CONCEPTS AND INSIGHTS SERIES®

The Forms and Functions of Tort Law

Fifth Edition

Kenneth S. Abraham

FOUNDATION PRESS

Chapter 1

THE NATURE AND FUNCTIONS OF TORT LAW

The law of torts (a name derived from the Latin word for "twisted" and from the French word for injury or "wrong") mainly concerns the rights of private parties to obtain monetary compensation from those who have caused them injury or damage. Most of tort law is "common law," that is, law made by courts rather than legislatures. Legislatures enact statutes, whereas courts decide individual cases. A series of judicial decisions based on the same principle—usually at the appellate level—then comes to stand for a rule of law. Most tort law is made by state rather than federal courts. So although reference often is made to "the" law of torts, in fact there are fifty-one separate state regimes of tort law. These different bodies of state tort law are nonetheless sufficiently similar in important respects to constitute one body of law with variations within it.

It is useful to begin at a general level before addressing particular areas of tort law and specific legal doctrines. This Chapter starts with a brief discussion of the nature of tort law in order to introduce the subject. As in many areas of the law, however, it is impossible to obtain the fullest appreciation of substance if one does not understand the procedural setting in which a substantive rule has been made. The Chapter therefore turns next to the procedural context in which tort law is made, surveying the points of procedure that arise most frequently in tort cases. Finally, the Chapter takes up the principles underlying and functions of tort law, surveying briefly the different functions that have been attributed to tort law and that figure prominently in the Chapters that follow this one.

I. Introduction

Courses in Torts often begin with the question, "What is a tort?" Students give puzzled responses until the correct answer, "A civil wrong not arising out of contract," eventually emerges. This answer is a good enough starting point, but it is both overinclusive and underinclusive. Not all civil wrongs that do not arise out of contract are torts. For example, many statutory schemes that create civil liability, such as Civil Rights statutes, involve neither contract nor tort liability, although they resemble tort in an attenuated way. And some torts actually do "arise" out of contract, at least in a loose sense. Certain legal actions for bodily injury or property damage caused by defective products, as well as claims for bad-faith breach of contract, are examples. But these are, so to speak, exceptions that prove the

rule. For the most part tort law is in fact a residual category of civil liability. Legally cognizable wrongs that are not part of another discrete field of law tend to fall under the rubric of tort law.

Tort law itself can be subdivided into two general categories, based on the "standard of care" whose breach may result in liability. What might be called *accident law* is comprised of cases imposing strict liability or negligence liability, usually for physical injury—bodily injury or property damage. Strict liability is imposed without regard to the degree of care that the defendant, or "tortfeasor," exercised. Negligence liability is imposed only upon proof of some kind of carelessness—technically, the failure to exercise reasonable care under the circumstances. In contrast, in what are sometimes called the *intentional torts*, liability is not imposed for negligence, but only upon proof of the defendant's intention to invade the legally protected interest of another. The intentional torts involve a wide variety of non-accidental behavior. Some of this behavior obviously merits the name "intentional" in the sense of an intention to cause harm. A good deal of what falls in the category of the intentional torts, however, does not necessarily require or involve an intent to cause harm. Trespass to land, certain forms of defamation, and some invasions of privacy, for example, can result in liability even in the absence of intent to cause harm, as long as the defendant intended to take the action that caused the plaintiff harm. Nonetheless, this rough distinction between the torts that fall in the general area of accident law and those informally classified as intentional is worth recognizing.

The distinction between tort liability for accidental and intentional harm, however, goes only to the "standard of care" at issue. Proof that the defendant violated the applicable standard of care is not enough to warrant the imposition of tort liability. Breach of the standard of care is merely one element of any "cause of action"—a wrong that is the basis for imposing liability, such as battery, negligence, or defamation—in tort. There also must be proof that the plaintiff suffered actionable harm, and that the defendant's conduct in breaching the applicable standard of care caused that harm. Combining these requirements yields the four elements of any cause of action in tort: 1) Duty (i.e., the legal duty to comply with a particular standard of care); 2) Breach of Duty (i.e., failure to comply with the applicable standard of care); 3) Causation; and 4) Damages. A good case can be made that causation should be divided into two categories, cause-in-fact and scope of liability (sometimes called "proximate cause"). But because the conventional approach is to refer to four elements rather than five, I will follow this convention.

