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Introduction to the Law of Torts

Joseph W. Little
University of Florida College of Law

INTRODUCTION TO THE LAW OF TORTS*

JOSEPH W. LITTLE**

In the broadest sense, *Law* is society's tool for regulating human behavior. In some contexts the law prescribes a more-or-less total structure of regulation. For example, traffic laws prescribe where to park and for how long: where to drive and how fast, and so forth. Similarly, the laws regulating securities transactions tend to be detailed and complete. By contrast, other areas of law serve merely to truncate behavior at the margin, dividing what society deems as acceptable from that deemed undesirable. The law of torts is one such branch. It divides behavior that causes injury to persons or property into two classes. The first is that class that requires the actor to compensate the injured party for harm done, and the second is that class that does not require compensation. Presumably, the possibility of having to make compensation serves prospectively as a brake on injury causing behavior.

Injury causing behavior of the class that requires compensation is called a "tort," and is one mode of wrongful civil behavior. I say wrongful *civil* behavior to distinguish torts from criminal behavior. In general, the field of torts encompasses all civil wrongs except breaches of contract and various statutory wrongs. Bear in mind, however, that an act may at the same time be both a crime and a tort.[1] For example, if, out of malice and with no excuse, I shoot one of my students, I will have committed a crime. Also, I will have no doubt committed an actionable tort against that person.

The victim's right to compensation for injuries done by me are private rights and are pursued by the victim in the civil courts. If the victim chooses not to seek a remedy for the private wrong done, then that right is defaulted. In

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** Professor of Law and Alumni Research Scholar, University of Florida Levin College of Law.

1. "In general, a person is criminally responsible and civilly liable for the intentional use of force or violence upon the person of another." Duplechain v. Turner, 444 So. 2d 1322, 1325 (La. Ct. App. 1984). Ordinarily, however, evidence of a criminal conviction or acquittal is not relevant to the trial of the tort action. Eggers v. Phillips Hardware Company, 88 So. 2d 507, 507 (Fla. 1956). Nevertheless, some state statutes bind certain findings in criminal convictions against the defendant in subsequent civil litigation. *See, e.g.*, Board of Regents v. Taborsky, 648 So. 2d 748, 755 (Fla. Dist. Ct. App. 1994).

general, no one else can pursue the remedy in the victim's stead without consent. On the contrary, the crimes I committed were technically not committed against the victim but were committed against the State or the people. Consequently, the victim has no individual right to prosecute me criminally for the harm done, but may certainly initiate the procedure by signing a complaint of some kind.[2] Thereafter, prosecution of the criminal action falls into the hands of the state's attorney who officially possesses practically unfettered discretion as to whether it should be prosecuted at all (absent advance pardons by a President or Governor). A decision not to prosecute a criminal complaint ordinarily ends the matter and the victim can do nothing further to seek vindication in the criminal law. Furthermore, even if a successful criminal prosecution should ensue, no economic advantage would accrue to the victim individually. Any fines or fees paid would go to the state. Only if successful in a civil tort action would the victim personally benefit financially.

In modern times some states have enacted restitutionary sentencing and victim compensation laws to temper these traditional propositions. England has a permanent victim compensation plan. Perhaps some states do too. In the end, however, these measures possess meager remedial power when contrasted to the law of torts.

What I have said so far should impart at least a vague sense of the nature of a tort. A tort is a wrongful act, ordinarily of the kind that causes injury to body or property. By contrast, wrongful acts in the contracts field are in effect broken promises. That is, when a person does not perform the legal obligation of a freely entered contract, that person has breached a binding promise and thereby committed a legal civil wrong. Ordinarily, a breach of contract is not a crime and is not a tort.

