</td>
</tr>
<tr>
<td>Automobile accident</td>
<td>4,994</td>
<td>4,235</td>
</tr>
<tr>
<td>Medical malpractice</td>
<td>1,201</td>
<td>1,156</td>
</tr>
<tr>
<td>Premises liability</td>
<td>2,232</td>
<td>1,268</td>
</tr>
<tr>
<td>Intentional tort</td>
<td>491</td>
<td>375</td>
</tr>
<tr>
<td>Product liability</td>
<td>421</td>
<td>158</td>
</tr>
</tbody>
</table>

<table>
<thead>
<tr>
<th>What percentage of plaintiffs won?</th>
<th>Year</th>
<th>Percent change</th>
</tr>
</thead>
<tbody>
<tr>
<td>All tort trials</td>
<td>48.2%</td>
<td>-0.3%</td>
</tr>
<tr>
<td>Automobile accident</td>
<td>57.5%</td>
<td>6.1%</td>
</tr>
<tr>
<td>Medical malpractice</td>
<td>23.3%</td>
<td>-17.0%</td>
</tr>
<tr>
<td>Premises liability</td>
<td>39.6%</td>
<td>-1.7%</td>
</tr>
<tr>
<td>Intentional tort</td>
<td>57.0%</td>
<td>-11.5%</td>
</tr>
<tr>
<td>Product liability</td>
<td>44.9%</td>
<td>-15.6%</td>
</tr>
</tbody>
</table>

<table>
<thead>
<tr>
<th>How much did prevailing plaintiffs win?</th>
<th>Year</th>
<th>Percent change</th>
</tr>
</thead>
<tbody>
<tr>
<td>All tort trials</td>
<td>$38,000</td>
<td>$30,000</td>
</tr>
<tr>
<td>Automobile accident</td>
<td>22,000</td>
<td>18,000</td>
</tr>
<tr>
<td>Medical malpractice</td>
<td>354,000</td>
<td>464,000</td>
</tr>
<tr>
<td>Premises liability</td>
<td>71,000</td>
<td>65,000</td>
</tr>
<tr>
<td>Intentional tort</td>
<td>40,000</td>
<td>41,000</td>
</tr>
<tr>
<td>Product liability</td>
<td>241,000</td>
<td>495,000</td>
</tr>
</tbody>
</table>

<table>
<thead>
<tr>
<th>What percentage of plaintiffs won punitive damages?</th>
<th>Year</th>
<th>Percent change</th>
</tr>
</thead>
<tbody>
<tr>
<td>All tort trials</td>
<td>3.3%</td>
<td>8.5%</td>
</tr>
<tr>
<td>Automobile accident</td>
<td>0.7%</td>
<td>134.3%</td>
</tr>
<tr>
<td>Medical malpractice</td>
<td>1.1%</td>
<td>144.7%</td>
</tr>
<tr>
<td>Premises liability</td>
<td>4.5%</td>
<td>-89.5%</td>
</tr>
<tr>
<td>Intentional tort</td>
<td>24.0%</td>
<td>1.2%</td>
</tr>
<tr>
<td>Product liability</td>
<td>7.7%</td>
<td>-83.8%</td>
</tr>
</tbody>
</table>

<table>
<thead>
<tr>
<th>How long did disposition of tort case take?</th>
<th>Year</th>
<th>Percent change</th>
</tr>
</thead>
<tbody>
<tr>
<td>All tort trials</td>
<td>21.8 mo.</td>
<td>21.5 mo.</td>
</tr>
<tr>
<td>Automobile accident</td>
<td>18.9</td>
<td>19.8</td>
</tr>
<tr>
<td>Medical malpractice</td>
<td>29.7</td>
<td>28.6</td>
</tr>
<tr>
<td>Premises liability</td>
<td>24.6</td>
<td>22.6</td>
</tr>
<tr>
<td>Intentional tort</td>
<td>20.6</td>
<td>20.2</td>
</tr>
<tr>
<td>Product liability</td>
<td>32.4</td>
<td>25.5</td>
</tr>
</tbody>
</table>

Source: Bureau of Justice Statistics, Tort Bench and Jury Trials in State Courts, 2005, Table 12, p. 12 (November 2009) (bjs.ojp.usdoj.gov/content/pub/pdf/tbjtsc05.pdf). Note: The table includes all jury trials, bench trials, trials with a directed verdict, trials that ended in a judgment notwithstanding the verdict, and jury trials for defaulted defendants concluded in a sample of the nation’s 75 most populous counties. Product liability includes cases of asbestos exposure. Data from Civil Justice Survey of State Courts (1996, 2001, and 2005). Data can be obtained from the University of Michigan Inter-University Consortium for Political and Social Research.
that gripped the attention of the nation in the 1990s. In a criminal trial, the former football star was acquitted of murdering two persons. In a subsequent civil trial, however, he was found liable for wrongfully causing the deaths of the same two people. These are not inconsistent results because the **standard of proof** is significantly different in criminal and civil cases. In a criminal case, the elements of the crime must be established against the defendant beyond a reasonable doubt, whereas in most civil cases, the elements of the tort or other cause of action must be established against the defendant by a **preponderance of the evidence**. One can conclude that the preponderance of evidence establishes that someone committed a certain act, and also conclude that there is some reasonable doubt about whether he or she committed it. See Exhibit 1–2 for more examples of the differences between civil and criminal cases.

**Exhibit 1–2** Tort action and criminal prosecution for the same misconduct: Two separate proceedings.

<table>
<thead>
<tr>
<th>Example</th>
<th>Facts: Jim pushes Mary against the wall, grabs her purse containing valuable jewelry, and flees.</th>
<th>Tort Case</th>
<th>Criminal Case</th>
</tr>
</thead>
<tbody>
<tr>
<td><strong>The wrong committed</strong></td>
<td>The tort of conversion (wrongfully taking another’s personal property).</td>
<td></td>
<td>The crime of robbery (using force or violence to take personal property from the person of another).</td>
</tr>
<tr>
<td><strong>Nature of the wrong</strong></td>
<td>A private wrong. Jim took Mary’s private property.</td>
<td></td>
<td>A public wrong. When robbery occurs, the public peace has been disturbed.</td>
</tr>
<tr>
<td><strong>Court hearing the case</strong></td>
<td>A suit for the tort of conversion is a civil action heard in a civil court.</td>
<td></td>
<td>A robbery prosecution is a criminal action heard in a criminal court.</td>
</tr>
<tr>
<td><strong>Parties</strong></td>
<td>Mary sues Jim. The moving party is Mary, who is the plaintiff; Jim is the defendant. Someone accused of committing a tort is an alleged tortfeasor.</td>
<td></td>
<td>The state prosecutes Jim. The moving party is the state. Jim is the defendant, also called the accused. (Mary is the complaining witness.)</td>
</tr>
<tr>
<td><strong>Standard of proof</strong></td>
<td>Mary must prove the elements of the tort of conversion by a preponderance of the evidence.</td>
<td></td>
<td>The state must prove the elements of robbery beyond a reasonable doubt.</td>
</tr>
<tr>
<td><strong>Representation</strong></td>
<td>Mary can represent herself or she can hire (and pay for) a private attorney to represent her. Jim can represent himself or he can hire (and pay for) a private attorney to represent him.</td>
<td></td>
<td>The state is represented by the prosecutor (sometimes called the district attorney). Jim may be able to represent himself or he can hire (and pay for) a private attorney to represent him.</td>
</tr>
<tr>
<td><strong>Right to counsel</strong></td>
<td>If Jim cannot afford a private attorney, in most cases he does not have the right to be represented by assigned counsel paid by the state.</td>
<td></td>
<td>If Jim cannot afford a private attorney, in most cases he has the right to be represented by assigned counsel paid by the state.</td>
</tr>
<tr>
<td><strong>Procedural rules</strong></td>
<td>Rules of civil procedure</td>
<td></td>
<td>Rules of criminal procedure</td>
</tr>
<tr>
<td><strong>Testimony of defendant</strong></td>
<td>The defendant (Jim) may be forced to testify.</td>
<td></td>
<td>The defendant (Jim) has a constitutional right to silence; he cannot be forced to incriminate himself.</td>
</tr>
<tr>
<td><strong>Jury verdict</strong></td>
<td>Many states allow jury verdicts by less than unanimous vote.</td>
<td></td>
<td>Most states require jury verdicts by unanimous vote.</td>
</tr>
<tr>
<td><strong>Conclusion of proceeding</strong></td>
<td>The defendant is found liable or not liable. The final judgment of the court includes a determination of liability.</td>
<td></td>
<td>The defendant is found guilty or not guilty. If guilty, the final judgment includes the punishment imposed during sentencing.</td>
</tr>
<tr>
<td><strong>Monetary payments</strong></td>
<td>A defendant who is found liable may be forced to pay money (damages) to the victim of the tort.</td>
<td></td>
<td>A defendant who is found guilty may be forced to pay restitution to the victim of the crime. The defendant might also be incarcerated and forced to pay a fine. The fine is paid to the state, not to the victim.</td>
</tr>
</tbody>
</table>
There are four major purposes of tort law: peace, deterrence, restoration, and justice.¹

1. **Peace:** To provide a peaceful means for adjusting the rights of parties who might otherwise “take the law into their own hands.” A courtroom is a neutral setting where allegations can be aired in order to reach a rational resolution that the parties and the community can accept.

