

TORT LAW IN A PEANUT

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[Note: This Peanut provides a brief, non-technical introduction to a complex area of the law. In the interest of brevity, generalizations are made without the qualifications needed to make them accurate. This Peanut is for use by John Akula as an instructional aid in his classes, and should not be used for any other purpose without the author's permission.]

I. PRIVATE AND PUBLIC LAW

One of the distinctive characteristics of the legal systems associated with Western societies is the extensiveness of "PRIVATE LAW". Private law is law that regulates the rights and duties of private citizens and institutions towards one another, in contrast to "PUBLIC LAW", which concerns itself with government and the relationship of private citizens and institutions to government.

While there are no rigid divisions between private and public law, or within the system of private law, there are several distinctive bodies of doctrine representing the major threads in the private law system. Probably the two most important bodies of private law for relationships outside the family (FAMILY LAW and the related law of inheritance are also major threads in private law) are the law of "TORTS" and the law of "CONTRACTS". A century ago, the law of PROPERTY, another body of private law, would probably have been ranked as high as tort law or contract law, but the importance of property law has declined with the decline of the significance of rights in "real property" (i.e., land and buildings) for general social ordering.

II. TORTS AND CONTRACTS COMPARED

A basic understanding of the roles of tort and contract law can be gained by contrasting them.

THE LAW OF CONTRACTS.

Contract law is concerned primarily with the ways in which private agreements or "deals" will be enforced, especially in commercial settings. The paradigmatic "contract" is a deal between two parties, in which there is an AGREEMENT (sometimes called a "MEETING OF THE MINDS") between the PARTIES, who voluntarily agree to exchange with one another some form of VALUE (sometimes called "CONSIDERATION"), which is

typically money, property, services, or promises. Complex arrangements are typically in the form of a **WRITTEN CONTRACT**. There are certain contractual **FORMALITIES**, such as the signing of a contract (or the "handshake" in simpler deals), which provide parties with a clear decision point on whether to enter the deal and also provide unambiguous evidence of the intent of the parties to be bound.

Contracts are thus typically entered into voluntarily, and reflect the preferences of the individuals involved. Because of the broad individual autonomy recognized by contract law, this system is often said to embody the principle of **FREEDOM OF CONTRACT**. It is typically considered ethical for each of the parties to a commercial contract to bargain hard for his own interests, and the extent to which the law of contracts is used as an ordering principle for certain relationships often reflects society's level of comfort with self-interested behavior in those relationships. Contractual relationships are at the heart of what economists call "free markets".

Contract law can apply outside of commercial arrangements, but typically subject to qualifications. (For example, the marriage relationship has some contractual aspects, but most of the terms of the "deal" are set by law, and not open to the parties to negotiate.) Even in commercial settings, the parties to a contract do not have the power to create a legally binding arrangement on any terms they decide. Contracts may not be contrary to **PUBLIC POLICY**, and in many arenas the permissible terms of contracts are quite closely regulated, especially where it is felt that untrammelled freedom of contract is likely to result in exploitative relationships. For example, most states specify many of the terms that must be included in life or health insurance policies.

Contracts represent private law in the sense that the law will enforce them. For example, if you put a down payment on a car and the car dealer promises to hold it for you, but later refuses to let you buy the car, you can go to court, and a court will normally treat the contract as legally binding. The dealer would be said to have **BREACHED** or **DEFAULTED** on the contract, and you would be the non-defaulting party.

Furthermore, the law as enforced by the courts, and not the parties themselves, determine what **RELIEF** will be granted to the non-defaulting party against the defaulting party. Typically, a court will grant **DAMAGES**, which is a money award. The rules on damages are quite complex, but the central idea is typically to put the non-defaulting party in as good a position financially as he or she would have been in had the deal gone through. In pure commercial relationships, there is generally no "punitive" element to contract damages. It is not considered "wrong" to breach a contract: each party has the option of either performing or paying damages.

THE LAW OF TORTS.