In a concise statement, Oliver Wendell Holmes, Jr., then a law teacher and later a great American jurist, summed up the law of torts as follows:

> The business of the law of torts is to fix the dividing lines between those cases in which a man is liable for harm which he has done, and those which he is not. But it cannot enable him to predict with certainty whether a given act under given circumstances will make him liable, because an act will rarely have that effect unless followed by damage, and for the most part, if not always, the consequences of an act are not known [that is, before the act is done] but only guessed at as more or less probable. All the rules that the law can lay down beforehand are rules for determining the conduct which will be followed by liability if it is followed by harm,—that is, the conduct which a man pursues at his peril. The only guide for the future to be drawn from a decision against a defendant in an action of tort is that similar acts, under

2. In general, so-called "private" criminal prosecutions are not permitted in the United States.

> circumstances which cannot be distinguished except by the result from those of the defendant, are done at the peril of the actor; that if he escapes liability, it is simply because by good fortune no harm comes of his conduct in the particular event.[3]

Often in contracts disputes, but not always, lawyers get involved in the planning process. They may draft the contracts and advise their clients of what to do in performing their sides of bargains and in urging other parties to perform. Consequently, the contracts lawyer may possess more background, information and a better perspective to use in resolving contract lawsuits that arise than does a torts lawyer. I would add quickly, however, that this is not always so.

By contrast, as is pointed out by Professor Morris in his treatise on torts, lawyers rarely, if ever, participate in planning or advising in torts.[4] Sometimes they find themselves in a position to advise *against* a tortious course of action (*e.g.*, advising against taking actions that might constitute a business tort), but, most often, lawyers get involved only long after the tortious act occurred. For example, a person seriously hurt in an automobile crash may be in no condition to seek legal advice for hours, days or even months. In the meantime, important evidence disappears—vehicles are towed, witnesses vanish, skidmarks are washed away and so forth. Consequently, the torts lawyer may be left with a sympathetic plaintiff, but a losing case, *simply for lack of evidence*. These factors strongly influence the law of torts, especially in the procedural and tactical moves lawyers make in the course of litigation. Typically, plaintiffs' lawyers work mightily to get their cases in the hands of juries for decision, knowing full well that jurors are not likely to employ legal technicalities to leave sympathetic plaintiffs with no recovery at all. Conversely, defendants' lawyers ordinarily attempt to get cases decided without having them submitted to trial by jury.

Although most beginning law students will possess partially formed impressions about the roles of the central players in a civil trial, few students will fully appreciate what is actually expected of them. Understanding the roles of the central actors in the litigation process is crucial. Using a football analogy may help students do this. Referees and judges have a lot in common. The job of the referees is to know the rules, apply them to evaluate outcomes of plays, detect infractions in the course of play, and keep the game moving. Judges do the same things in civil litigation.

Football referees also have an extemporaneous fact-finding role that does not have an exact analogy in litigation. Here I refer to out-of-bounds, offsides, pass interference and similar mixed factual-judgmental calls that referees make as play takes place. In this regard, football refereeing takes on the coloration

3. OLIVER WENDELL HOLMES, JR., THE COMMON LAW 79 (1943).

4. CLARENCE MORRIS & C. ROBERT MORRIS, JR., MORRIS ON TORTS (2d ed. 1980).

of fact-finding that falls not to judges but to juries in civil litigation. Juries are also central players in civil litigation. But unlike referees, jurors are not eyewitnesses to the play as it occurs. Instead, jurors see and hear evidence presented by lawyers. The purpose of the evidence is to paint a picture of what actually happened between the parties in the collective mind of the jury.

In a sense, the jury's fact-finding role mirrors that of those football officials who review television tapes of the play to make an instant replay decision. The actual "truth" of the replay depends upon camera angles, television lens' fidelity, the presence of occluding bodies between the lens and the play and similar factors. By contrast, the fidelity of a jury's "instant replay" decisions as measured by "truth as God knows it" is a function of the amount and quality of the evidence submitted to it, the skill of the lawyers and the capabilities of the jurors. When parties dispute historical facts (such as What happened?, When?, Where?, By whose acts? and Why?) juries must provide the answers (often embodied in verdicts). These "findings of fact" become the legal version of the historical truth and they determine who wins and who loses the cases.