2. **Deterrence:** To deter wrongful conduct. Tort litigation takes place in public. The media is free to report what occurs in court. News that certain conduct forced someone into court and led to the payment of a large money judgment can encourage the public to avoid that kind of conduct for fear of being subjected to a similar fate. This is sometimes called the “behavior modification” purpose of tort law. It has the effect of encouraging socially responsible behavior such as making safer automobiles and removing ice from sidewalks.

3. **Restoration:** To restore injured parties to their original position, insofar as this is possible, usually by compensating them for their injury. This is sometimes referred to as being **made whole**. Of course, it is often impossible to restore someone to the condition that existed before the injury occurred. If you negligently break my leg, I may never be restored to full health. Yet by providing compensation (damages), I am being made as whole as is humanly possible.

4. **Justice:** To identify those who should be held accountable for the harm that resulted. A tort case can involve one or more victims and one or more defendants alleged to have a role in causing a particular injury. The law of torts is designed to sort through the involvement of all of the participants in order to identify who is **culpable** or blameworthy and to determine who, in fairness, should be made to pay.

Whenever someone suffers a serious loss caused by another, our tort system could become involved. If it does, the overriding question of tort law—and the theme of this book—is whether that loss should be shifted to someone else in light of the peace, deterrence, restoration, and justice objectives of tort law.

### ELEMENTS OF ALL THE TORTS

Every tort is a **cause of action**, which is simply a legally acceptable reason for bringing a suit. When you state a tort cause of action, you list the facts that give you a right to judicial relief against the **tortfeasor**—the wrongdoer who has committed the tort. Causes of action are rules. Every rule can be broken down into the component parts that we call **elements**. (As we will see in Chapter 2, the complete definition of an element is as follows: a portion of a rule that is one of the preconditions of the applicability of the entire rule.) The elements of the torts and related causes of action that we will study in this book are listed in Exhibit 1–3. For each cause of action, you are told what elements must be supported by facts in order to “state” the cause of action. When a party has offered sufficient evidence covering every element of a cause of action, that party has presented what is called a **prima facie case** that will entitle the party to prevail unless the other side offers more convincing counterevidence.

### CATEGORIES OF TORTS

There are three main categories of torts:

- intentional torts
- negligence
- strict liability torts

These categories are not ironclad. There are some torts that overlap the categories, as we will see.

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¹ Made whole

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**made whole** Restored to the condition that existed before the wrong was committed against the victim insofar as this is possible. To be compensated for a loss.

**culpable** At fault; blameworthy.

**cause of action** 1. A legally acceptable reason for bringing a suit. A rule that constitutes a legal theory for bringing a suit. 2. The facts that give a person a right to judicial relief. When you state a cause of action, you list the facts that give you a right to judicial relief against the wrongdoer. When you state a tort cause of action, you list the facts that give you a right to judicial relief against the tortfeasor.

**tortfeasor** A person who has committed a tort.

**element** A portion of a rule that is one of the preconditions of the applicability of the entire rule. A cause of action is a rule. Hence, a cause of action has elements.

**prima facie case** A party’s presentation of evidence that will prevail unless the other side offers more convincing counterevidence.
### Torts and related causes of action: The elements.

<table>
<thead>
<tr>
<th>1. Abuse of Process</th>
<th>(Chapter 8)</th>
</tr>
</thead>
<tbody>
<tr>
<td>1. The use of criminal or civil process</td>
<td></td>
</tr>
<tr>
<td>2. For improper or ulterior motive</td>
<td></td>
</tr>
</tbody>
</table>

<table>
<thead>
<tr>
<th>2. Alienation of Affections</th>
<th>(Chapter 22)</th>
</tr>
</thead>
<tbody>
<tr>
<td>1. The defendant intended to diminish the marital relationship (love, companionship, and comfort) between the plaintiff and the latter’s spouse</td>
<td></td>
</tr>
<tr>
<td>2. Affirmative conduct by the defendant</td>
<td></td>
</tr>
<tr>
<td>3. Affections between the plaintiff and spouse were in fact alienated</td>
<td></td>
</tr>
<tr>
<td>4. The defendant caused the alienation</td>
<td></td>
</tr>
</tbody>
</table>

<table>
<thead>
<tr>
<th>3. Assault (Civil)</th>
<th>(Chapter 6)</th>
</tr>
</thead>
<tbody>
<tr>
<td>1. Act</td>
<td></td>
</tr>
<tr>
<td>2. Intent to cause (a) an apprehension of an imminent harmful or offensive contact or (b) the imminent harmful or offensive contact itself</td>
<td></td>
</tr>
<tr>
<td>3. Apprehension of an imminent harmful or offensive contact with the plaintiff’s person</td>
<td></td>
</tr>
<tr>
<td>4. Causation of the apprehension</td>
<td></td>
</tr>
</tbody>
</table>

<table>
<thead>
<tr>
<th>4. Battery (Civil)</th>
<th>(Chapter 5)</th>
</tr>
</thead>
<tbody>
<tr>
<td>1. Act</td>
<td></td>
</tr>
<tr>
<td>2. Intent to cause (a) an imminent contact with the plaintiff’s person or (b) an apprehension of such contact</td>
<td></td>
</tr>
<tr>
<td>3. Contact that is harmful or offensive</td>
<td></td>
</tr>
<tr>
<td>4. Causation of the harmful or offensive contact</td>
<td></td>
</tr>
</tbody>
</table>

<table>
<thead>
<tr>
<th>5. Civil Rights Violation</th>
<th>(Chapter 27)</th>
</tr>
</thead>
<tbody>
<tr>
<td>1. A person acting under color of law</td>
<td></td>
</tr>
<tr>
<td>2. Deprives someone of a federal right</td>
<td></td>
</tr>
</tbody>
</table>

<table>
<thead>
<tr>
<th>6. Conversion</th>
<th>(Chapter 10)</th>
</tr>
</thead>
<tbody>
<tr>
<td>1. Personal property (chattel)</td>
<td></td>
</tr>
<tr>
<td>2. The plaintiff is in possession of the chattel or is entitled to immediate possession</td>
<td></td>
</tr>
<tr>
<td>3. Intent to exercise dominion over the chattel (a serious interference)</td>
<td></td>
</tr>
<tr>
<td>4. Dominion</td>
<td></td>
</tr>
<tr>
<td>5. Causation of the serious interference</td>
<td></td>
</tr>
</tbody>
</table>

<table>
<thead>
<tr>
<th>7. Criminal Conversation</th>
<th>(Chapter 22)</th>
</tr>
</thead>
<tbody>
<tr>
<td>The defendant had sexual relations with the plaintiff’s spouse (adultery).</td>
<td></td>
</tr>
</tbody>
</table>

<table>
<thead>
<tr>
<th>Defamation (two torts: libel and slander)</th>
</tr>
</thead>
<tbody>
<tr>
<td>8. Libel</td>
</tr>
<tr>
<td>1. Written defamatory statement by the defendant</td>
</tr>
<tr>
<td>2. Of and concerning the plaintiff</td>
</tr>
<tr>
<td>3. Publication of the statement</td>
</tr>
<tr>
<td>4. Damages:</td>
</tr>
<tr>
<td>a. In some states, special damages never have to be proven in a libel case</td>
</tr>
<tr>
<td>b. In other states, libel per se does not require special damages, but libel per quod does</td>
</tr>
<tr>
<td>5. Causation</td>
</tr>
</tbody>
</table>