Although tort liability is imposed, under various circumstances, for bodily injury, property damage, emotional, dignitary, and

reputational harm, and for economic loss, liability for bodily injury and property damage dominates tort law in practice. Consequently, it also dominates introductory courses in tort law. The reason is that tort liability is much more likely to be imposed when conduct causes physical harm. Bodily integrity is central to people's ability to benefit from all the other goods of life. Greater obligations of safety therefore attach to conduct that risks bodily injury, and tort law affords greater protection against such risks. It would be much harder to justify also affording greater protection against the risk of damage to property, except for the fact that conduct that risks property damage typically simultaneously risks bodily injury. It is often a matter of serendipity whether the conduct results in bodily injury, property damage, or both.

In addition, tort law in the United States has four features that are so fundamental to its operation, even though their existence is not logically necessary to it, that they are worth noting at the outset:

Jury Trial. In all state and federal courts there is a right to a trial by jury in almost all tort cases. This produces a body of rules about the allocation of authority between courts and juries. Much of tort law emerges in decisions about this allocation of authority. In addition, there is more potential for emotion and sympathy for the plaintiff to influence the outcome, and less concern for consistent treatment of similar cases, than there would be if ultimate decisions were made by professional judges rather than by lay juries. It is worth noting, however, that over ninety percent of all tort suits are settled. Settlements typically are reached in anticipation of what would happen at trial. But many routine, small and medium-sized claims are handled in a somewhat bureaucratic fashion by lawyers and liability insurance companies, without careful consideration of factual and legal nuances that would be relevant at trial.

Liability Insurance.[1] Beginning in the second half of the nineteenth century there was a significant increase in the incidence of accidental physical injuries. This resulted from industrialization, the mechanization of transportation and a consequent increase in the risk of injury from industrial activity, railroads, trolley cars, and airplanes, and from a slowly evolving political and cultural shift that favored the greater socialization of risk generally. In part to respond to the increased liability that resulted, late in the nineteenth century liability insurance was introduced. Liability insurance covers, among other things, the damages for bodily injury or property damage that a tort defendant must pay a victim. It has grown exponentially since

[1] A three-paragraph primer on insurance, including liability insurance, is set out at the beginning of Chapter Twelve. Interested readers may wish to review this material now.

then. Today, virtually all defendants in bodily injury and property damage suits, and many defendants in other kinds of suits, have at least some liability insurance. The availability of liability insurance influences the decision whether to sue and whom to sue. Moreover, over a period of more than a century, the availability of insurance and the scope of tort liability have influenced each other. The more tort liability expanded, the more liability insurance became available. And often, tort liability expanded at least in part because liability insurance was, or could be expected to become, available.[2]

The Contingent Fee System. Plaintiffs' attorneys almost always take cases on a "contingent-fee" basis. That is, the plaintiff's attorney receives a percentage of the plaintiff's recovery if the suit is successful, and charges nothing if the suit is unsuccessful. The result is that plaintiffs are not required to be able to pay their attorneys in order to bring suit. In addition, the contingent fee approach affects the selection of cases in which suit is brought, because plaintiffs' attorneys decisions about what cases to take are heavily influenced by their prospects of success and by the magnitude of the potential plaintiff's losses.

The "American Rule" for Costs. In our tort system, each party pays its own costs, including counsel fees, win or lose. In contrast, in many other systems, a loser-pays approach is applied. Under our system, plaintiffs are less discouraged from bringing suit, because they do not risk incurring a sizeable personal cost if they lose their suits, and defendants must pay their own counsel fees and costs even if they win. Obviously, fewer suits would be brought, whether involving strong or weak claims, and some suits might be more vigorously defended, under a loser-pays system.

These four features of tort law and liability have heavily influenced its development. Together they help to account for the great transformation of tort law that took place in the twentieth century. From a comparatively obscure field of law with little economic importance even in the late nineteenth century, the scope and incidence of tort liability expanded substantially. Tort law had become a major legal specialty of considerable economic importance by the beginning of the twenty-first century. That is one reason that virtually every law school requires the study of tort law in the first year. The other reason is that tort law is a near-perfect vehicle for studying the legal process. And that is where we now turn.

---

[2] *See* Kenneth S. Abraham, THE LIABILITY CENTURY: INSURANCE AND TORT LAW FROM THE PROGRESSIVE ERA TO 9/11 (2008).