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## Chapter 7

# Tort and Product Liability

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*“The Tort Tax adds to the cost of everything we buy because businesses and manufacturers have to cover themselves and their employees — just in case they get sued by a greedy personal injury lawyer.”*

John Dennis Hastert (R), Speaker of the House of Representatives,  
1999 to 2007

Tort law concerns the issue of when, and to what extent, a private party can be held legally responsible (liable) for injury caused to the person or property of another party by wrongful acts or omissions. It deals, in short, with the allocation of legal responsibility for private wrongs in society. This is the “when” part of the equation. The extent of the defendant’s (called the “tortfeasor”) liability can best be understood in terms of the remedies, usually in the form of monetary damages, for the harm or damage caused by the wrongful act or omission. Arguably, in tort law more than in any other branch of American law, the potential of receiving a large monetary award serves as a strong motivation for plaintiffs (and their lawyers) to sue. The law of tort is called upon continually to balance the social costs and benefits of preventing, and redressing, private harm. It is an area of law infused with fundamental issues of public policy revolving around the central question of who bears the loss. The “Tort Tax” referred to by former Speaker Hastert is an extreme way of suggesting that business (and, ultimately, the consumer) bears a large portion of the cost of the tort system.

## Tort and Criminal Law Compared

The private nature of tort law sets it apart from criminal law, which is concerned with wrongs that are done to both individuals and society. Three important consequences flow from this distinction. First, one action or set of behaviors can be both criminal and tortious (i.e., being a tort) at the same time. A person who sets a dangerous trap, such as a gun attached to a trip wire, on his property to prevent intruders may be committing a crime under state law. The individual may also be liable in tort for any damages sustained by a person who is injured by the dangerous trap, even if the injured person was trespassing on the tortfeasor’s property and the property owner posted warnings. The reason behind this policy is clear. To allow a property owner to place the value of property over human safety would be an unacceptable social result. A child might not appreciate the risk involved even if

warnings are posted. Also, someone might venture onto the property by accident or in response to an emergency. Society simply does not permit individuals to protect property with deadly force, especially when mechanically applied without human thought or judgment.

Second, since criminal law is concerned with the redress of private and public wrongs, the victim does not control the prosecution of the legal action and cannot require the prosecutor to drop the case or to proceed in a certain fashion. The prosecutor represents the state first, which has an independent interest in punishing criminal behavior, and the victim second. A classic example of this is where an individual is arrested for spousal abuse. Even though the abused spouse may not want to press criminal charges against his or her mate, the prosecutor can nevertheless prosecute the abuser. The private nature of tort law, in contrast, would allow the injured party to forgo, settle, or drop a civil lawsuit at any time.

Third, in a criminal prosecution in the United States, the burden of proof remains at all times with the government, which must prove guilt "beyond a reasonable doubt." This is a fundamental rule in all criminal cases because a criminal prosecution brings the entire weight (police, prosecutors, etc.) and resources of the state to bear against the individual. Moreover, a guilty verdict could result in taking the life, liberty, and property of the defendant. In a private lawsuit for tort, the plaintiff and defendant stand on equal footing (although as a practical matter one of the parties may have significantly more money than the other), and the life and liberty of the defendant are not at stake. Thus, the plaintiff bears only the burden of proving the elements of a *prima facie* ("first view") case against the defendant by a "preponderance of the evidence," and the same burden can shift to the defendant with respect to showing the existence of a valid defense excusing, or mitigating, liability.

## Elements of a Tort

Every tort has certain basic elements that must be proved by the plaintiff in order to establish the *prima facie* case. The elements will vary for each type of tort. The intentional tort of libel requires, for example, a showing that the defendant published false and defamatory information about the plaintiff causing harm to the good name of the plaintiff. If the party bringing the lawsuit cannot produce sufficient evidence to demonstrate each element of the *prima facie* case, the judge will dismiss the suit without the defendant having to produce any evidence in defense.

In broad terms, there are two classes of private wrongs: Intentional Torts and those based on negligence, known as Unintentional Torts. In addition, certain hazardous activities such as keeping wild animals, blasting, demolition, and transporting dangerous materials are based on strict liability. When reading the cases in this chapter, identify the elements of the tort being alleged while keeping in mind that

the outcome is highly dependent on the facts and circumstances of each case. The skill of the lawyer in establishing and presenting the facts in a manner favorable to the client is critical. Identify the material facts in each case and consider how the result might be different if one or more material facts were changed.