<table>
<thead>
<tr>
<th>9. Slander</th>
<th>(Chapter 24)</th>
</tr>
</thead>
<tbody>
<tr>
<td>1. Oral defamatory statement by the defendant</td>
<td></td>
</tr>
<tr>
<td>2. Of and concerning the plaintiff</td>
<td></td>
</tr>
<tr>
<td>3. Publication of the statement</td>
<td></td>
</tr>
<tr>
<td>4. Damages:</td>
<td></td>
</tr>
<tr>
<td>a. Special damages are not required for slander per se</td>
<td></td>
</tr>
<tr>
<td>b. Special damages are required for slander per quod</td>
<td></td>
</tr>
<tr>
<td>5. Causation</td>
<td></td>
</tr>
</tbody>
</table>

<table>
<thead>
<tr>
<th>10. Disparagement</th>
<th>(Chapter 26)</th>
</tr>
</thead>
<tbody>
<tr>
<td>1. False statement of fact</td>
<td></td>
</tr>
<tr>
<td>2. Disparaging the plaintiff’s business, products, or title to property</td>
<td></td>
</tr>
<tr>
<td>3. Publication</td>
<td></td>
</tr>
<tr>
<td>4. Intent</td>
<td></td>
</tr>
<tr>
<td>5. Special damages</td>
<td></td>
</tr>
<tr>
<td>6. Causation</td>
<td></td>
</tr>
</tbody>
</table>

<table>
<thead>
<tr>
<th>11. Enticement of a Child or Abduction of a Child</th>
<th>(Chapter 22)</th>
</tr>
</thead>
<tbody>
<tr>
<td>1. The defendant intended to interfere with the parent’s custody of the child.</td>
<td></td>
</tr>
<tr>
<td>2. Affirmative conduct by the defendant:</td>
<td></td>
</tr>
<tr>
<td>a. to abduct or force the child from the parent’s custody,</td>
<td></td>
</tr>
<tr>
<td>b. to entice or encourage the child to leave the parent, or</td>
<td></td>
</tr>
<tr>
<td>c. to harbor the child and encourage the latter to stay away from the parent’s custody.</td>
<td></td>
</tr>
<tr>
<td>3. The child left the custody of the parent.</td>
<td></td>
</tr>
<tr>
<td>4. The defendant caused the child to leave or to stay away.</td>
<td></td>
</tr>
</tbody>
</table>
12. Enticement of Spouse
   (Chapter 22)
   1. The defendant intended to diminish the marital
      relationship between the plaintiff and the latter’s
      spouse.
   2. The defendant engaged in affirmative conduct
      either:
      a. to entice or encourage the spouse to leave the
         plaintiff’s home, or
      b. to harbor the spouse and encourage the latter
         to stay away from the plaintiff’s home.
   3. The plaintiff’s spouse left home.
   4. The defendant caused the plaintiff to leave home
      or to stay away.

13. False Imprisonment
   (Chapter 7)
   1. An act that completely confines the plaintiff within
      fixed boundaries set by the defendant
   2. Intent to confine the plaintiff or a third party
   3. Causation of the confinement
   4. The plaintiff was either conscious of the confine-
      ment or suffered actual harm by it

14. Injurious Falsehood
   (Chapter 26)
   1. False statement of fact
   2. Harmful to the pecuniary interest of the plaintiff
   3. Publication
   4. Intent
   5. Special damages
   6. Causation

15. Intentional Infliction of Emotional Distress
    (Chapter 9)
    1. An act of extreme or outrageous conduct
    2. Intent to cause severe emotional distress
    3. Severe emotional distress is suffered
    4. Defendant is the cause of this distress

16. Interference with Contract Relations
    (Chapter 26)
    1. An existing contract
    2. Interference with the contract by the defendant
    3. Intent to interfere
    4. Damages
    5. Causation

17. Interference with Prospective Advantage
    (Chapter 26)
    1. Reasonable expectation of an economic
       advantage
    2. Interference with this expectation
    3. Intent to interfere
    4. Damages
    5. Causation

18. Appropriation
    (Chapter 25)
    1. The use of the plaintiff’s name, likeness, or
      personality
    2. For the benefit of the defendant

19. False Light
    (Chapter 25)
    1. Publicity
    2. Placing the plaintiff in a false light
    3. Highly offensive to a reasonable person

20. Intrusion
    (Chapter 25)
    1. An act of intrusion into someone’s private affairs or
       concerns
    2. Highly offensive to a reasonable person

    (Chapter 25)
    1. Publicity
    2. Concerning the private life of the plaintiff
    3. Highly offensive to a reasonable person

22. Malicious Prosecution
    (Chapter 8)
    1. Instigation of criminal proceedings
    2. Without probable cause
    3. With malice
    4. The criminal proceedings terminate in favor of the
       accused

23. Misrepresentation
    (Chapter 26)
    1. Statement of fact
    2. Statement is false
    3. Scienter (intent to deceive)
    4. Justifiable reliance
    5. Actual damages

24. Negligence
    (Chapter 12)
    1. Duty
    2. Breach of duty
    3. Proximate cause
    4. Damages

Nuisance (two torts)
25. Private Nuisance
    (Chapter 23)
    1. An act
    2. Unreasonable interference with the use and
       enjoyment
    3. Of private land
    4. Based on negligence, intent, strict liability, or viola-
       tion of a statute, ordinance, or regulation
    5. Causation
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| **26. Public Nuisance**  
(Chapter 23) | **33. Trespass to Land**  
(Chapter 23) |
| 1. An act | 1. An act |
| 2. Unreasonable interference with the use and enjoyment | 2. Intrusion on land |
| 3. Of a right common to the general public | 3. In possession of another |
| 4. Based on negligence, intent, strict liability, or violation of a statute, ordinance, or regulation | 4. Intent to intrude |
| 5. Causation | 5. Causation of the intrusion |

### Warranty (three causes of action)

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| **34. Breach of Express Warranty**  
(Chapter 19) |   |
| 1. A statement of fact that is false |   |
| 2. Made with the intent or expectation that the statement will reach the plaintiff |   |
| 3. Reliance on the statement by the plaintiff |   |
| 4. Damage |   |
| 5. Causation |   |

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| **35. Breach of Implied Warranty of Fitness for a Particular Purpose**  
(Chapter 19) |   |
| 1. Sale of goods |   |
| 2. By a merchant of goods of that kind |   |
| 3. The merchant has reason to know the buyer's particular purpose in buying the goods |   |
| 4. The merchant has reason to know that the buyer is relying on the merchant's skill or judgment in buying the goods |   |
| 5. The goods are not fit for the particular purpose |   |
| 6. Damage |   |
| 7. Causation |   |

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| **36. Breach of Implied Warranty of Merchantability**  
(Chapter 19) |   |
| 1. Sale of goods |   |
| 2. By a merchant of goods of that kind |   |
| 3. The goods are not merchantable |   |
| 4. Damage |   |
| 5. Causation |   |

### Wrongful Civil Proceedings

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| **37. Wrongful Civil Proceedings**  
(Chapter 8) |   |
| 1. Initiation of civil proceedings |   |
| 2. Without probable cause |   |
| 3. With malice |   |
| 4. The proceedings terminate in favor of the person against whom the civil proceedings were brought |   |
| 5. Some states add an additional element of special injury or interference caused by the civil proceedings |   |

### Wrongful Discharge

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| **38. Wrongful Discharge**  
(Chapter 26) |   |
| 1. Termination of an employee by an employer |   |
| 2. Retaliation |   |
| 3. Violation of public policy |   |
Intentional Torts

An **intentional tort** is a tort in which a person either desired to bring about the result or knew with substantial certainty that the result would follow from what the person did or failed to do. Some of the major intentional torts are battery, assault, trespass, and false imprisonment. Many of the cases asserting these torts are relatively straightforward. An easy battery case, for example, occurs when one person punches another in the nose. Other cases, however, are not so easy:

**EXAMPLE**

Jim rides his bicycle through a large puddle of water directly in front of a bench where Mary is sitting. The water splashes on Mary who now sues Jim for battery. *Mary v. Jim* (battery)

When we study battery, we will see that a main issue in the battery case of *Mary v. Jim* will be whether Jim desired to hit Mary with the water or knew with substantial certainty that this would happen if he rode through the water.

It is often difficult to get into someone's head to prove desire. Hence, plaintiffs can use the alternative test of substantially certain knowledge. Compare the following two cases:

- I place a lighted match to the newspaper you are reading, which then catches fire. Assume that I was just joking around; I didn't want the newspaper to go up in flames.
- I light a cigarette in a room full of gasoline vapors, which then explode. Assume that I did not want this explosion to occur.

