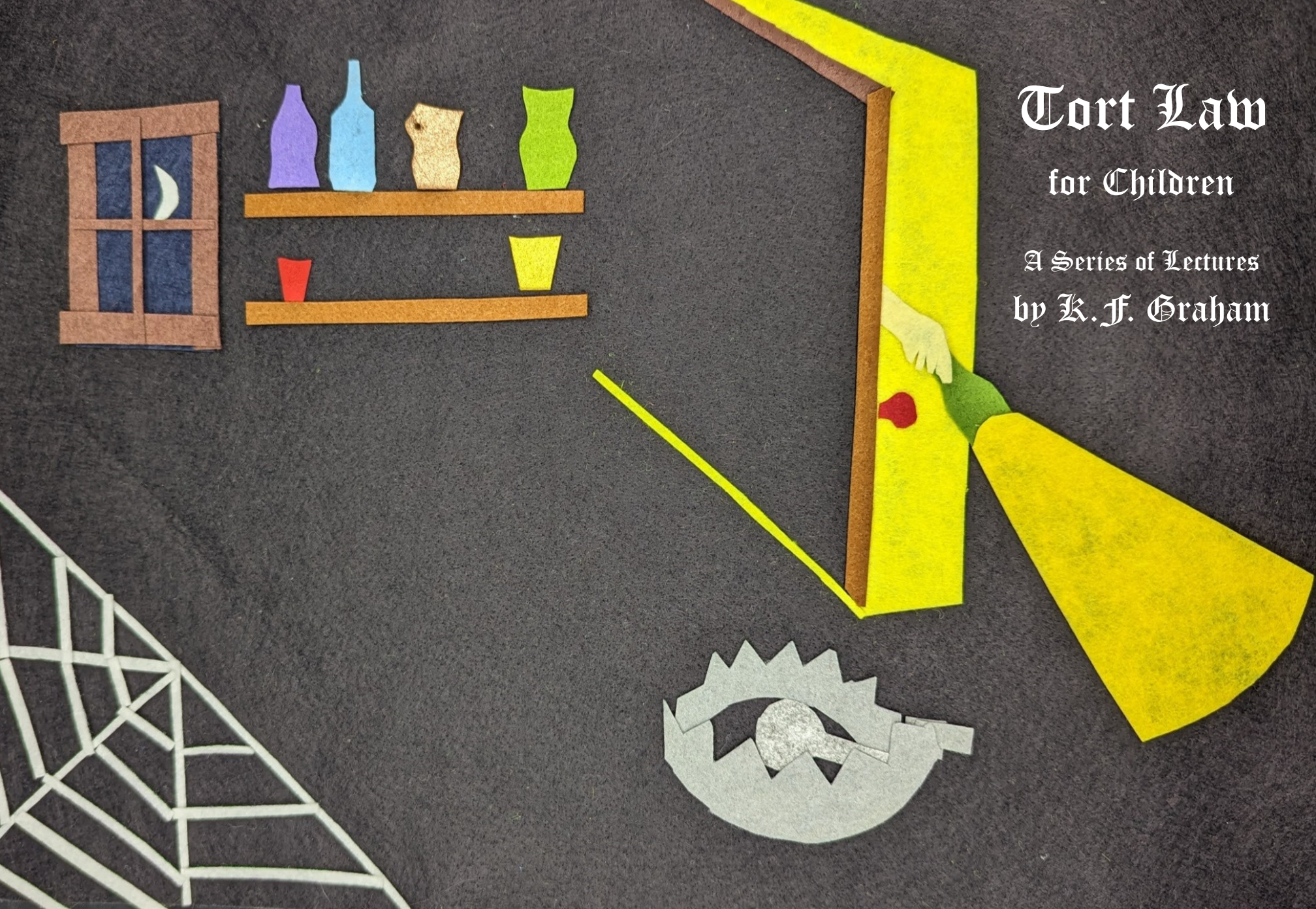


Tort Law

for Children

A Series of Lectures
by K. J. Graham



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for Daphne

Foreword

This book is intended as an introduction to torts for young people interested in the law.