But the role of juries is even more far reaching than finding historical facts. Indeed, a jury's most important role is to decide guilt and innocence; in short, who wins and who loses. To this end, the jury's decision-making expands to include assessing the legal consequences of the historical facts as it has found them. In torts cases, juries routinely make qualitative assessments of the actions of the parties. Did the defendant act negligently? Did the plaintiff? Did either party act with bad intent or evil motive? The jury's factual-judgmental decisions on these "ultimate" propositions are the heart of the matter in tort litigation. In rendering them, juries are guided both by the evidence and by the judges' instructions as to the decisional rules (*i.e.*, the law) it must apply.

The lawyers are the final major players in the litigation process. By reference to the football analogy, the lawyers are the coaches and also the cheerleaders. The lawyer's job is to assemble the team (*i.e.*, witnesses and evidence), call the plays (*i.e.*, develop the theories of the action and sequence the presentation of evidence), argue points of law to the judge (*i.e.*, the referees) and make opening and closing arguments to the jury (*i.e.*, cheerleading). Indeed, the lawyer's function might be seen to subsume the roles of both coach and player. To the extent that human effort determines the outcome of litigation, the main weight of that performance is carried by the lawyers. As a general proposition, smart, well-prepared and energetic lawyers are more likely to prevail in given cases than those who do not possess those qualities in equal measure.

While incomplete and imperfect in describing the roles of the main players in civil litigation, this sports analogy may make the litigation process more accessible to many students. But knowing more about the primary actors is

only the beginning of understanding. Just as knowing the roles of referees, coaches and players does not provide a complete context to understand a football match, neither does knowing the functions of judges, juries and lawyers provide a complete context to understand litigation. Students must also know the internal structure of the game. What is the layout of the field? The division of playing time into quarters and halves? The first down standard? And all the rest? By the same token, lawyers must not only know the rules of torts, which we refer to as the substantive law of torts, but must also know the laws of procedure and evidence that permit them to paint a favorable "instant replay" picture in the minds of the jurors.

That is, it is not enough for torts lawyers to know that such-and-such behavior is wrongful. They must also know how to prove the facts to substantiate their clients' claims and defenses, how to present those facts to the jury, and how to preserve error to permit appeals against bad decisions judges sometimes make. Therefore, when reading appellate opinions in Torts, students must pay close attention to the stage in the trial process in which the appealed issues arose. In my view, the substantive law and the process of trying cases are more tightly interwoven in torts cases than in most other fields of substantive law. Accordingly, possessing a technical appreciation of the procedural context in which a trial judge's ruling on a question of tort law arose prior to appeal should help students understand the rules of the law of torts that the parties are attempting to employ.

In Torts, as in most first-term courses, the main sources of instructional text are opinions written by appellate judges. All appellate cases found their way to the appellate courts from some particular stage of the trial proceedings. Hence, the appeal may be a review of a decision made by the trial judge at any stage of the litigation process. Frequent entry points to appeals are orders on motions to dismiss complaints, motions for summary judgment, motions to introduce or exclude evidence at trial, motions for directed verdicts at the conclusion of a trial, motions to include or exclude jury instructions and various post-trial motions. When trying cases, torts lawyers must be prepared to seize opportunities when and as they arise to test questions of law relating to the cases. In many instances, failure to seize the moment as it arises and make a timely objection will conclusively waive the objection. This is one of the reasons that trying lawsuits is such a stressful vocation. To be successful, trial lawyers must know both the rules for trying cases and the substantive rules of torts before the trial begins.

To illustrate how issues arise during the course of litigation, I lead students through an imaginary trial of a tort case, commencing with the filing of a complaint and concluding with appellate review of a final judgment.

Summarized below is a structural outline of what I examine in detail in class. I break the presentation into three stages—the pleadings stage, the trial stage and the appeals stage. I indicate points in the process where judicial

error may occur, thus providing a potential basis for immediate appellate review (*e.g.*, an order dismissing the complaint with prejudice) or post-trial appellate review (*e.g.*, errors in instructions).

THE PLEADINGS STAGE

1. COMPLAINT (or petition for relief): The plaintiff's allegations must state a cause of action upon which relief could be given. This means that all the elements of the torts causes of action must be satisfactorily shown on the face of the complaint.