In the first case, a jury would probably conclude that I had substantially certain knowledge that your newspaper would catch fire when I placed a lighted match to it. To reach this result, the jury would rely on common sense and the everyday experience of all adults. The jury, however, might not conclude that I had substantially certain knowledge that the explosion would result in the second case. I may have been stupid to light a cigarette in that room, but stupidity or carelessness is not the same as substantially certain knowledge.

In the case of *Mary v. Jim*, suppose (a) that the jury believes Jim when he asserts that he never wanted (desired) to splash Mary (perhaps because he was riding the bike so fast when he turned a sharp corner that he never saw anyone on the bench) or (b) that the jury concludes he did not know with substantial certainty that he would splash her (perhaps because he was riding the bike so slowly). In short, the jury believes Jim when he says that he splashed Mary by accident. If the jury accepts this version of the facts, there is no intentional tort because the element of intent has not been proven. There is, however, another tort that Jim may have committed: negligence.

Negligence

**Negligence** is the failure to use reasonable care that an ordinary prudent person would have used in a similar situation, resulting in injury or other loss. An example might be colliding with someone while driving under the influence of medication that causes intense drowsiness. An ordinary prudent person taking such medication would not drive. Hence the driver was negligent.

To understand the distinction between negligence and intentional torts, we need to compare an **unreasonable risk of harm** and a **substantial certainty of harm**:

- negligence: The heart of a plaintiff’s negligence case is to show that the defendant created an **unreasonable risk of harm**, which is a risk that an ordinary prudent person would not take.
- intentional tort: The heart of a plaintiff’s intentional tort case is to show that the defendant wanted (desired) the harm to result or knew that there was a **substantial certainty of harm** based on what the defendant did or failed to do.
CHAPTER 1 INTRODUCTION TO TORT LAW AND PRACTICE

In our bicycle example of Mary v. Jim, assume that Mary does not sue for battery because of the difficulty of proving intent. Instead, she sues Jim under a negligence cause of action. Now the question will be whether Jim was so careless in riding the bike near the bench that he created an unreasonable risk of splashing people with water. The answer may depend on a variety of facts (which a paralegal might be asked to help uncover through interviewing and investigation) such as:

- how fast Jim was riding,
- how deep was the puddle,
- whether Jim knew his riding through other puddles in the area was causing splashes,
- how visible to Jim was Mary on the bench, etc.

A jury might believe that Jim never wanted (desired) to splash Mary and that he did not have substantially certain knowledge that he would splash her, but still come to the conclusion that he created an unreasonable risk of splashing her and that an ordinary prudent person would not have taken this risk. Hence, he committed negligence. In later chapters, we will examine other examples of this important distinction between negligence and intentional torts.

Strict Liability

The general meaning of strict liability (also called absolute liability or liability without fault) is responsibility for harm whether or not the person causing the harm was at any fault or engaged in any moral impropriety. If the defendant engages in a certain kind of conduct that causes harm, liability will result irrespective of intent or negligence. An example would be performing an abnormally dangerous activity such as blasting. If the plaintiff is injured because of the explosion of the defendant’s dynamite, the latter will be responsible (i.e., liable), regardless of whether the defendant desired to injure the plaintiff or knew with substantial certainty that the plaintiff or anyone else would be injured (intent), and regardless of whether the defendant acted unreasonably in setting off the explosive (negligence). As we will see, however, it is sometimes difficult to distinguish strict liability from negligence, especially in the area of products liability.

One final caution about definitions of legal terminology: use the definitions as points of departure only. The most dangerous definitions are the ones that give the appearance of universality. The meaning of a word or phrase may change when the context changes. In the practice of law, great care is needed to localize all definitions by determining what a particular court in your state meant by a word or phrase. Also, keep in mind that as courts struggle to do justice, they sometimes stretch the definitions to accommodate the result they want to reach on the facts before them. Again, consider all definitions as no more than starting points from which you need to make further inquiry.

INTRODUCTION TO CAUSATION

In Chapter 15 we will study causation extensively. Since causation will be referred to throughout the book, a brief introduction is in order here. Proximate cause is a cause that is legally sufficient to impose liability for the results of one’s wrongful act or omission. Unfortunately, courts use the phrase proximate cause in different ways. In this book, we will use it to mean both actual cause and legal cause:

- actual cause, which answers the question of who was the cause in fact of the harm or other loss
- legal cause, which answers the question of whether the harm or other loss was the foreseeable consequence of the original risk.
For now, let’s focus on actual cause, which means cause in fact as established by one of the following two tests:

- **but-for test**: Would the event (e.g., the injury) have happened without the act or omission of the party? But for the act or omission, would the event have occurred?
- **substantial-factor test**: Did the party have a significant or important role in bringing about the event (e.g., the injury)?

Either test is sufficient to establish actual cause. The but-for test is used when there is only one alleged cause of an event in question. The substantial-factor test is used primarily when more than one causal entity is alleged.

**EXAMPLES**

- **But for.** George fires his gun at Bill. Bill’s left arm is paralyzed by the bullet. But for the gunshot wound, Bill’s arm would not have been paralyzed. Therefore, George’s act of firing the gun was the actual cause of the paralysis.
- **Substantial factor.** Ajax Manufacturing Co. and Winthrop, Inc., pour chemicals into a stream. After they do so, the stream is so polluted that it is no longer suitable for fishing.
  - The dumping by Ajax had a significant role (i.e., was a substantial factor) in making the river unfishable. Therefore Ajax was an actual cause of this result.
  - The dumping by Winthrop had a significant role (i.e., was a substantial factor) in making the river unfishable. Therefore Winthrop was an actual cause of this result.

Again, in Chapter 15 we will have a lot more to say about these two tests for actual cause and we will also cover legal cause, the second component of proximate cause.

**RELATIONSHIP BETWEEN TORT LAW AND OTHER AREAS OF THE LAW**

The study of tort law will involve us in many other areas of the law:

**Contract Law**

When you buy a toaster, you have entered a contract of purchase. If the appliance explodes in your face when you try it for the first time, you may have an action for a breach of contract (you did not receive the functioning toaster you paid for) and an action for a tort (you were injured by the toaster). Most of the law of products liability grows out of such situations. Furthermore, it can be a tort to cause or induce someone to breach a contract.

**Criminal Law**

When Ted punches Bob in the face, two wrongs have probably been committed. Bob has been personally injured. He can bring a tort action against Ted for civil battery. In addition, as we have seen, the public has been injured. The public peace has been violated. The state prosecutor can bring a criminal action against Ted for a crime that might be called “battery” or “assault and battery.” The tort action and the criminal action are separate proceedings (see Exhibit 1–2). We need to examine the relationship between torts and crimes. For example, is it a tort to encourage the prosecutor to bring a criminal action that turns out to be groundless? We will answer this question when we study the tort called malicious prosecution.

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**Actual cause**

Cause in fact. Causation established either by the but-for test or by the substantial-factor test. But-for test: can it be said that an event (e.g., the injury) would not have occurred without the act or omission of the party? Substantial-factor test: can it be said that the party’s acts or omissions had a significant or important role in bringing about the event?

**But-for test**

Would the event (e.g., the injury) have happened without the act or omission of the party? But for the act or omission, would the event have occurred? Also called the *sine qua non* test.

**Substantial-factor test**

Did the party’s acts or omissions have a significant or important role in bringing about the event (e.g., the injury)?
Civil Procedure Law

A tort may lead to a lawsuit where civil procedure law governs jurisdiction, pleadings, discovery, trial, and appeal. We will review some of these topics with an emphasis on paralegal roles during the different stages of tort litigation. We will also cover alternative dispute resolution (ADR) such as arbitration and mediation.

Family Law

There are a number of tort doctrines that are designed to protect the family. Examples include damages for loss of consortium and suits for wrongful adoption. In addition, family members can commit torts against each other. Whether they are allowed to sue for such torts depends on the scope of the intrafamily tort immunity, which we will be examining.

Constitutional Law

To deprive someone of federal civil rights under color of law can be what is called a constitutional tort. Constitutional law is also significant in suits for defamation (libel and slander) brought against the media.

Estate Law

What happens when the wrongdoer dies before being sued by the injured party? Can the wrongdoer’s estate be sued? Suppose the injured party dies before suing the wrongdoer. Can the estate of the injured party sue the wrongdoer? If so, who receives the award of damages in the suit? We will examine these questions under the topics of survival and wrongful death.