If contracts is the law of deals, torts is the law of duties. The law of torts is much more internally diverse than the law of contracts, but the central idea is that people have certain interests which others have the obligation or duty to respect. The existence of these

interests and the duty of others to respect them do not depend upon promises or agreements: they are broader-gauged social obligations. With respect to many such interests, the violation of the duty to respect it is called a "tort," and the tort law is that body of principles which defines these interests, duties, and the remedies available when the duties have not been met.

The interests protected by tort law are diverse and changing. Some of the key ones, but by no means all, are the following:

- The interest in bodily integrity, and in particular the right to be free from offensive or harmful touchings. The commonest violation of this interest is the tort of ASSAULT (posing a threat of an offensive or harmful touching) or BATTERY (the offensive or harmful touching itself). If the interest threatened is life itself, the violation is the tort of WRONGFUL DEATH.
- The interest in being free to move about, the violation of which is the tort of FALSE IMPRISONMENT.
- The interest in one's reputation. The violation of this interest is DEFAMATION, which may take the form of LIBEL (written defamation) or SLANDER (spoken defamation).
- The interest in controlling access to one's home or place of business. The violation of this interest is TRESPASS.
- The interest against unreasonable interference with the use and enjoyment of one's residence or place of business, which would be the tort of NUISANCE.

Since tort law has been around a long time, much of its terminology sounds archaic, but as social expectations have changed, torts have been expanded, or new torts have arisen.

The more "modern" torts include:

- INVASION OF PRIVACY;
- The infliction of EMOTIONAL DISTRESS; and
- PRODUCTS LIABILITY, designed to protect the interest of consumers in protection from bodily harm from consumer products.

In fact, as society's sense of duties changes, these changes are almost always reflected in tort law, which is the most elastic of the major bodies of private law.

The torts mentioned above all have very broad applicability. There are also many more specific duties, arising under more narrowly defined circumstances, which are

enforced by tort law. One especially important group of such duties are referred to generically as **FIDUCIARY DUTIES**. A person subject to these duties is called a **FIDUCIARY**. Broadly speaking, a fiduciary relationship is one in which the fiduciary is charged with putting the interests of the other party to the relationship ahead of his own in certain respects. The fiduciary is not only precluded from acting in a self-interested manner: he is required to act in the interests of the other party. Physicians are fiduciaries for their patients. Members of a board of directors are fiduciaries for their corporations. Trustees are fiduciaries for those whose assets they hold in trust.

Fiduciary duties highlight another aspect of the relationship of torts to contracts. There are some duties enforced by tort law which we owe to everybody we encounter in life, such as the duty to use the public ways in a manner that doesn't endanger the safety of others. However, many of the more refined duties enforced by tort law arise only in certain relationships which are first established by contract. For example, you do not simply find yourself to be a director of a corporation, or, as a doctor, find yourself to have a patient. These relationships are typically contractual in origin; the parties involved agree to form the relationship and, to some extent, agree upon its terms. However, insofar as the law imposes fiduciary duties (or other tort duties), it is generally not left to the parties to negotiate the terms of these duties. They are imposed by law. In fact, a fiduciary who tried to negotiate out of his fiduciary duties would typically by that act alone be deemed to be in breach of his fiduciary duty. For example, it would be wrong for a doctor to seek a patient's agreement to the provision of sub-standard care, or for the directors of a corporation to seek the corporations's agreement to unreasonably high compensation for directors.

Tort law thus has more pronounced moral overtones than contract law. To violate a contractual obligation, especially in a purely commercial setting between parties of equal bargaining power, may be a matter of moral indifference. To violate a duty enforced by tort law is wrong, and, with respect to some torts (especially fiduciary duties), a very serious moral matter.

Tort law is extremely complex, and distinctive bodies of doctrines have grown up around different tort interests. For example, there is a complex interplay between the tort of defamation and the constitutionally protected right of freedom of expression, especially as to public figures. The law of trespass blends into the complex law of real property and its dense collection of rights and relationships, with tenants, mortgages, sub-leases, condominiums, etc. However, there are certain themes that run through much of tort law. The most important of these are discussed below.

