

Seventh Edition

Tort Law

J. Stanley Edwards, J.D. | Traci Cull, J.D.



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Preface

“If it’s not broken, don’t fix it.” This has been our guiding adage throughout the seventh revision of this text. The feedback we have received throughout the years for the first six editions has been so positive, we have not made major changes for the sake of change alone.

I have updated cases, added new materials due to changes in the law, and revised our web references to reflect the widespread student understanding of search engines. We hope we have maintained the balance of readability and academic integrity created in the past. The core of the text has remained unchanged except for updates where necessary and additional information where helpful including new cases.

The text retains the hypotheticals introducing each chapter and the “Putting It into Practice” exercises that encourage students to immediately put into application concepts to which they have been exposed. The “Practice Pointers” continue to introduce practical procedural skills, such as drafting pleadings, preparing medical authorization requests, documenting damages, writing FOIA letters, and assembling trial exhibits. The “Tort Teasers” at the end of each chapter continue to provide stimulating fact patterns in the form of actual cases, which can be used in class to discuss the tort principles presented in that chapter.

Many of our features from previous editions have been retained. They are:

- **Review Questions and Practice Exams**—The review questions are broad in nature and require students to assimilate the concepts in each chapter. The practice exams consist of true/false, multiple-choice, fill-in-the-blank, and matching questions that test knowledge of specific principles and vocabulary. The questions are similar to those provided in the Cognero Test Bank. Consequently, students can be assured that if they do well on these practice exams (whose answers are provided in Appendix A), they should do well on the exams given in class. We have also emphasized the need for students to take advantage of this resource and to make sure they have sufficiently mastered the materials before moving on to the next chapter.
- **Internet Inquiries**—Searching the Internet is the best way to build confidence and become familiar with what is available. These exercises provide some structure to that search. Some of these exercises are a fairly structured means of familiarizing students with particular websites, whereas other exercises are more exploratory in nature, encouraging students to discover and report what they find.
- **Practical Ponderables**—These exercises include questions that require students to assimilate information they have learned throughout the chapter (sometimes incorporating concepts discussed in previous chapters). The questions are more provocative than those in the practice exams and necessitate integration of materials. They could easily serve as the basis for class discussion and homework assignments.

Supplemental Teaching and Learning Materials

This seventh edition is accompanied by a support package that will assist students in learning and aid instructors in teaching.

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The Cengage Instructor Center is an all-in-one resource for class preparation, presentation, and testing. The instructor resources available for download include:

- **Instructor’s Manual.** Provides activities and assessments for each chapter (including business cases with corresponding assessment activities) and their correlation to specific learning objectives, an outline, key terms with

definitions, a chapter summary, and several ideas for engaging with students with discussion questions, ice breakers, case studies, and social learning activities that may be conducted in an on-ground, hybrid, or online modality.

- **Test Bank.** A comprehensive test bank, offered in Blackboard, Moodle, Desire2Learn, and Canvas formats, contains learning objective-specific true-false, multiple-choice, and essay questions for each chapter. Import the test bank into your LMS to edit and manage questions and to create tests.
- **PowerPoint Slides.** Presentations are closely tied to the Instructor's Manual, providing ample opportunities for generating classroom discussion and interaction. They offer ready-to-use, visual outlines of each chapter that may be easily customized for your lectures.
- **Transition Guide.** Highlights all of the changes in the text and in the digital offerings from the previous edition to this edition.

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1

Part



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Introduction

Chapter 1: Overview of Tort Law

Chapter 2: Overview of a Tort Case

Chapter 3: Intentional Torts

Chapter 1



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Overview of Tort Law

Chapter Topics

Background

What Is a Tort?

Reasonableness of Conduct

Public Policy

Morality of Conduct

Slippery-Slope Arguments

Creation of Case Law

Relationship between Tort Law and Other Areas of the Law

Brief History of Tort Law

Coming Full Circle

Classification of Torts

Chapter Objectives

After completing the chapter, you should be able to

- Define a tort and distinguish between a tort and a crime, as well as between a tort and a contract.
- Trace the evolution of tort law.
- Recognize the philosophical principles and arguments underpinning tort law.

You come home one evening to find that one of your children has been bitten by your next-door neighbor's pit bull, who was safely secured behind the fence when your child, contrary to your instruction, entered the yard to retrieve a wayward ball. Your neighbor took every precaution of isolating the dog, short of locking the fence. Should the neighbor be held liable?