State and Local Government Law

Can a city or state be sued in tort? Can a tort action be brought against the United States (federal) government? Answers to such questions involve the doctrine of sovereign immunity.

Real Property Law

There are a number of torts that are committed by or against landowners and land occupiers. These real estate torts sometimes raise questions such as What is land? and What is the possession of land?

Insurance Law

Insurance law has a major impact on tort litigation, particularly on the question of whether the parties will settle their dispute. Also, in many states, insurance companies can be sued for “bad faith” in how they handle policy claims made against them.

Environmental Law

Environmental rules and regulations can have an important impact on certain negligence and nuisance cases as well as in the area of mass tort litigation and toxic torts.

SOURCES OF TORT LAW

Where does tort law come from? Who writes the rules for establishing tort liability through litigation? Where are these rules found? These are our concerns in this section. Although many of these themes may be covered in a legal research course, it is helpful to reinforce them in the context of tort litigation.
Primary Authority

Primary authority is any law that a court could rely on in reaching a decision. Examples include court opinions, statutes, constitutions, administrative regulations, administrative decisions, charters, ordinances, and rules of court. See Exhibit 1–4 for the definitions of these categories of primary authority and examples of how they could be involved in tort litigation.

Exhibit 1–4 Categories of primary authority involved in a tort case.

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<tr>
<th>Category</th>
<th>Definition</th>
<th>Example</th>
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<tr>
<td>(a) Opinion</td>
<td>A court’s written explanation of how it applied the law to the facts before it to resolve a legal dispute. Also called case or decision. (Most tort law is created in opinions.) (The word case has two other meanings: a pending matter on a court calendar and a client matter handled by a law office.)</td>
<td>The case of Smith v. Jones rules that Jones negligently injured Smith in an automobile collision.</td>
</tr>
<tr>
<td>(b) Statute</td>
<td>A law passed by the federal or state legislature declaring, commanding, or prohibiting something. Also called act and legislation. (Statute, act, and legislation are sometimes used in a broader sense to include laws passed by any legislature, which would include ordinances passed by a city council.)</td>
<td>Davis is injured in one of the elevators at Macy’s Department Store. In the suit, Davis alleges that Macy’s violated § 236 of the state’s statutory code, which requires a monthly safety inspection of all elevators.</td>
</tr>
<tr>
<td>(c) Constitution</td>
<td>The fundamental law that creates the branches of government, allocates power among them, and defines some basic rights of individuals.</td>
<td>A story in Time magazine links Harris with the illegal drug trade. Harris sues for libel. Time argues that the suit violates the First Amendment right to freedom of the press.</td>
</tr>
<tr>
<td>(d) Administrative Regulation</td>
<td>A law written by an administrative agency and designed to explain or carry out the statutes, executive orders, or other regulations that govern the agency. Also called administrative rule.</td>
<td>Simpson suffers food poisoning after eating a product of General Foods Inc. The suit alleges that General Foods failed to follow § 137.3, a regulation of the Food and Drug Administration on proper food labeling.</td>
</tr>
<tr>
<td>(e) Administrative Decision</td>
<td>An administrative agency’s resolution of a controversy (often following a hearing) on the application of the regulations, statutes, or executive orders that govern the agency. Sometimes called administrative ruling.</td>
<td>In Perry v. Commissioner, the State Workers’ Compensation Board rules that Perry is not entitled to benefits because his injury did not arise out of his employment.</td>
</tr>
<tr>
<td>(f) Charter</td>
<td>The fundamental law of a municipality or other local unit of government, authorizing it to perform designated governmental functions.</td>
<td>Adams can sue Portland for the injury caused by a city police officer; Adams is allowed to bring this suit because § 26 of the Portland charter waives sovereign immunity for injuries wrongfully caused by municipal employees within the scope of employment.</td>
</tr>
<tr>
<td>(g) Ordinance</td>
<td>A law passed by the local legislative branch of government (e.g., city council, county commission) that declares, commands, or prohibits something. (Same as a statute, but at the local level.)</td>
<td>Kelly sues Parker for trespass to land when Parker’s cows damage Kelly’s land. Parker argues that Kelly did not have the kind of fencing around his land required by § 22(g) of the County Ordinance on farm animal control.</td>
</tr>
<tr>
<td>(h) Rules of Court</td>
<td>The procedural laws that govern the mechanics of litigation (practice and procedure) before a particular court. Also called court rules.</td>
<td>Richardson sues his doctor for negligence. Under Superior Court Rule 38, all medical malpractice cases must be first heard by a magistrate, who must prepare a pretrial order before the case can commence in Superior Court.</td>
</tr>
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Opinions Court opinions (referred to as case law) are the foundation of tort law. In fact, the major way in which tort law comes into existence is through what is called common law. This is judge-made law created in the absence of statutes or other controlling law.

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other controlling law. In effect, the courts create tort law when there is a vacuum. If, for example, the court has a dispute before it that has never been litigated in the courts and is not governed by any statute or constitutional provision, the court can create law to govern that dispute. What it creates is called the common law. An example is invasion of privacy, which, as we will see in Chapter 25, consists of four separate torts. The courts created privacy tort law at a time when there were few or no statutes in this area. When a court creates common law, it relies primarily on the customs and values of the community from time immemorial. Very often these customs and values are described and enforced in old opinions, which are heavily referred to (i.e., cited) by modern courts in the continuing process of developing the common law.

Court opinions are printed in volumes called reporters. For example, in Exhibit 1–5 you will find the first page of the opinion called Austria v. Bike Athletic Co., printed in volume 810 of the Pacific Reporter, 2d Series. (The same opinion can be found online. See Exhibit 1–6.) Austria is a products liability case in which a high

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**Exhibit 1–5**


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1312 Or.

107 Or. App. 57

John Austria, as guardian ad litem for Richard Austria, a minor, and John Austria and Perla Austria, husband and wife, Respondents.

v.

BIKE ATHLETIC CO., a foreign corporation, Colgate-Palmolive Co., a foreign corporation, and Kendall Research Center, a foreign entity, Appellants,

and

Renato Pizarro, M.D., Defendant

A8707–044789; CA A63576.

Court of Appeals of Oregon.

Argued and Submitted Nov. 21, 1990.

Decided May 1, 1991.

Parents of football player severely injured by blow to head during football practice brought suit against designer and manufacturer of football helmet, alleging defective design. The Circuit Court, Multnomah County, Richard L. Unis, J., entered judgment for plaintiffs, and defendants appealed. The Court of Appeals, Deits, J., held that there was evidence from which jury could conclude that player’s injuries were caused by defects in football helmet.

Affirmed.

1. Products Liability 60

In order to prove that football player’s injuries were caused by defects in football helmet, it was not necessary to prove amount of force received by player as result of blow, amount of force that he would have received had he been wearing helmet of alternative design or amount of force required to cause type of head injury he suffered.

2. Products Liability 83

Evidence, when combined with inferences drawn therefrom, was sufficient to allow jury to conclude that defective helmet caused football player’s head injury; there was evidence about how and why player was struck, what a football helmet is supposed to do to reduce consequences of collision, that hematoma resulted from precisely the kind of trauma that helmets are designed to prevent, that properly designed helmet would have greatly reduced likelihood of hematoma and that helmet was not adequately designed to reduce that likelihood.

3. Products Liability 88

There was sufficient proof to submit to jury allegation that football helmet was improperly designed or manufactured so that it would allow energy of blow to be transmitted to head of user without absorbing sufficient amounts of energy so as to prevent closed head injuries.

James N. Westwood, Portland, argued the cause for appellants.

W. Eugene Hallman, Pendleton, argued the cause for respondents.

Before RICHARDSON, P.J., and NEWMAN and DEITS, JJ.

DEITS, Judge.

Richard Austria was severely injured by a blow to the head during football practice. Through his guardian ad litem, he sued the designer and manufacturer of the football helmet that he was wearing, alleging that its defective design was the cause of his injury. The jury returned a verdict for plaintiffs and defendants appeal, arguing, primarily, that the trial court erred in denying their motions for directed verdict, because there was insufficient evidence of causation. We affirm.