The plaintiffs who brought the cases discussed in this book did not ask to get injured, and their stories are being told here not for amusement, but to help secure a better understanding of how the law operates in practice.

This is a book about tort law. Tort law provides rules for when people get hurt.

Tort law is different from criminal law because with tort law, no one goes to jail. Instead, the person who was hurt, known as the plaintiff, can recover money from the person they say hurt them, known as the defendant. But to do that, the plaintiff has to prove the defendant actually broke the rules, and that the plaintiff should receive damages.

When a plaintiff tries to prove these things in court, it is known as a court case. When a plaintiff brings a case, it is heard before a judge, who knows a lot about the rules, and sometimes before a jury, who are everyday people asked to decide together how the rules apply in the plaintiff's case.

Sometimes court cases lead to written decisions by judges, explaining how the rules work. We will discuss some famous decisions in the text below. We will also discuss some imaginary cases, known as hypotheticals.





You may wonder why people bring court cases. Sometimes they don't! Sometimes people agree in advance who will pay if any injuries happen, so there is no need for a lawsuit.

For example, a farmer and a railroad company may agree that the company will pay the farmer if one of its railroad engines creates sparks that set the farmer's crops on fire. Or they may agree that the railroad *won't* pay for these crops, if the rules are clear that the railroad does not have to pay damages.

But sometimes the rules are not clear, or people disagree about how the rules apply to them. When that happens, they may go to court to get a decision about whether the defendant has to pay damages, stop what it is doing, or both.

Battery

Some tort rules are very simple. For example, you usually can't touch someone who has not agreed to getting touched. If you do — even if it's just a light tap — you have committed a tort known as a battery.

A batterer is liable for all of the plaintiff's injuries, even if these injuries turn out to be much worse than expected.

For example, a long time ago, a young boy kicked a classmate in the leg. The kick did not hurt at first, but the other boy's leg got worse and worse, and he had to wear a leg brace for the rest of his life. Although no one could have predicted that such a little kick would lead to such a bad result, the first boy was held responsible in court for all of the damage caused by his battery.



Vosburg v. Putney (Wis. 1891)



Tombs v. Painter (Eng. 1810)

Assault

You also cannot do things that make it seem like you are going to touch someone in a way they would not want to be touched. If you do that, you have committed a tort known as an assault.

You can commit an assault even without touching the other person. What matters is that the other person believes you will touch them.

In one old case, the court found an assault had occurred when one person shook his fist in front of another person (and drank his beer) at a tavern. There was no touching — the defendant's friend held him back — but the defendant's actions led the plaintiff to reasonably believe he was about to get hit.

Negligence: Duty

Tort law also provides rules for accidents where no harm was intended. These cases involve what is known as negligence.

The most famous negligence case was decided a long time ago. A railroad worker pushed a man, who was carrying a package, onto a departing train.

The worker did not know that the package contained fireworks! The man dropped the package and the fireworks exploded. People at the train station got scared and ran away, and a large, heavy scale fell on a woman, Mrs. Palsgraf, who was standing with her children on the railroad platform. Mrs. Palsgraf was hurt, and she sued the railroad for damages.

A jury decided that the railroad owed Mrs. Palsgraf damages. The railroad then asked some judges to write a decision saying the opposite. This is known as an appeal. On appeal, most of the judges agreed with the railroad. They said that the railroad did not owe a duty of care to Mrs. Palsgraf. But a few judges disagreed. What do you think?



Palsgraf v. Long Island Railroad Co. (N.Y. 1928)



The *Palsgraf* case is unusual. Most of the time, you *do* have a duty not to accidentally hurt other people. So you need to be careful when you ride your bicycle, or walk down the street, or play with someone else on a trampoline. This means no surprise double-bouncing of your friends, even — or maybe *especially* — if it sends them super-high into the sky.



