



Throughout most of human history, and in plenty of places today, there has been no recourse for people aggrieved and harmed by the actions of others. In other times and places, recourse has been at the discretion of government intermediaries, whether criminal prosecutors or consumer protection commissioners, who decide what wrongs are worth the allocation of scarce resources.

The tort system, its many flaws notwithstanding, represents a remarkable counter-current. Private citizens can demand the attention of an alleged wrongdoer to account for what they've done—and of a judge and jury to weigh the claims and set terms of compensation. There need not even be a statute that delineates acceptable behavior from unacceptable and therefore the legally actionable. Rather, judicial systems set and elaborate legal standards on their own accord, and ask panels of citizens—juries—to weigh what behavior meets or fails those standards.

At its core, tort law defines the duties we owe each other—whether we are parents, government officials, business owners, or mere bystanders—and what we should do when those duties are not met. Tort law attempts to make the injured whole and set societal norms. Unlike criminal law, it rarely involves the threat of state action: it is merely an organized system of allowing one person to peaceably bring a grievance against another. Although there are tort systems throughout the world, this private system of personal responsibility and enforcement is quintessentially American.

The impact of tort law is everywhere. If you get in your car and put on your seat belt,<sup>1</sup> drive soberly to the supermarket,<sup>2</sup> use a shopping cart,<sup>3</sup> and buy bag of marshmallows,<sup>4</sup> you are both defining and following American tort jurisprudence. Every carbon monoxide detector, bucket of paint, water pipe, and baseball ticket has a story to tell with respect to tort law and our society.

This book seeks, through the language and example of public judicial opinions, to elucidate some of the progression of the law of torts in fitful, even meandering, evolution. The cases together show differing approaches to the problems of defining legal harm and applying those definitions to a messy world. Sometimes judges focus on the parties before them and what makes for the most satisfying—just?—resolution, in their view. Sometimes they focus on the incentives that a particular resolution would create for similarly situated parties, asking questions about the systemic impact of a lasting decision for a particular case.

Appellate opinions are supposed to take as a given the facts as recorded in the courts below, though as some of the dissenting opinions offered here will show, appellate judges can have wildly different impressions from one another about what happened even in a single case, much less how to assess it philosophically and doctrinally.

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1. See *Derheim v. Fiorito*, p. 441.

2. See *Kelly v. Gwinnell*, p. 264.

3. See *Keen v. Dominick's Finer Foods*, p. 498.

4. See *Emery v. Federated Foods*, p. 507.

Each case is an artifact of its time, and of the legal establishment of that time. As you read these cases, part of learning the law is not simply taking the reasoning at face value and seeing where it might fit into some kind of comprehensive outline—a task that the authors of the Restatement can assure you is necessarily fraught and incomplete—but rather comparing the judges’ societal perceptions and moral compasses to your own and those of your peers, and imagining how you might express any differences from them in the vernacular of the law. The common law system invites reasoning by comparison and analogy, and it invites not only the invocation of precedent but the necessity of evolution and change as society evolves and its power dynamics are taken up and assessed.

We set out to create this casebook in part to provide more context to the opinions it contains. We do this by trying to edit out as little of the original case as possible. When we do make an edit for space or concision, we denote it with an [ . . . ] so that readers will know exactly where that edit is. On the H2O version of each case, found at <https://opencasebook.org/author/zittrain/torts/>, readers can click the ellipses, revealing our edits. You can find out more about H2O at <https://opencasebook.org/>.

A law school casebook is by definition and practice not for a general readership. If you’re reading these words, chances are good that you are on the cusp of taking up a life in or adjacent to the law, probably in your first year of law school. The bar exam is far off—and the doctrine you’ll learn in torts and other first-year classes will have to be relearned for that test. That is all to the good: the function of first-year courses is less to teach doctrine for the truth of the matters asserted, as catechisms to be recalled through oddball mnemonics, than to expose students to the incommensurability of the law, the need to constantly reapply, refine, and reexamine our principles and perceptions, and to arrive at a more or less shared vernacular through which to analytically express disagreements and their stakes to tee them up for resolution. The law and its study are invitations to take an active part in its evolution, bringing to bear your own sense of what justice is and what it requires.

—Jonathan Zittrain and Jordi Weinstock