In September, 1985, Richard Austria was a sixteen year old high school junior. He was injured during football practice when the knee of another player forcefully struck the front of his helmet. Although he was dazed by the collision, he walked off the field on his own and seemed to suffer few ill effects. Approximately two weeks later, however, he experienced severe headaches. On October 1, he collapsed during football practice. A CT scan indicated that Richard had a subdural hematoma....
CHAPTER 1  INTRODUCTION TO TORT LAW AND PRACTICE


Parents of football player severely injured by blow to head during football practice brought suit against designer and manufacturer of football helmet, alleging defective design. The Circuit Court, Multnomah County, Richard L. Unis, J., entered judgment for plaintiffs, and defendants appealed. The Court of Appeals, Deits, J., held that there was evidence from which jury could conclude that player's injuries were caused by defects in football helmet.

Affirmed.

Statutes  The statutes passed by legislatures affect tort litigation in three significant ways:

Statutes can change the common law  Generally, statutes are superior in authority to court opinions. If the legislature desires to change the common law that has been developed by the courts, it can pass a statute making this change. Such a law is called a statute in derogation of the common law.

Statutes can define the standard of care  When a defendant is sued for negligence, one of the claims often made by the plaintiff is that the defendant violated a statute, e.g., a traffic statute or a license statute. In such cases, the court must examine the relationship between the common law of negligence and the statute that has allegedly been violated. As we will see in Chapter 14, the specific question is whether the statute will be used by the court to define the standard of care to which the defendant will be held.

Statutes can create new torts  Occasionally the legislature will create an entirely new tort cause of action. The state of Minnesota, for example, recently decided that the traditional torts did not sufficiently cover the harm caused when one person coerces another into prostitution. Consequently, the Minnesota legislature created the following new cause of action:

Minnesota Statutes Annotated § 611A.81. Cause of action for coercion for use in prostitution.

derogation  A partial repeal or abolition of a law. For example, a statute in derogation of common law changes the common law.

school student sued a helmet manufacturer after being severely injured in the head during football practice. Hundreds of thousands of tort opinions such as this can be found in the many sets of reporter volumes in a law library and in online databases.
CHAPTER 1  INTRODUCTION TO TORT LAW AND PRACTICE

Subdivision 1. Cause of action created.
(a) An individual has a cause of action against a person who:
(1) coerced the individual into prostitution;
(2) coerced the individual to remain in prostitution; [or]
(3) used coercion to collect or receive any of the individual’s earnings derived
from prostitution. . . .

This cause of action for coerced prostitution did not exist at common law. It is a
creation of the legislature.

In the same manner, the legislature could pass a statute that creates a new de-
fense to an existing cause of action or could set limits on the amount and kind of
damages that can be awarded for certain torts that are successfully established. For
example, some states have statutes that limit the amount of damages that can be
awarded in a medical malpractice case.

Statutes are printed in volumes called statutory codes. For example, in
Exhibit 1–7 you will find the beginning of § 2–621 in Illinois Annotated Statutes.
(The same statute can be found online at www.ilga.gov.) This section of the statute
provides some of the requirements for bringing products liability litigation against
manufacturers and other defendants.

Exhibit 1–7
Excerpt from a page in a statutory code on a torts issue: Illinois Annotated Stat-
utes, chapter 110, § 2-621 (West 1983).

Administrative Regulations  In a number of areas, administrative agencies
and their regulations have a large role in tort litigation. At the state level, the best
example is the workers’ compensation agency or board that covers occupational
accidents. At the federal level, an example of an important agency is the United
States Consumer Product Safety Commission, as we will see when we examine
products liability.

Administrative regulations are printed in volumes often called administrative
code or code of regulations. For example, in Exhibit 1–8 you will find § 1118.1
in Code of Federal Regulations. (The same administrative regulation can be found
online at www.gpoaccess.gov/cfr.) This section covers investigations conducted by
the United States Consumer Product Safety Commission on products alleged to be
unsafe, such as athletic equipment used in school sports.

Secondary Authority

Secondary authority is any nonlaw that a court could rely on to reach its deci-
sion. Examples include legal encyclopedias, legal treatises, legal periodical literature,
and annotations. There are two main values of secondary authorities. First, they
often contain extensive footnotes that will lead you to court opinions and other
primary authorities on the tort (or other) topic you are examining. Second, they are
usually written in a clear, basic writing style. Since they often cover the fundamen-
tals, they are excellent starting points for the novice who needs a quick overview or
summary of the law. This background can be valuable in understanding the some-
times more difficult-to-read primary authority.
Restatement (Third) of Torts: Products Liability

As we will see in Chapter 19, some controversial changes were made in the most

Group.

Law of Torts

Prosser and Keeton

book has been extensively updated by

Prosser and Keeton on the Law of Torts
tise is

commentary on a legal topic. Perhaps the most famous and widely used legal trea-

A

A book written by

legals

applicable
tears of the

free to accept or reject the authority in rendering its decision. When a dispute is in

interest to the court when the legal issue before the court is a difficult one or

relatively novel. Otherwise, courts generally prefer that parties do not cite

secondary authority in documents submitted to the court during litigation.

Assume that you are working on a products liability case and that you want to

find relevant discussions of the law in secondary authority. Here are some examples
of law books you might use:

Legal Encyclopedia A legal encyclopedia is a multivolume set of books that

summarizes almost every important legal topic. Two of the major legal encyclope-
dias are Corpus Juris Secundum (see Exhibit 1–9 for a sample page) and American Jurisprudence 2d (see Exhibit 1–10 for a sample page), both published by West Group.

Legal Treatise A legal treatise is a book written by a private individual (or by

a public official writing as a private citizen) that provides an overview, summary, or

commentary on a legal topic. Perhaps the most famous and widely used legal trea-
tise is Prosser and Keeton on the Law of Torts (5th ed. 1984). See Exhibit 1–11 for

a sample page. The Prosser and Keeton book has been extensively updated by The


Another extremely important legal treatise is Restatement of Torts, published

by a private organization of scholars, the American Law Institute. Many courts are

greatly influenced by the Restatement, particularly when these courts are dealing

with questions or issues that are relatively new for their states. Products liability

litigation is a major example of this; a large number of courts have agreed with and

have adopted positions of the Restatement on strict liability in tort. These positions

are found within the volumes of Restatement (Second) of Torts (see Exhibit 1–12).

As we will see in Chapter 19, some controversial changes were made in the most

recent addition to the field, Restatement (Third) of Torts: Products Liability.

Courts can rely on secondary authority, although they are not required to do so. Secondary authority can only be persuasive authority, which means that the court is free to accept or reject the authority in rendering its decision. When a dispute is in litigation, the main focus of the court is on primary authority. Secondary authority is of interest to the court when the legal issue before the court is a difficult one or when it is relatively novel. Otherwise, courts generally prefer that parties do not cite secondary authority in documents submitted to the court during litigation.

Assume that you are working on a products liability case and that you want to

find relevant discussions of the law in secondary authority. Here are some examples

of law books you might use:

Legal Encyclopedia A legal encyclopedia is a multivolume set of books that

summarizes almost every important legal topic. Two of the major legal encyclope-
dias are Corpus Juris Secundum (see Exhibit 1–9 for a sample page) and American Jurisprudence 2d (see Exhibit 1–10 for a sample page), both published by West Group.

Legal Treatise A legal treatise is a book written by a private individual (or by

a public official writing as a private citizen) that provides an overview, summary, or

commentary on a legal topic. Perhaps the most famous and widely used legal trea-
tise is Prosser and Keeton on the Law of Torts (5th ed. 1984). See Exhibit 1–11 for

a sample page. The Prosser and Keeton book has been extensively updated by The


Another extremely important legal treatise is Restatement of Torts, published

by a private organization of scholars, the American Law Institute. Many courts are

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recent addition to the field, Restatement (Third) of Torts: Products Liability.

Exhibit 1–8


Consumer Product Safety Commission

PART 1118—INVESTIGATIONS, INSPECTIONS AND INQUIRIES UNDER THE CONSUMER PRODUCT SAFETY ACT

Subpart A—Procedures for Investigations, Inspections, and Inquiries

Sec.

1118.1 Definitions, initiation of investigations, inspections, and inquiries and delegations.
1118.2 Conduct and scope of inspections.
1118.3 Compulsory processes and service.
1118.4 Subpoenas.
1118.5 Investigational hearings.
1118.6 Deposits.
1118.7 Rights of witnesses at investigational hearings and of deponents at depositions.
1118.8 General or special orders seeking information.
1118.9 Motions to limit or quash subpoenas and general or special orders and delegation to modify terms for compliance.
1118.10 Remedies for failure to permit authorized investigation.
1118.11 Nonexclusive delegation of power.