III. CONSENT.

The interests protected by tort law are often rightfully intruded upon in day-to-day life, for reasons which the law recognizes and that preclude tort liability. Broadly speaking, there are two grounds for such rightful intrusions: consent, discussed in this

section, and privilege, discussed in the next.

We routinely consent to conduct that would otherwise be tortious, i.e., of the kind that would give rise to tort liability. For example, although tort law generally protects an individual against bodily contact, we play at sports in which we bump into one another; get crushed against others in crowded elevators; and are examined, and sometimes cut open, by doctors and nurses. The law approves of these contacts because there has been CONSENT, either EXPRESS (spoken or written and explicitly granting consent) or IMPLIED (inferred from other conduct).

If an intrusion into a protected interest is especially significant and is based upon consent, the scope and validity of the consent becomes a more sensitive issue. Often, this sensitivity is reflected in a concern that there be INFORMED CONSENT, i.e., consent based upon full information and deliberation. In fiduciary relationships, it is often the duty of the fiduciary to make sure that consent by the other party is adequately informed. So, for example, physicians have the duty to discuss medical procedures and options adequately with patients, and obtain the patient's informed consent to treatment. A corporate officer who seeks corporate approval for a business transaction between the corporation and that officer has the duty of sharing with the corporation any information or insights he possesses bearing upon why the deal might be to the corporation's disadvantage.

IV. PRIVILEGE.

The doctrine of PRIVILEGE is an acknowledgment that intrusions upon protected interests are often reasonable in the pursuit of other important social goals. A fireman who sees smoke coming from a building at night is supposed to smash in the front door and go charging through the house dragging people out of bed. When he does so, it is not trespass or battery. Likewise, a peer review committee of a hospital may have the responsibility of unearthing and discussing even flimsy allegations about professional misconduct, and this is not defamation.

Privileges are typically quite narrowly bounded, and conduct that exceeds the boundaries of the privilege is tortious even if related conduct within it is not. In the above-cited example of a hospital peer review committee, a committee member who discussed such allegations outside of the committee and when not on committee business would likely be liable for defamation. In the corporate setting, activities which would be tortious but for the existence of a privilege must be carefully managed to insure that the privilege is not exceeded.

V. IMMUNITY

Another limiting principle to the application of tort law is the concept of

IMMUNITY. Consent and privilege typically carve out limited exceptions to the obligations enforced by tort law. Tort law immunities are typically much broader carve-outs, reflecting the view that for certain institutional domains, tort principles are inappropriate. Traditionally, there were three major immunities in tort law. One was actually a group of immunities clustered around **FAMILY** relationships, that together made it very difficult for family members to sue one another in tort. That immunity has seriously eroded in recent years. The second was **CHARITABLE IMMUNITY**. Institutions which were "public charities", such as community hospitals, were substantially protected from tort liability on the theory that the protection of the charitable assets upon which the continued existence of such institutions depended was more important than individual rights of recovery under tort law. However, charitable immunity has been either abolished or severely cut back in most states in the United States.

The one major immunity which is thriving is **SOVEREIGN IMMUNITY**, the doctrine that the federal or a state government cannot be sued in tort without that government's consent. In fact, the federal government and most state governments have passed statutes that permit suits under certain circumstances. However, much of government's activities, especially those involving policy decisions, is typically still immune from tort liability. As government's role has expanded, this immunity has become more important.

VI. THE STANDARD OF CARE AND NEGLIGENCE.

Generally, for a person to be liable under tort law principles, he must fail to fulfill a duty owed another. Often this duty is expressed as a **STANDARD OF CARE**. Not every unfortunate result or accident represents a failure by someone to meet the applicable standard of care. If two people are driving their cars carefully, but nevertheless have an accidental collision, there will typically be no tort liability even if there has been serious injury. If a doctor exercises due care with respect to a surgical procedure for a patient, there is typically no tort liability even if the patient dies as a result of the procedure, and even if, in light of facts that later become clear, retrospect, the decision to operate was a mistake. Typically, conduct is not tortious in the absence of a failure to meet the applicable standard of care.