Someone in your family contracts a deadly disease, the cause of which can be traced to chemical contaminants found in toxic wastes dumped by the city in which you live. The city dumped the waste several decades before the area became residential and, at the time, was totally ignorant of the long-term effects. Should the city be held liable?

A medical student watches as a five-year-old girl falls into the lake at the local park and screams "Help, I can't swim." He walks away as she goes under for the third time. Although he worked as a lifeguard for several years, he has not worked as a lifeguard since entering medical school. Should he be held liable?

An eight-year-old boy trespasses and falls into a hole on your property. Should you be held liable?

Your daughter finally succeeds in becoming a famous actress. Without her permission, a magazine publishes nude photographs of her. Should she be able to sue for invasion of privacy? Intentional infliction of emotional distress? Defamation?

Your son is wrongfully detained because a storekeeper suspects him of shoplifting. Should he be able to sue the store for the emotional distress he endures while being detained?

Should the attorney for whom you work as a paralegal be held liable for your negligent acts?

Should you be held liable for the intentional torts of your children?

Your home has been burglarized on several occasions and, in a desperate attempt to protect your property, you set up a mechanical trap. Should you be held liable if a would-be burglar is seriously injured by the device?

These questions, illustrating the broad scope of human experiences that fall under tort law, will be examined in this text. Tort law is an intriguing area of the law that covers virtually every aspect of human behavior. It not only governs the conduct of people in our society, but also reflects our attitudes and values toward living life itself. The parameters of tort law contain many of the philosophical underpinnings of our society.

Background

It has been said that tort liability is like a tax that makes products and services more costly to all and ultimately unaffordable to some. This “tax,” it is argued, has put some medical doctors out of business, prohibited the sale of certain drugs and products, and severely hampered businesses and governmental bodies in their delivery of services.

Advocates of expanded tort liability see tort law as the knight in shining armor, duly anointed to protect the interests of the consumer. In their perception, manufacturers and those who deliver services are better able than consumers to predict and prevent injuries from the use of their products and services. The burden of injury, they reason, should be borne by those who create risks rather than by those who fall prey to them. The philosophical and political debates on the issue of risk allocation have gained new significance in one of the most recent developments in tort law—product liability.

Others argue that we have become too paternalistic in our efforts to protect individuals and that we should allow people to bear the consequences of

their decisions. After all, they point out, the process of living comes with no guarantees and the assurance of safety is too high a price to pay for freedom.

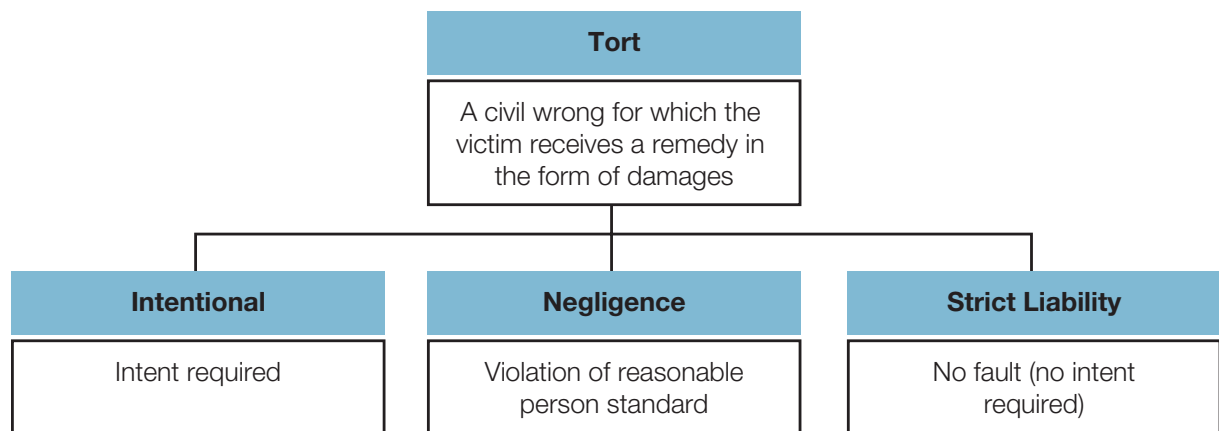
In addition to this philosophical concern, there is reluctance to burden a defendant, particularly an industry, with all losses and damages, for fear of financial ruin. As a result, new technological developments may be inhibited or become financially prohibitive.