Subpart A—Procedures for Investigations, Inspections, and Inquiries

§1118.1 Definitions, initiation of investigations, inspections, and inquiries and delegations.
(a) Definitions. For the purpose of these rules, the following definitions apply:
(3) Firm means a manufacturer, private labeler, distributor, or retailer of a consumer product, except as otherwise provided by section 16(b) of the Act.
(4) Investigation is an undertaking by the Commission to obtain information for implementing, enforcing, or determining compliance with the Consumer Product Safety Act and the regulations, rules, and orders issued under the Act.
CHAPTER 1  INTRODUCTION TO TORT LAW AND PRACTICE

Exhibit 1–9

72 C.J.S.Supp.

Assuming facts favorable to plaintiff using a cigarette manufacturer for cancer or death resulting from cancer because of cigarette smoking, recovery might be grounded on negligence,68 fraud for misrepresentation,69 implied warranty,70 or strict liability in tort.71 While a manufacture of cigarettes is strictly liable for foreseeable harm resulting from a defective condition in the product when the consumer uses the product for the purpose for which it was manufactured and marketed,72 there is no absolute liability for the harmful effects of which no developed skill or foresight can avoid.73 Thus, the manufacturer of cigarettes cannot be held absolutely liable for cancer, or a consumer’s death from cancer, allegedly caused by smoking cigarettes,74 whose plaintiff’s claim negates scientific foreseeability, peculiar defects in cigarettes, and cancer consequences to a substantial segment of the public.75

§ 66. Toys, Games, and Athletic or Recreational Equipment


PRODUCTS LIABILITY §§65–66

Library References

Products liability 60.

The concept of products liability applies to a manufacturer of toys, games, and athletic or recreational equipment. Thus, the manufacturer may be liable under the doctrine of strict liability in tort for injury caused by a defective condition unreasonably dangerous to the user or consumer of such product.76 Liability may also be grounded on negligence. The manufacturer is not an insurer of the safety of the equipment77 and does not guarantee that it will not wear out and will last forever.78 The manufacturer should anticipate the reasonably foreseeable risks in the use of the product.79 The manufacturer of toys, games, and athletic or recreational equipment, is under a duty to test and inspect the products for safety before marketing them,10 but a wholesaler or retailer has been held not to have a duty to inspect products packaged by, and received from, a reputable manufacturer.80 While a manufacturer has a . . .

Exhibit 1–10

§ 1. GENERALLY; “PRODUCTS LIABILITY” DEFINED

The term “products liability,” a phrase almost unknown to the legal profession in earlier years, is now almost universally applied to the liability of a manufacturer, processor, or nonmanufacturing seller for injury to the person or property of a buyer or third party caused by a product which has been sold. The subject matter of products liability was formerly dealt with under such legal classifications as “negligence,” “torts,” or “sales.” Particularly in light of the development of the doctrine of strict liability in tort, however,11 it is clear that “products liability” has become a legal heading or subject in its own right. The paradigmatic products liability action is one where a product which is reasonably certain to place life and limb in peril, and is distributed without reinspection, causes bodily harm, and a manufacturer is liable regardless of whether it is negligent because public policy demands that responsibility be fixed wherever it will most effectively reduce the hazards to life and health inherent in defective products that reach the market. Typically, the term “products liability” covers any liability of a manufacturer or other seller or a product, where personal injury or damage to some other property is caused by a defect in the product.12 The manufacturer's duty of care includes protection against property damage, which traditionally means damages to other property caused by a defective product; such damage is so akin to personal injury that the two are treated alike. Products liability may also include any liability arising because some defect causes loss or destruction of the product itself,13 . . .

Chapter 1

INTRODUCTION TO TORT LAW AND PRACTICE

Chapter 17

PRODUCTS LIABILITY

Table of Sections

Sec.
95. Theories of Recovery and Types of Losses.
95A. Warranty and Intangible Economic Losses.
96. Negligence and Liability for Physical Harm to Persons and Tangible Things.
97. Strict Liability in Warranty for Physical Harm to Persons and Tangible Things.
98. Strict Liability in Tort for Physical Harm to Persons and Tangible Things.
99. Meaning of Dangerously Defective or Unsafe Products.
100. Parties.
101. Summary—Interests Protected and Theories of Recovery.
102. Contributory Negligence, Misuse, and Other Intervening Misconduct.
103. Proof.
104. Other Suppliers.
104A. Real Estate Transactions.

§95. Theories of Recovery and Types of Losses

Products liability is the name currently given to the area of the law involving the liability of those who supply goods or products for the use of others to purchasers, users, and bystanders for losses of various kinds resulting from so-called defects in those products.

1. A recent government estimate placed the number of consumer product injuries (both in and out of the home) at 36 million for 1977. See Prod.Saf. & Liab.Rep. (BNA), June 28, 1979, 511. The total cost of such injuries to the nation has been estimated at $20 billion or more per year. Owen, Punitive Damages in Products Liability Litigation, 1976, 74 Mich.L.Rev. 1258–59 n. 2.

At the very outset, it is important to make a distinction between two types of product conditions that can result in some kind of loss either to the purchaser or a third person. One is a dangerous condition of the product or, if one prefers, a product hazard; the other is the inferior condition or . . .

Exhibit 1–11


Exhibit 1–12

Restatement (Second) of Torts (1979).
**Legal Periodical Literature**

A legal periodical is an ongoing publication (e.g., one published six times a year) containing articles, case notes, and other information on legal topics. When published by law schools, legal periodicals are often called law reviews or law journals, e.g., *Harvard Law Review*, *Yale Law Journal*. Two of the main indexes to legal periodical literature are the Current Law Index and the *Index to Legal Periodicals and Books*. See Exhibit 1–13 for a sample page from the *Index to Legal Periodicals and Books*.

**Exhibit 1–13**

Excerpt from a page in the *Index to Legal Periodicals and Books* that includes citations to legal periodical literature on torts issues.

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**SUBJECT AND AUTHOR INDEX**

<table>
<thead>
<tr>
<th>Subject</th>
<th>Author</th>
<th>Summary</th>
</tr>
</thead>
<tbody>
<tr>
<td>Drugs</td>
<td>California</td>
<td>Kill or cure? Bogash. 13 <em>Cal. L.</em> 48–51 + Je’93</td>
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<tr>
<td></td>
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<td>Motor vehicles</td>
</tr>
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<td></td>
<td></td>
<td>The tide has turned. L. E. Cohen. 29 <em>Trial</em> 75–9 Ja ’93</td>
</tr>
<tr>
<td>Products liability</td>
<td>Alaska</td>
<td>Products liability in Alaska—a practitioner’s overview. T. A. Matthews. 10 <em>Alaska L. Rev.</em> 1–32 Je’93 California</td>
</tr>
<tr>
<td></td>
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<td>European Community countries</td>
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<td>Michigan</td>
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</tbody>
</table>

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**Annotations**

An annotation is a set of notes and commentary on issues in court opinions. The major annotations are published by West Group in books called *American Law Reports*. These books print the annotations as well as the court opinions that contain the issues treated in the annotations. The main units of *American Law Reports* are A.L.R., A.L.R.2d, A.L.R.3d, A.L.R.4th, A.L.R.5th, A.L.R.6th, A.L.R. Fed., and A.L.R. Fed. 2d. Annotations provide excellent leads to case law on thousands of issues such as torts and other areas of the law. For an example of a tort annotation, see Exhibit 1–14.

**Tort Law Online**

It is now possible to obtain a great deal of online information that is relevant to a torts practice from free and fee-based sites on the Internet. In addition to research...
into cases, statutes, and other authorities, a law firm often needs to do factual research. Examples include obtaining information about the manufacturer of a product, the weather conditions on the day of an accident, the assets of a defendant, or the location of a potential witness.

The two major fee-based online services are Westlaw and LexisNexis. They have extensive databases containing primary and secondary authority. One of the particularly useful databases that each provides is a jury verdict service. It allows you to search court records to find out what jury verdicts have been returned for specific bodily injuries caused by different categories of accidents. Such information can be invaluable in deciding whether to settle a case and in making a presentation to a liability insurance company.

Greater caution is needed when using free Internet sites than when using the fee-based ones like Westlaw and LexisNexis. In general, the free sites are not as accurate, current, comprehensive, or easy to use as the fee-based sites. Many government sites are free and reliable, although they are rarely as user-friendly as fee-based sites. For an example of a government site relevant to a torts practice, see Exhibit 1–15.

See also the Helpful Websites section at the end of the chapter for sites that a torts practice would find helpful.