## Intentional Torts

A *prima facie* case of intentional tort requires the plaintiff to show the following three elements: (1) an act; (2) an intention to so act; and (3) harm to the plaintiff that is causally related to the intentional act. The defendant tortfeasor will only be liable for an intentional tort if it is shown that he or she has exercised some measure of "volition" (or positive will) in performing the harmful act. For example, if A were to push B intentionally into C, A would satisfy the requirement of having performed a willful act both as to B and C, but B would not as to C. Person A might be liable to both B and C for damages suffered, whereas B would not be liable to C. On the other hand, if A's action resulted from an uncontrollable seizure because of an unknown medical condition, A would not be liable either to B or C because A's action would lack the necessary volition. If the medical condition is known to A, the situation might be different — for example, A voluntarily driving a car after taking medication known to produce drowsiness.

Intent comes in two varieties: specific and general. Specific intent exists when the tortfeasor intends the result that actually occurred. The case of A pushing B on purpose is an example of specific intent. However, if the tortfeasor does not actually intend the result, but knows with substantial certainty that the result will occur, then general intent is present. It is not necessary that the actor intend the actual harm that was suffered. Under our earlier example, if A intentionally pushes B and B knocks C down as a result, it is not a defense to A's liability that A did not intend for B to cause harm to C. Intent can be transferred when the tortfeasor intends to cause harm to one person but another person is injured instead. The rules of causation are substantially similar to those for unintentional torts taken up later.

Intentional torts can be divided into three broad categories. The first involves intentional torts to persons. These include: Battery (harmful or offensive contact to plaintiff); Assault (a reasonable fear of immediate harmful or offensive contact); False Imprisonment (confining or restraining the plaintiff); and Intentional Infliction of Emotional Distress (extreme or outrageous conduct by defendant intended to cause severe emotional distress).

The second category concerns intentional torts to property. Tort actions in this area include: Trespass to Land (physical invasion of plaintiff's real property); Trespass to Chattels (interference with plaintiff's right to possess movable property); and Conversion (interference with plaintiff's right of possession that deprives the property of use or value; in essence the civil version of the crime of theft).

Finally, there is a category of intentional torts involving harm to reputation and economic interests. This third category of intentional torts, especially those dealing with harm to the reputation of the defendant, often involve complex issues and competing interests relating to freedom of speech and press under the First Amendment. Examples of these kinds of intentional torts are: Defamation (publication of false information damaging the plaintiff's reputation); Invasion of Privacy (prying or intruding on the plaintiff's private matters); Publication of Private Facts (publishing information about plaintiff's private matters); Publication of Facts Putting Plaintiff in a False Light (publication of misleading information); Misrepresentation (using false, fraudulent or deceitful tactics to obtain a benefit from the plaintiff); Wrongful Institution of Legal Proceedings and Malicious Prosecution (bringing a frivolous lawsuit against the plaintiff); and Interference with Business Relations or Contract (inducing a third party to breach or terminate an existing contract with the plaintiff).

A number of defenses are available against an intentional tort claim. These include: Consent (express or implied); Self Defense, Defense of Others or Property; Reentry onto Land and Recapture of Chattels; Privilege (absolute and qualified), Necessity, and Discipline (applicable to parents, guardians, teachers, etc. who administer reasonable discipline to children under their supervision).

### Informed Consent

The most commonly asserted defense to an intentional tort is consent. Consent must be informed before it can be a valid defense. "Informed consent" requires that the person be advised (1) in advance (2) of the specific risks being consented to (3) in a manner and to a level of detail that (4) can reasonably be understood by the person asked to give the consent. A general consent that does not provide adequate information about the risk may not be effective. Likewise, consent to one type of risk will not usually be transferred to another type of risk not covered by the consent. To protect themselves against claims based on a lack of informed consent, healthcare providers routinely require patients to sign written informed consent forms. These forms typically list every known risk associated with the medical procedures to be performed and acknowledge that the risks are understood and accepted by the patient. The informed consent form authorizes the physician (or someone under the direction of the physician) to take necessary action should something be discovered during surgery that is best treated while the patient is already under sedation and unable to give consent. After all, few patients would want to wake up in the recovery room of the hospital only to be asked to consent to a second operation.

The medical profession, in order to shield itself from Battery claims whenever lack of informed consent is alleged, has lobbied successfully in many states to have these claims treated as ordinary cases of medical malpractice. The following case provides an overview of the issues involving informed consent and medical malpractice.