The most common standard of care is the so-called **REASONABLE PERSON** or **REASONABLE MAN** standard, which is the general duty to take reasonable precautions to protect the interests of others from harm. The reasonableness of precautions is evaluated under all the circumstances, including the costs of the precautions, and the social utility of the conduct at issue. For example, it may be unreasonable for me to drive down a city street at 40 miles per hour, but not unreasonable for the emergency repair vehicle from the local gas company to do the same if it is responding to a report about a gas leak.

The failure to exercise reasonable care is typically referred to in law as **NEGLIGENCE**, and negligence is the most common basis of tort liability. A person who is

negligent does not necessarily intend to cause harm, and typically is simply inadvertent or inattentive to a risk. Tort liability generally requires FAULT, and the law considers negligence a form of fault, although a relatively weak form.

VII. INTENTIONAL TORTS.

Sometimes tortious conduct is **INTENTIONAL**, i.e., the party committing the tortious act intends to inflict the harm, or has acted in reckless disregard of the likelihood of harm. Some torts can be committed either negligently or intentionally, while others can only be committed by intentional conduct. For example, the tort of battery must be intentional: it is not a battery if I accidentally trip and fall on someone else, even though that other person is hurt. An **INTENTIONAL TORT** involves a morally more culpable form of fault than negligence. The damages available to victims of intentional torts are often broader than those available to victims of torts based on negligence. Many intentional torts are also **CRIMES**, and a person who commits such an act may find himself both the defendant in a **CIVIL ACTION** in which he is being sued in tort by the victim seeking damages, and also the defendant in a separate **CRIMINAL ACTION** in which the state is seeking punishment.

VIII. CORPORATE LIABILITY FOR TORTS

Corporations, like other legal actors, are liable for the torts they commit. However, since corporations can only act through flesh-and-blood persons, the question that arises in applying this principle is: Whose conduct, and which of their actions, are we going to consider conduct of the corporation? There is no simple answer to this question, but it is generally true that the more responsibility an individual has in the corporate structure, the more likely his acts will be considered to be acts of the corporation. So, for example, if the Board of Directors, or senior management, decides on a course of conduct that is later deemed tortious, the corporation will typically be considered to have committed the tort, and be liable under the same principles applicable to individuals.

However, if an individual with less responsibility, such as a truck driver, has an accident on the roadway in which the driver was negligent, the analysis is more complex. The truck driver would of course be negligent in his own right, but injured parties will be much more interested in suing the corporation's "deep pocket" than suing the driver. The corporation would probably be negligent if any of its policies contributed to the negligent act of the driver. For example, the company might have a policy which strongly pressured drivers to drive too fast, or for longer periods than a person can remain alert. Or the corporation may have been negligent in the manner it selected, trained, or supervised its truck drivers. Any of these acts would probably amount to corporate negligence. There would be many other factors to be considered in determining corporate negligence, such as: Was the negligent act contrary to corporate policy? (which makes a finding of corporate negligence less likely); and, Was the act within a zone of discretion or judgment

granted to this individual by the corporation ? (which makes a finding of corporate negligence more likely). Very generally, the negligent acts of employees such as truck drivers, in contrast, say, to the acts of the CEO, are less likely to be considered to be the negligent acts of the corporation.

In fact, a person injured in an accident with a corporation's truck would probably not bother trying to establish corporate liability by an analysis such as sketched above. There are doctrines in tort law that have developed primarily in the context of corporate accountability which make it possible to establish corporate liability on simpler bases. The two most important are the doctrines of "vicarious liability" and "strict liability", each of which is discussed below. Although neither is in theory limited to the corporate context, it is in fact within that context that both doctrines have had their most significant development.