Even though you have a duty to use appropriate care to avoid foreseeable harms to others, there are some exceptions to this rule. As you will see, there are a lot of exceptions to general tort rules. These exceptions are why lawyers use words like “generally,” “typically,” “normally,” “usually,” “commonly,” “conventionally,” and “frequently” a lot when they describe these rules. These words all recognize that there are exceptions.

Among these exceptions, you don’t have a duty to rescue someone you don’t know. So if you go to the beach and see a stranger about to get eaten by a shark, you don’t have to dive into the water to save them. Even if they ask you nicely. You could just wave at them and that would be fine. For *you*, that is. Probably not for the person about to be eaten by a shark.

When you do have a duty of care, you are usually expected to use what is known as reasonable care.

Reasonable care means that if you are an adult, you have a duty to act as a reasonable person. If you are a kid, you have a duty to act like a reasonable kid your age. *Except* if you are younger than around seven or so. If you are that young, the general rule is that you cannot be negligent because you haven't yet learned what you are supposed to do and not do (except for really basic things, like not hitting people, which we've already covered). If you are reading this and you are younger than seven, first, congratulations!; and second, *please* try not to be negligent, even if you won't be liable even if you are. Your parents will appreciate it.

You can think of the reasonable person and reasonable kid as superheroes, but with only one superpower: they are always reasonably careful. This is not a particularly exciting superpower, but it means they are never negligent.

Being reasonably careful is not the same as being *ultra* careful. It just means that you take care to avoid accidents when it makes good sense to do so.





United States v. Carroll Towing Co. (2d Cir. 1947)

Breach

What does it mean to take reasonable care? One famous judge provided an explanation.

This judge decided a case in which a ship sank, and the question was whether a worker known as a bargee should have been on board to protect it. The judge said that reasonable care means that you should take extra care when the cost (also known as the burden, or B) of taking another precaution (like having a bargee on board) is less than the probability (P) that this precaution will avoid an accident, times the expected cost (loss, or L) of the accident, if it were to happen. If you do not take the extra precaution when B is less than P times L, we say that you *breached* your duty of reasonable care.

(Can you spot the bargee having a good time in the city? Come back to your ship, bargee!)

It can be hard to prove that someone did not take reasonable care. A plaintiff proves a court case by offering evidence.

One kind of evidence involves having people who saw what happened come into court to tell the judge and jury what they saw. These people are called “witnesses.”

But sometimes there are no witnesses to explain why an accident happened

To deal with this problem, courts sometimes allow a plaintiff to show that a defendant was negligent through a rule known as *res ipsa loquitur*. *Res ipsa loquitur* is a phrase in Latin, a language that was spoken in ancient Rome and is sometimes used by lawyers and judges even today.

Res ipsa loquitur means “the thing speaks for itself.” When this rule applies, if something happens that makes it seem like the defendant was negligent — like a big barrel falling out of a defendant’s upper-story window, as in one case — the jury can decide that the defendant *was* negligent, even if no one can explain exactly why the barrel fell.



Byrne v. Boadle (Eng. 1863)

A defendant also can be held liable for things *other* people do in response to their actions.

Two hundred years ago, a hot-air balloonist landed in a farmer's field. A bunch of people rushed over to the landing site, trampling the farmer's crops. The court decided that the balloonist was liable for the damage to the crops, because the balloonist should have expected that people would race to where he landed.



Guille v. Swan (N.Y. 1822)

To recover damages, a plaintiff suing for negligence must do more than show that the defendant owed them a duty and breached it. The plaintiff also must prove that their harm would not have happened but for the defendant's negligence. If the harm would have happened even if the defendant had used reasonable care, the plaintiff cannot recover.

Imagine a defendant was hired to move some sheep on her boat, but forgot to put the sheep in pens on the ship's deck. A big storm came and swept the sheep overboard. If the owner of the sheep sued in negligence, the defendant might argue that the storm was so fierce that the sheep would have been thrown into the water even if they had been in the pens. In other words, she would argue that her negligence was not the cause of the plaintiff's loss.