**PROJECT**

Exhibit 1–3 lists a large number of torts. Go to websites of attorneys who practice law in your state. Find law firms that mention any ten of the torts in Exhibit 1–3. Limit yourself to one law firm per tort. For each site you find, give the name of the firm, quote the sentence from the site that mentions the tort, give the web address of the page of the quote, and give the date you visited the site to find the quote. Example: Law offices of Smith and Smith. “We handle malicious prosecution cases.” www.smithlawoffice.com (visited December 10, 2011). To locate law firms in your state, run a search in Google, Bing, or other search engine that contains the name of your state, the word “attorney,” and the tort you are checking. Example: Pennsylvania attorney negligence. See also the links to trial attorneys in Appendix A.

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**Exhibit 1–14**

ETHICS IN A TORTS PRACTICE

You are a paralegal working in the law office that represents Ed Harris, who is being sued for negligence by George Adams. The negligence case arose out of a car accident, which Adams claims was caused by Harris. Immediately after the accident, Adams called the police when Harris threatened to kill Adams because of Adams’s “crazy driving.” Another law firm is representing Harris in the criminal case in which Harris is being charged with criminal harassment. One day in the office, Harris asks you a legal question about his criminal case. You happen to know the correct answer. Because your firm is not representing Harris on the criminal case, you answer the question. Any ethical problems?

SUMMARY

A tort is a civil wrong (other than a breach of contract) that causes injury or other harm for which our legal system deems it just to provide a remedy such as damages. A remedy is the means by which a right is enforced or the violation of a...
right is prevented, compensated for, or otherwise redressed. Criminal law governs
a suit brought by the government for the commission of a crime. Civil law gov-
erns a suit between private persons or between private persons and the govern-
ment over a matter other than the commission of a crime. Tort law is one of the
branches of civil law. The same conduct can constitute both a tort and a crime.
Tort and criminal cases, however, involve separate proceedings. There are four
major purposes of tort law: to provide a peaceful means for adjusting the rights of
parties; to deter wrongful conduct; to try to restore injured parties to their origi-
nal position; and to identify who, in fairness, should be responsible for the harm
that resulted.

A cause of action is a legally acceptable reason for bringing a suit. Tort causes
of action have elements. To state a tort cause of action is to assert facts that support
each element of the tort committed by the tortfeasor. A prima facie case is a party’s
presentation of evidence that will prevail unless the other side offers more convinc-
ing counterevidence. There are three main categories of torts: intentional torts (the
actor desires the result or knows with substantial certainty that it will occur), negli-
gence (the actor creates an unreasonable risk of harm), and strict liability torts (the
actor engages in conduct for which the law imposes liability regardless of intent or
negligence). Proximate cause is a cause that is legally sufficient to impose liability
for the results of one’s wrongful act or omission. The two components of proximate
cause are actual cause and legal cause. The two tests for actual cause are the but-for
test and the substantial-factor test.

Primary authority is any law that a court can rely on in reaching a decision.
The major primary authorities are court opinions, statutes, constitutions, admin-
istrative regulations, administrative decisions, charters, ordinances, and rules of
court. Common law is judge-made law in the absence of statutes or other control-
ling law. A good deal of tort law is common law. Statutes can change the com-
mon law, define the standard of care in negligence cases, and create new torts and
defenses. Secondary authority is any nonlaw that a court can rely on to reach a
decision. Examples include legal encyclopedias, legal treatises, legal periodical lit-
erature, and annotations. Secondary authority is helpful in finding and explaining
primary authority. There is a great deal of legal and factual information relevant to
a torts litigation practice that is available online from both free and fee-based sites
on the Internet.

### KEY TERMS

- **tort** 2
- **damages** 2
- **diversity of citizenship** 2
- **remedy** 2
- **jurisdiction** 2
- **criminal law** 2
- **civil law** 2
- **standard of proof** 4
- **preponderance of the evidence** 4
- **made whole** 5
- **culpable** 5
- **cause of action** 5
- **tortfeasor** 5
- **element** 5
- **prima facie case** 5
- **intentional tort** 9
- **negligence** 9
- **strict liability** 10
- **liable** 10
- **proximate cause** 10
- **actual cause** 11
- **but-for test** 11
- **substantial-factor test** 11
- **contract** 11
- **alternative dispute resolution (ADR)** 12
- **primary authority** 13
- **opinion** 13
- **statute** 13
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- **administrative regulation** 13
- **administrative decision** 13
- **charter** 13
- **ordinance** 13
- **rules of court** 13
- **common law** 13
- **reporter** 14
- **derogation** 15
- **statutory code** 16
- **administrative code** 16
- **secondary authority** 16
- **persuasive authority** 17
- **mandatory authority** 17
- **legal encyclopedia** 17
- **legal treatise** 17
- **online** 20
CHAPTER 1 INTRODUCTION TO TORT LAW AND PRACTICE

■ REVIEW QUESTIONS

1. What is the financial scope of accidental or unintentional injuries every year?
2. What is a tort?
3. Distinguish between civil and criminal disputes.
4. What are the four purposes of tort law?
5. How do you state a cause of action?
6. What is the effect of stating a prima facie case?
7. What is an intentional tort?
8. How does an intentional tort differ from negligence?
9. Distinguish between unreasonable risk of harm and substantial certainty of harm.
10. How do intentional torts and negligence differ from strict liability?
11. What is proximate cause?
12. What are the two components of proximate cause?
13. What are the two tests for actual cause (cause in fact)?
14. Give examples of how tort law can relate to the following areas of law: contract law, criminal law, civil procedure law, family law, constitutional law, estate law, state and government law, real property law, insurance law, and environmental law.
15. What is primary authority?
16. Define the following primary authorities: opinion, statute, constitution, administrative regulation, administrative decision, charter, ordinance, and rules of court.
17. What is common law?
18. What are the three ways that the statutes of the legislature can affect tort law?
19. What is secondary authority?
20. What are the main categories of secondary authority?
21. How can a torts practice use secondary authority?
22. What is the Restatement of Torts?
23. What kinds of online research can be used in a torts practice?

■ HELPFUL WEBSITES

OVERVIEW OF TORT LAW ONLINE

■ Findlaw
www.findlaw.com
(type “torts” in the search box; also click links to “Accidents & Injuries”)

■ Washlaw
www.washlaw.edu/subject/torts.html

■ Hieros Gamos, Guide to Tort Law
www.hg.org
(click “Law & Practice,” then “Legal Malpractice,” “Libel/Slander,” “Malpractice,” “Personal Injury,” “Product Liability,” “Torts,” “Workers’ Compensation,” etc.)

■ MegaLaw
www.megalaw.com
(click “Law Topic Pages” for links to damages, libel, personal injury, torts, etc.)

■ Legal Information Institute
topics.law.cornell.edu/wex/Tort

■ LexisNexis Torts Capsule Summary

■ Personal Injury Law
www.lawguru.com
(click “Personal Injury Law”)

GENERAL LAW (including Tort Law) ON THE INTERNET: FREE SITES

www.plo.org
scholar.google.com
scholar.google.com/advanced_scholar_search?hl=en&as_sdt=2000
www.justia.com
law.lexisnexis.com/webcenters/lexisone
findacase.com
www.infogrid.com/legal.htm
www.law.stanford.edu/library/research
www.lexisweb.com
openjurist.org

DATA ON INJURIES AND TORTS

www.cdc.gov/nchs/injury.htm
www.nsc.org
www.cdc.gov/mmwr
www.ojp.usdoj.gov/bjs/civil.htm

GOVERNMENT AGENCIES

■ Consumer Product Safety Commission
www.cpsc.gov

■ National Highway Traffic Safety Administration (NHTSA)
www.nhtsa.dot.gov
CHAPTER 1 INTRODUCTION TO TORT LAW AND PRACTICE

- National Transportation Safety Board
  www.ntsb.gov
- Occupational Safety and Health Administration
  www.osha.gov

TORT REFORM/ATTACKS ON THE TORT SYSTEM
- American Tort Reform Association
  www.atra.org
- Junk Science Review
  www.junkscience.com
- National Patient Safety Foundation
  www.npsf.org
- Overlawyered
  overlawyered.com
- Center for Justice and Democracy
  www.centerjd.org

ENDNOTES

   United States Department of Justice, Bureau of Justice Statistics (www.ojp.usdoj.gov/bjs/abstract/fttv03.htm).
3. Adapted from John W. Wade et al., *Torts* 1 (9th ed. 1994).

Student StudyWARE™ CD-ROM
For additional materials, please go to the student CD in this book.