IX. STRICT LIABILITY AND CORPORATE ACCOUNTABILITY

The statement made earlier that tort liability generally requires fault (in the form of either negligence or intent) is subject to a major qualification. There is an expanding body of so-called STRICT LIABILITY tort law, in which a party is held responsible for certain kinds of harm that is caused by its conduct without a showing that it was at fault in either of the traditional senses. That is, even if it did not intend the harm, and took all reasonable precautions to prevent it (i.e., were not negligent), it is nevertheless held responsible in tort and must pay tort-like damages to whomever was harmed. The most dramatic expansion of strict liability has been in the area of PRODUCTS LIABILITY law, which protects consumers against physical injury caused by the manufacturers (and sometimes the distributors) of consumer products.

However, even under "strict liability" principles, the party being held liable is not liable for any and all consequences of its actions. Typically, there are limiting principles. For example, in the products liability area, a manufacturer bound by strict liability principles is not responsible for every harm a product causes. If an acquaintance of mine gives me a concussion by banging me over the head with a coffee pot, I can't sue the manufacturer of the pot. There is a requirement that the injury be due to a "DEFECT" in the product. Without exploring here the complexities of the concept of "defect", it should be noted that the fact that a manufacturer exercised due care in the design of the product will not preclude a finding that there was a defect. However, the requirement of a defect also keeps manufacturers from in effect insuring that under no circumstances will their products cause harm.

The policy justifications offered for strict liability in the consumer products area include the themes most often found in strict liability proposals generally: that strict liability avoids the difficulties of proving fault; that it can be designed to put legal responsibility where it will provide the most effective incentives to avoid future harm; and that it can function as a form of social insurance by placing the costs of harm on a party

that can both afford and spread these costs.

The principles of strict liability are rarely applied to conduct by individuals. It has developed primarily in the business context, and been applied to corporations.

X. VICARIOUS LIABILITY AND CORPORATE ACCOUNTABILITY

"VICARIOUS LIABILITY" is present when one person (and that term is used here to include both natural, flesh-and-blood persons, and "legal persons" such as corporations) is, as a matter of law, held liable for the tortious conduct of another person. Vicarious liability (in which the law says "A" is responsible for the tortious conduct of "B") should not be confused with strict liability (in which the law says "A" is responsible for certain injurious consequences of its actions without the need to find that A's conduct involved "fault").

The broadest application of vicarious liability in tort law is to corporations, in the circumstances discussed in VIII above, where we considered the example of the corporate employee who was a truck driver and who caused an accident by driving negligently. Under the doctrine of "vicarious liability", corporations are generally responsible for the torts of all of their employees, whether or not there was any corporate fault. This is sometimes referred to as the doctrine of "RESPONDEAT SUPERIOR" (in which the MASTER - the archaic term for an employer - must respond for the torts of its SERVANTS - the archaic term for employees). Not everyone who works for a corporation is an employee for purposes of vicarious liability. A person who is hired under an arrangement under which he is expected to exercise independent judgment and operate largely free of the employer's supervision is sometimes an INDEPENDENT CONTRACTOR. The doctrine of Respondeat Superior does not apply to independent contractors, although, of course, there might be employer negligence if due care was not exercised in the selection or monitoring of the work of an independent contractor. Doctors are often considered independent contractors of the hospitals with which they are affiliated.

Both strict liability (liability without fault) and vicarious liability (liability for the torts of others) have expanded primarily in the area of corporate liability. These two trends, combined with the expansion of tort law generally, have markedly increased tort exposure for corporations.