Gorris v. Scott (Eng. 1874)



Summers v. Tice (Cal. 1948)

There are exceptions to this rule that the plaintiff must show that a defendant's negligence was a "but for" cause of the plaintiff's harm.

In one case, two hunters were both negligent for firing in the direction of a third hunter. Although the plaintiff could not prove which of the other two hunters shot him, the court decided that he did not have to. Instead, the court "flipped the burden" to the two other hunters. It ruled that unless one of these hunters could prove he was *not* the one who shot the plaintiff, they *both* would be held liable for the plaintiff's damages.

Another fact pattern in which the causation requirement is relaxed is known as the "two fires" hypothetical. If a defendant negligently starts a fire that merges with *another* fire and then burns down the plaintiff's house, the defendant may be liable for the plaintiff's damages even if the other fire would have burned the house down all by itself. Why do you think that is the rule?

Proximate Cause

A plaintiff also has to show that the defendant's negligence was a "proximate cause" of their damages.

Imagine that I negligently fall down in front of you, making you leave a minute later than you otherwise would have. As a result, a bolt of lightning strikes you out of the blue right as you walk outside. In this hypothetical, you would not have been hit by lightning but for my negligence, but my negligence will not be considered the proximate cause of your injury.

Courts describe proximate cause in different ways. Some courts connect proximate cause with foreseeability. One court found that this requirement was not met when the defendant could not have foreseen that oil it leaked into a harbor would start a fire at a nearby wharf.

Another description first asks why we considered the defendant negligent in the first place. What kinds of risks did the defendant unreasonably create or increase? And then we look at whether the harm that actually occurred involved one of those enhanced risks. If it did, the proximate cause requirement is met.



Overseas Tankship (UK) Ltd. v. Morts Dock and Eng. Co. Ltd. (Australia 1961)



Dillon v. Twin State Gas & Elec. Co. (N.H. 1932)

Damages

Finally, a plaintiff has to show that the defendant's negligence caused the plaintiff to suffer damages.

This can be tricky. In one case, a teenager was playing on the side of a bridge high above a river. He lost his balance and grabbed a nearby wire to support him. The wire was electrified, and the boy was electrocuted. His family sued the electric company in what is known as a "wrongful death" lawsuit.

The court ruled that even though the electric company was negligent, if the boy would have fallen into the river and died anyway even if he had not been electrocuted, the damages associated with the defendant's negligence would be limited, and maybe zero. Whether the boy would have fallen, or whether he would have regained his balance, was for the jury to decide.

Defenses:

Contributory Negligence and Comparative Fault

Even if a plaintiff shows that there was a duty, a breach of that duty, causation, and damages, a defendant still may avoid or lessen liability if it can establish a valid defense.

One defense is that the plaintiff's injuries were the result of the plaintiff's own negligence. If the defendant can show this, it may relieve the defendant from having to pay damages, or reduce the amount it must pay.

So look where you are walking and do not fall into a coal hole, like the woman in the old tort case that's shown here. If you do, the court may say that the defendant owed you no duty to protect you from such an obvious hazard, or that you did not use reasonable care to protect yourself.



Lorenzo v. Wirth (Mass. 1898)



Murphy v. Steeplechase Amusement Co. (N.Y. 1929)

Assumption of the Risk

Another defense is called assumption of the risk. Plaintiffs may be seen as agreeing to assume dangers inherent in activities they voluntarily participate in. If the plaintiff is then injured because of one of those risks comes to pass, they cannot recover for their injuries.

For example, if you go on a bumper car ride at an amusement park, you assume the risk of getting bumped. But you would not assume the risk of, say, the bumper car being full of poisonous spiders, because poisonous spiders are not an inherent risk with bumper cars.

One court applied the assumption of the risk rule in a case involving an amusement park ride called “The Flopper.” The plaintiff sued after he fell down on The Flopper. The court decided that the man could not recover for flopping on The Flopper, because he had assumed the risk of falling.

