

Tort Law

Cases and Materials

THIRD EDITION

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University of Toronto

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A substantial and a compendious Report of a Case rightly adjudged doth produce three notable Effects. First, it openeth the Understanding of the Reader and Hearer; secondly, it breaketh through Difficulties; and thirdly, it bringeth home, to the Hand of the Studious, Variety of Pleasure and Profit. I say, it doth set open the Window of the Laws, to let in the gladsome Light, whereby the right Reason of the Rule (the Beauty of the Law) may be clearly discerned. It breaketh the thick and hard Shell, whereby with Pleasure and Ease the Sweetness of the Kernel may be sensibly tasted, and adorneth with Variety of Fruits, both pleasant and profitable, the Storehouses of those by whom they were never planted nor watered. Whereunto (in those Cases that be *tortuosi* and of great Difficulty ...) no one man alone, with all his true and uttermost Labours, nor all the Actors in them, themselves by themselves out of a Court of Justice, nor in Court without solemn Argument (where, I am persuaded, Almighty God openeth and enlargeth the Understanding of the desirous of Justice and Right) could ever have attained unto. For it is one amongst others of the great Honours of the Common Laws, that Cases of great Difficulty are never adjudged or resolved *in tenebris* or *sub silentio suppressis rationibus*; but in open Court, and there upon solemn and elaborate Arguments, first at the Bar by the Counsel learned of either Party ... ; and after at the Bench by the Judges, where they argue ... declaring at large the Authorities, Reasons, and Causes of their Judgements and Resolutions in every such particular case (*habet enim nescio quid energiae viva vox*): a Reverend and Honourable Proceeding in Law, a grateful Satisfaction to the Parties, and a Great Instruction and Direction to the attentive and studious Hearers.

—Sir Edward Coke, *Preface to the Ninth Part of the Reports* (1613)

Preface to the First Edition

This casebook on torts is the latest version of teaching materials that have been in use at the University of Toronto and elsewhere in Canada for about two decades. This period has witnessed a dramatic flowering of a Canadian jurisprudence of tort law. Those who attended a Canadian law school outside Quebec in the 1960s and 1970s will recall that, although appeals to the Privy Council had been abolished years earlier, the overwhelming preponderance of cases studied were still English, with a mere sprinkling of decisions by the Supreme Court of Canada. Today, in contrast, leading Canadian cases exist on almost every issue of tort law, and these frequently contain arguments and approaches that differ from those found in other common law jurisdictions.

Moreover, during this period, the academic study of tort law has expanded to include not only the elucidation of rules of liability but also the examination of the nature of liability. There is now a rich literature that addresses such fundamental issues as basis of liability, the tension between instrumental and non-instrumental approaches to tort law, the nature of adjudication, the relationship between legal, moral, and economic argument, and the plausibility of seeking comprehensive theories. These theoretical controversies have drawn participants with widely different perspectives: economic analysts, critical legal scholars, feminists, moral philosophers, proponents of corrective justice, and others. And the realization that theoretical argument about tort law has implications for our conceptions of the legal order more generally has served to confirm the pedagogical importance of tort law as a basic subject within the law school curriculum.

The materials in this collection reflect these developments. Of course, a casebook intended for use in Canadian law schools must present the legal doctrines that have emerged in the common law jurisdictions of Canada. In addition, however, the casebook attempts to facilitate a critical understanding and appreciation of tort law as a distinctive mode of legal ordering. Accordingly, the cases have been edited to exhibit not only the conclusion but also the essential steps in the court's reasoning. Historically important or conceptually interesting cases from elsewhere in the common law world have been included, both to provide the opportunity for comparison and to stimulate reflection about the nature of the common law and its relation to particular social conditions. Academic writings from various perspectives have been introduced, so that students can begin to develop a sense of how different theoretical and doctrinal standpoints bear on the treatment and understanding of specific issues. To foster an attitude of active and critical consideration rather than passive and inert reception, the casebook frequently juxtaposes competing conceptions, modes of

reasoning, and methodologies. My principle of selection for the material has been straightforward: when alternatives were available, I have always chosen what was intellectually the most engaging, had the most far-reaching implications, and was the most lucidly or provocatively formulated. Above all, the casebook attempts to encourage students to regard the study of tort law as an intellectual exercise of the highest order, spanning practice and theory, the particular and the general, the serious and the playful.

I am grateful to Peter Benson and Stephen Perry, who as students years ago worked on an early version of these materials; to my secretary Ellen Downer, who prepared the manuscript with her usual diligence and dedication; to Boo Thompson of the University of Toronto Bora Laskin Law Library, who provided valuable reference assistance; to the staff of Emond Montgomery, whose skill and professionalism allowed the transition from in-house materials to published casebook to be relatively painless; and—most of all—to generations of wonderful first-year law students at the University of Toronto, who have been my indispensable and constant collaborators.

June 20, 1997
Toronto

Preface to the Second Edition

In the six years since the publication of the first edition, tort law in Canada and elsewhere in the common law world has evolved in significant ways. Among the particularly striking developments are those that have dealt with the duty of care, proof of negligence, factual causation, wrongful birth, vicarious liability, and psychiatric harm. The second edition fully incorporates the new material on these issues.

This edition continues the approach adopted in its predecessor volume. The casebook aims to illuminate tort law by including the most interesting judgments from the common law world, and to foster classroom debate by constantly juxtaposing judicial and academic material that offers conflicting views on the issues at hand. The casebook is designed to lay the foundation for a logical and natural progression through the basic building blocks of tort law, to provide an effective introduction to the academic study of tort law, and to encourage students to come to grips with judicial reasoning that underlies the creation and application of legal rules.

I am grateful to my secretary Allyn Whitmore for patiently dealing with successive versions of the casebook; to my colleagues at the University of Toronto and elsewhere who have supplied ideas and suggestions; to the staff at Emond Montgomery for their skill, their professionalism, and their constant reminders about deadlines; and especially to my students, who always make me delight in teaching this subject.

*April 8, 2003
Toronto*

Preface to the Third Edition

The continuing evolution of tort law over the last few years has brought interesting developments both in Canada and in the common law world more generally. Especially noteworthy have been new cases on cause in fact, wrongful birth, nonfeasance, and strict liability. The present edition has incorporated these new developments, while continuing to emphasize the presentation of carefully edited material that might facilitate lively teaching and active student reflection about the role of legal reasoning and about the range of considerations, both juridical and institutional, that appropriately pertain to tort law.

I am grateful to colleagues who have reported their reactions (and those of their students) to the material in previous editions and who have made suggestions about what might be included in a new edition. As always, I owe a special debt to my own students, who allow me to discover tort law afresh every year.

*May 28, 2008
Toronto*

Acknowledgments

This book, like others of its nature, contains extracts from published materials. We have attempted to request permission from and to acknowledge in the text all sources of such material. We wish to make specific reference here to the authors, publishers, journals, and institutions that have been generous in giving their permission to reproduce works in this text. If we have inadvertently overlooked any acknowledgment, we offer our sincere apologies and undertake to rectify the omission in any further editions.

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