XI. CAUSATION.

Complex tort issues often turn on an analysis of CAUSATION, since a failure to perform a duty or conform to a standard of care generally gives rise to responsibility only for harms that are caused by that failure. In fact, the doctrines relating to "causation" in tort law are a complex mix of two kinds of judgments. The first is what the laws calls

CAUSATION IN FACT, or "BUT-FOR" cause (but for the act in question, the harm would not have occurred). This type of cause is factually oriented, and is close to what a scientist would mean by cause. Causation-in-fact of the plaintiff's harm by the defendant's breach of a standard of care is a necessary but not sufficient grounds for tort liability.

The defendant's conduct must also be the "PROXIMATE CAUSE" or LEGAL CAUSE of the plaintiff's harm. The principles of "proximate" or "legal" cause are more normative, and reflect moral judgments about the scope of responsibility which society wishes to attach to certain acts. For example, if the defendant's negligent act caused adverse consequences which were not reasonably foreseeable, the law may conclude that responsibility should not attach. This conclusion would be expressed by saying that there was no "legal cause." In one famous case, a railroad porter was negligent in assisting a passenger who, as a result, dropped a package. The package contained explosives, and another passenger at the far end of the platform was injured by some equipment knocked over by the explosion. It was held that the porter's negligence was not the "legal cause" of the second passengers's injuries.

XII. CONTRIBUTORY AND COMPARATIVE NEGLIGENCE.

It often occurs that when a complaining party (called the PLAINTIFF) brings a lawsuit alleging that a harm he suffered was due to the tortious conduct of another (the DEFENDANT), the defendant will argue that, even though the defendant might have been negligent, the plaintiff was also negligent and that the plaintiff's negligence also contributed to the plaintiff's harm. Negligence by the plaintiff which increased his own risk or aggravated his own harm is called CONTRIBUTORY NEGLIGENCE or COMPARATIVE NEGLIGENCE. If contributory or comparative negligence is found, it may bar the plaintiff's suit, or reduce the plaintiff's recovery.

The doctrines of contributory and comparative negligence are afforded differing degrees of scope in different areas of tort law. For example, if there is a dispute among the different parties which participated in the design and building of a skyscraper about who was at fault for a defect in the final structure, any party that was sued in tort would have a broad opportunity to attempt to establish that the negligence of the suing party also contributed to the problem. By contrast, in medical malpractice, health care providers can raise only a very limited issues that relate to the role of the patient in contributing to the hazards that resulted in injury. For example, it would be legally relevant that a patient did not take prescribed medication, but conduct of the patient that caused the condition that required treatment would not be relevant, no matter how foreseeable and clear the risks of treatment.

XIII. CIVIL LITIGATION.

Tort law is, for the most part, judge-made law. Civil litigation is not just a forum for enforcing principles of tort law: it is the primary forum in which the principles develop. The flexibility of tort law, and its heavy reliance on open-textured standards such as negligence and reasonableness, reflect in part the primary role of courts and juries in developing tort law. However, the traditional characterization of tort law as "judge-made" is subject to an increasingly important qualification concerning the role of statutes and regulations, as discussed below.

XIV. STATUTES, REGULATIONS, AND "NEGLIGENCE PER SE".

Traditionally, the application of standards of care under tort law have been very open-textured, circumstantial, and driven by the facts of particular cases. However, when there is law or regulation concerned with preventing the same harms for which tort law provides a remedy, those laws or regulations will be looked to in determining the standard of care, at least in the sense that a failure to meet the statutory or regulatory standard will create a strong presumption of negligence. For example, if it is alleged that a driver was going unreasonably fast, the fact that the posted maximum speed was 25 mph and he was going 45 mph will probably, in the absence of special circumstances, come close to determining the appropriate standard. A finding of negligence based on a statutory or regulatory standard is said to be "NEGLIGENCE PER SE".

As regulation has become more common, the negligence per se doctrine has become more important. It is one of the major ways in which tort law keeps "up to date." Furthermore, it adds some very effective remedies to regulatory schemes that might, taken just on their own terms, appear deficient with respect to enforcement. So, for example, when there is an expansion of regulation into a new area, such as environmental risks, this is usually complemented by a growth of tort liability based in part on the new regulatory standards.