Emotional Distress

So far we have covered things like broken bones and property destroyed by fire. Tort law also treats hurt feelings as a type of injury that a plaintiff can recover for. But only sometimes, because lots of things can hurt your feelings and we don't want to have lawsuits every time that happens.

For a long time, courts tried to limit lawsuits for hurt feelings caused by someone's negligence by requiring that the negligence involve some physical contact with the plaintiff. The contact didn't even have to hurt.

Is this the kind of book that would talk about a pooping horse here? Yes, this is exactly that kind of book. In one lawsuit, a circus worker mishandled a horse, causing the horse to poop on the lap of a woman attending the circus. She sued for the negligent infliction of emotional distress – and she won.

These days, most courts do not require a physical touching for a plaintiff to recover for negligent infliction of emotional distress. Instead, they apply other rules to limit the kinds of plaintiffs who can receive damages for this kind of injury.



Christy Brothers Circus v. Turnage (Georgia 1928)



Nickerson v. Hodges (La. 1920)

Intentional Infliction of Emotional Distress

Some of the limits on the recovery of emotional distress damages do not apply when someone *intends* to cause another person serious or severe emotional distress, and does so.

Two men once told a woman a pot of gold was buried nearby. The woman went all around town trying to find and dig up the treasure. Eventually she found something – but it was just a bunch of rocks that the men had hidden! She was very embarrassed by this cruel prank.

But the woman got the last laugh. She sued the practical jokers and won \$500, which was a lot of money back then. She didn't have to show any kind of contact or touching, because the prank was so mean-spirited.

Strict Liability

There is another kind of tort claim, called strict liability. The main difference between strict liability and negligence is that strict liability does not require that the defendant fail to use reasonable care. A defendant can be as careful as possible and still be liable for damages if strict liability applies to their activity.

One situation in which courts apply strict liability involves “ultrahazardous” activity. “Ultrahazardous” activity is very dangerous even when reasonable care is being used.

A long time ago, it was considered ultrahazardous to maintain an artificial reservoir. So strict liability applied when a reservoir flooded nearby mining tunnels. But what will be regarded as “ultrahazardous” may depend on things like how useful or common the activity is, so a reservoir might not be regarded as ultrahazardous today.



Rylands v. Fletcher (Eng. 1868)



Strict liability also applies when a private person keeps a wild animal as a pet. When that happens, the owner is strictly liable for their pet's dangerous tendencies.

The thinking behind this rule is that we want people to think twice about owning, say, a pet crocodile, a pet lion, or a pet rhinoceros.

But this strict liability rule does not apply to zoos. Zoos are liable for their wild animals only when zoo employees do not exercise reasonable care. Why do you think that is?

There are some defenses to strict liability for ultrahazardous activities. One is that the only reason the plaintiff suffered damages is because it is ultrasensitive.

That argument was successfully raised in a lawsuit arising out of blasting operations. Blasting is commonly subject to strict liability when it causes damage to nearby property. But in this case, noise and vibrations from the blasting caused mink at a mink farm a few miles away to get very upset, even though people were not that bothered by the explosions.

The court held that the plaintiff who owned the mink farm could not recover because the mink had an “exceedingly nervous disposition” that made them abnormally sensitive to the blasting.



Foster v. Preston Mill Co. (Wash. 1954)



McPherson v. Buick (N.Y. 1916)

Products Liability

Another kind of strict liability claim involves a product you buy that does not work the way it should, and causes an injury. These products are called “defective.”

It is easy to show that some products are defective, like glass soda bottles that explode for no reason. (This used to happen a lot.) It can be more difficult to spot other defective products. The plaintiff may have to show that the product could work just about as well even if it was made safer. A product also may be found defective if it has an inadequate warning, like a chemistry set that doesn’t warn you that some of the chemicals in it are poisonous.