    - To test the sufficiency of the allegations, the defendant may file a motion to dismiss the complaint on the ground the allegations, if true, do not state a cause of action.

2. ANSWER: The defendant must admit or deny (or neither admit nor deny) each of plaintiff's allegations. The defendant must also plead affirmative defenses, if any, in the answer. All of the elements of the torts defenses must show on the face of the complaint and the answer. The plaintiff may file a motion to dismiss affirmative defenses on the grounds that the allegations, if true, do not establish the legal basis for them.

3. DISCOVERY: Parties may engage in discovery using tools such as requests for admissions, requests for the production of documents and tangible evidence, interrogatories, depositions and the like.

4. MOTIONS FOR SUMMARY JUDGMENT OR JUDGMENT ON THE PLEADINGS: Either party may test the sufficiency of the evidence to prove the *prima facie* case or affirmative defenses by filing these motions. The testimony to be tested is represented by sworn affidavits of expected witnesses. If a dispositive factual issue remains in dispute, the disputed facts or issues must be resolved by a jury at trial.

5. MEDIATION: Many jurisdictions now mandate pre-trial mediation and others afford voluntary mediation.

THE TRIAL STAGE

1. JURY SELECTION

    A. The Venire (pool of people from which the jury is selected).
    B. The "voir dire" (*i.e.*, actual selection of jurors).
    C. Jury is sworn.

2. PARTIES' OPENING STATEMENTS

A. Plaintiff speaks first.
B. Defendant speaks second.

3. PRESENTATION OF EVIDENCE

- Pre-trial motions in limine.

A. Plaintiff presents case in chief.

(1) Testimony of witnesses: direct examination, cross-examination, re-direct, etc.
(2) Presentation of demonstrative (non-testimonial) evidence.

B. Plaintiff rests (*i.e.*, concludes presentation of evidence to prove case).

- The defendant may move for a directed verdict of no liability on the grounds that the plaintiff's evidence did not prove the elements of the *prima facie* case pleaded in the complaint.

C. Defendant presents evidence to refute the plaintiff's *prima facie* case and to prove defendant's affirmative defenses, if any.

D. Both parties close.

- Both parties may file motions for directed verdicts on any element of the case.

4. CLOSING ARGUMENTS

A. Plaintiff argues first.
B. Defendant argues second.
C. Plaintiff rebuts.

5. CHARGING CONFERENCE

- Parties propose instructions of law for the judge to read to the jury, which the trial court accepts or rejects.
- The charging conference may occur at any time as prescribed by the judge

6. THE JUDGE CHARGES [INSTRUCTS] THE JURY AS TO THE LAW

7. THE JURY RETURNS ITS VERDICT

8. THE JUDGE ENTERS FINAL JUDGMENT

9. PARTIES SUBMIT POST-TRIAL MOTIONS

   - Examples include motions for new trial, motions for judgment *non obstante veredicto*, motions for remittitur or additur, renewal of motions for directed verdict.

THE APPELLATE STAGE

1. APPEALS FROM DISPOSITIVE PRE-TRIAL ORDERS

   - Examples include orders granting a defendant's motion to dismiss or motion for summary judgment of no liability.

2. APPEALS FROM DISPOSITIVE POST-TRIAL ORDERS

   - Examples include orders on motions for new trial, remittitur, additur, and judgment *nonobstante veredicto*.

With this familiarity about civil litigation under their belts, students should be enabled to learn more than rules of substantive tort law from reading appellate decisions. For example, most every Torts student will read the famous opinions in *Palsgraf v. Long Island Railroad Co.*[5] to learn about legal duty in the law of torts and to distinguish duty from proximate causation. But students can learn much more than that from *Palsgraf*. Students should also learn that *Palsgraf* exemplifies the rule that determining whether a defendant owes a plaintiff a duty of care under the law of torts is a question of law to be made by judges and not by juries and that the duty issue may be tested at any stage of the litigation process. Judges may dismiss a case on no-duty grounds on motions to dismiss a complaint, for summary judgment, for directed verdict, and, as in *Palsgraf*, even upon appeal after a jury verdict has been returned and judgment entered. Hence, as students learn the substantive law of torts they should concomitantly develop a sense of how lawyers use the law tactically in the course of litigation.