For a long time companies that made products were only liable to their direct customers. If the plaintiff bought the product from someone else, the plaintiff could not recover against the manufacturer. This “privity” rule was gradually eliminated by courts. One important case came after a car wheel broke and caused an accident. The court held that automobiles were so dangerous that manufacturers could be liable to consumers, even though the cars were sold through dealers.

Nuisance

Still another type of tort is known as a nuisance. A nuisance means a use of land that other people don't like, either because it's loud, or stinky, or dangerous, or gross, or just plain annoying.

Plaintiffs can use tort rules to shut a nuisance down or get it to move away. But sometimes plaintiffs have to pay for that to happen, because it wouldn't always be fair to force the owner of the nuisance to move without providing them with some money to make up for it.

That's what happened in one case. A housing developer brought a nuisance lawsuit and got a nearby livestock feedlot to leave, but it had to pay the feedlot owner some money to move.



Spur Industries, Inc. v. Del E. Webb Development Co. (Ariz. 1972)



Edwards v. Sims (Ky. 1929)

Trespass

Another tort, a trespass, occurs when someone intentionally enters someone else's land without permission. Trespass is a tort because it violates the property owner's right to control who can enter their property.

Airplanes can fly *over* someone's land without getting permission, so long as they fly high enough. But until this rule was agreed upon, airlines worried about whether they would be guilty of trespass whenever they flew over someone else's land, which is pretty much always.

What about going *under* the surface of the land? A long time ago, one court said it was a trespass for the defendant to enter cave tunnels below the surface of the plaintiff's property, even though the entrance was on the defendant's property. What do you think? If you were the defendant's lawyer, what would you argue? What about if you were the plaintiff's lawyer? And what would you decide if you were the judge?



Defamation

What about when someone says something about you that's not true? There's a tort for that, too. It's called defamation. Written defamation is called libel. Spoken defamation is known as slander.

You may have a defamation claim if someone says false things about you, knowing they are untrue. But these statements have to involve *facts*, not just personal opinions. "I think you are a bad person!" is not defamation, but "You stole my toy!" may be, so long as someone else other than you heard it.

You may also have a defamation claim even if someone is just careless in what they say or write. But that depends on who you are and what is being written or said about you. If you are a famous person, and the alleged defamation is about something important, you may have to show that the defendant acted recklessly, which is worse than just carelessness.

Economic Torts

Some plaintiffs sue because a defendant hurt their business. These plaintiffs might say that the defendant lied to them and cost them money. When that happens, it is known as fraud.

Another type of tort claim alleges that the defendant took away the plaintiff's customers. Sometimes that is fine, and is not a tort — it is just fair competition. But there are some rules businesses have to follow when they compete against each other.

Once a rich person opened a new barber-shop in a town just to force another barber out of business. The barber whose shop was hurt sued the rich person, and won. It might have been fine to start a new barber-shop if that was what the rich person actually wanted to do. But he didn't really want to do that; he just wanted to close down the other barber's shop.



Tuttle v. Buck (Minn. 1909)



Heartbalm Torts

Tort law changes over time. Some tort claims that plaintiffs used to be able to bring are no longer allowed. A long time ago, if you broke a promise to marry someone, your former fiancé or fiancée could bring a tort claim against you for damages. They could not get the court to order you to go through with the wedding, however. Tort law has its limits.

Breach of promise to marry was known as a “heartbalm tort” because the money a plaintiff might get provided balm (which is something like medicine) for a broken heart.

Most courts don’t allow these kinds of lawsuits anymore. Judges figure that someone shouldn’t have to choose between getting married or paying damages.

But who should keep the engagement ring when the couple breaks up? Perhaps we will turn to contract law in our next set of lessons to find out.

Final Exam

There is a lot more we could discuss!

We haven't even talked about torts like conversion, intrusion on seclusion, or abuse of process. Maybe you will learn about those torts someday in law school, or as a lawyer. But we've covered a lot, and it's time for your final examination.

Can you look at this picture and see what torts might be occurring, or about to occur?