5. 162 N.E. 99 (N.Y. 1928).

Something further needs to be said about trying torts cases. First, most tort claims never involve lawyers at all. Many of the minor ones are resolved by the parties and their insurance companies. And, of torts claims that do involve lawyers, relatively few wind up in lawsuits. Those disputes the parties cannot resolve themselves, their lawyers often can. Furthermore, of the cases that do result in suit very few actually go to trial. Some of the parties settle at some point prior to trial and others settle after the trial begins.[6] Lawyers and parties now have settlement tools at their disposal that hardly existed prior to the latter decades of the twentieth century. These include pre-trial mediation, arbitration, requests for judgment and other practices that have become commonplace. Many commentators believe that the movement to systematize pre-trial negotiations, often by statute or court rules, has further reduced the numbers of cases that actually go to trial.

These facts, and they are true, may make students curious about why we spend most of our class time examining the small fraction of cases that wind up with appellate opinions. Why bother to examine what happens in 0.1% of the cases and let the other 99.9% go begging? Several factors explain this. Perhaps most important is that lawyers evaluate cases based upon informed predictions of what juries will do with them if they go to trial. These predictions rest mainly upon informed, but imperfect, assessments of the probability that the jury would rule for the plaintiff and the probable amount of damages it would award. Plaintiffs and their lawyers must ponder the risk of zero verdicts. Defendants and their lawyers worry about very large verdicts. In any event, appellate opinions are central to these predictions because they control the trials if settlement fails. In short, the few cases that wind up in appellate courts provide the guidelines to resolve the multitudes that never go that far.

The nature of the relationship between a lawyer and a client is especially sensitive in tort cases. Plaintiffs' lawyers almost always represent tort claimants on a contingency fee basis. Hence, the plaintiff's lawyer may claim one-third of the gross recovery if settlement is reached before suit, as much as forty percent if settlement is reached after suit is filed, and perhaps even more if the case is actually tried. If nothing is recovered, that is also what the plaintiffs' lawyers get: Nothing. On the other hand, defendants' lawyers are ordinarily paid by the hour for their work and the defendants must pay them, win or lose.

While a plaintiff's lawyer should never permit personal concerns to affect the handling of lawsuits, the contingent fee system supplies tempting potential. For example, extraneous personal considerations may tempt a plaintiff's lawyer to urge the client to accept a tendered settlement offer even though the lawyer believes a trial would render a greater recovery. The maxim, "A bird in

6. By settle, I mean that the parties agree on an outcome.

the hand is worth two in the bush," is often hard to resist. Different circumstances might tempt another lawyer to urge rejection of a settlement with the purpose of pushing the case to trial, thereby raising the percentage of the contingent fee.

These law practice realities raise ethical questions that students, and especially lawyers, must constantly keep in mind. Most importantly, a lawyer must always be mindful that the decision to settle a case, or not, is the client's and not the lawyer's! This imposes a heavy burden upon lawyers to be candid and patient in explaining cases to clients. Suffice it to say, a lawyer who permits personal well-being, rather than the client's, to control professional judgment risks violating customary standards of morality, the rules of professional conduct and perhaps the criminal law.

From what I have said about how the law of torts is practiced, students should perceive that effective practitioners must be skilled in the art and tactics of negotiation as well as in the substantive law of torts. They must also be constantly aware of ethical considerations. Although I touch upon all of these matters in the beginning Torts course, students will learn much more in advance courses, such as Professional Responsibility, Client Counseling, Trial Practice, Civil Clinic and especially in practice. Beginning Torts concentrates upon learning about the common law of torts. Despite that focus, students will also learn that much legislative effort was expended in the 1980s and 90s in attempts to rein in what was seen by critics as an overly generous system of civil reparation. For that reason, students and lawyers must always turn to the statutes to guard against surprise from an unexpected legislative incursion into the common law.