This problem of distribution of losses continues to haunt those who seek an equitable balance between the needs of plaintiffs and defendants. Judges must decide the proper solution to this controversy. Suffice it to say that whichever philosophical trail they choose to follow predetermines their resolution of many cases.

What Is a Tort?

But what is this thing we call a **tort**? Although the term has evaded concrete definition, it has been described as a civil wrong for which the victim receives a remedy in the form of damages (Exhibit 1–1). Included under this heading are

Exhibit 1–1 Definition of a Tort



intentional torts (assault, battery, false imprisonment, intentional infliction of emotional distress, and trespass, are some examples), negligence (acts committed with no deliberation but in violation of a reasonable person standard to someone they owe a duty), and strict liability (acts committed with no intent or fault at all).

Reasonableness of Conduct

The common thread interweaving most torts is the notion that socially unreasonable conduct should be penalized and those who are its victims should be compensated. Of course, determining what is unreasonable is a formidable task, because reasonableness, like beauty, is in the eye of the beholder. The overall goal in defining reasonableness is to balance the plaintiff's need for protection against the defendant's claim of freedom to pursue their own ends. But how does one determine reasonableness of conduct? Should one take into consideration, for example, the parties' religious beliefs, their physical disabilities, their values, emotional idiosyncrasies, or their mental state?

To get a feeling for where you stand on this issue of reasonableness, consider the following. You are sitting as a juror on a case in which the plaintiff, a devoutly religious Catholic woman, was severely injured by the negligent driving of the defendant. The plaintiff was pregnant at the time of her injury and was told that because of the serious pelvic injury she had sustained, she would be in grave danger if she carried her baby to term. Because of her intense aversion to abortion, she chose to deliver the baby and died in the process.

Do you think the defendant should be required to compensate the plaintiff's family for her death? How would you determine the reasonableness of the plaintiff's conduct? Would you require her to conform to the conduct of the "average" person, or would you compare her conduct to that of a reasonable person holding her beliefs? These are just some examples of the

types of questions with which jurors and courts must grapple in their struggle to assign fault and apportion damages equitably under tort law doctrines.

Sometimes the reasonableness of the defendant's conduct is not at issue because of the far-reaching social consequences of their actions. In the area of product liability, for example, even those manufacturers and sellers who act reasonably are held liable to plaintiffs injured by their products. This is done in the name of protecting society. By holding manufacturers and sellers responsible for all such losses, the argument is made, consumers will be better protected, and sellers and manufacturers will be more conscientious in the delivery of their services and products. Similarly, one who innocently defames another will be held liable despite their lack of intent. Once defamation has occurred, the damage has already been done. The victim's reputation is irreparably tarnished no matter how reasonable the defamer's conduct, goes the rationale, and so compensation is required.

Public Policy

Tort law often goes beyond compensating individuals and considers, more broadly, the interests and goals of society at large and the community in which we live. These interests are often referred to by the courts as **public policy** concerns. Most people are familiar with the term *corporate* or *company policy*, which dictates the values and principles of a corporation. Similarly, the local, state, and national communities have "public policies" that dictate the norms of the community or the public based on its beliefs and values regarding justice, fairness, and equality. Judges may consider public policy to determine the impact their rulings or legal principles will have on society as a whole.

All laws, including tort law, are based in some part on the public policy of the society and/or the community. To find the public policy underlying a law, one must look at the rationale or reason for the law. For example, a community may have an ordinance that



In the News

For an overview of tort law and what it encompasses, go to www.law.cornell.edu. Search for tort law and it will take you to www.law.cornell.edu/wex/tort. This is a great overview of tort law. You can search any topic on the main site and it will give you the same.

prohibits the opening of an adult bookstore within 300 feet of an elementary school. The public policy underlying such an ordinance is the community policy or value that young children should not be exposed to adult bookstores, their materials, and their patrons.

Understanding public policy is essential to understanding tort law.

Why, you might ask, must the interest of society be considered when dealing with a dispute between two individuals? Because our common law system is based on case precedent, every decision rendered by a court has the potential of establishing a rule that must be followed by other courts. Society, therefore, has an interest in ensuring that disputes between litigants are resolved through a process of resolution that is fair and just for all concerned. The very principles set forth today will be those that govern the cases of tomorrow.

Morality of Conduct

Is the morality of a defendant's conduct relevant in tort law? Although personal morality may be subject to variation, tort law borrows heavily from a sense of public morality. It can be said that, at least in certain cases, we all have a sense of what is universally regarded as right and wrong. Tort law generally reflects that sense.

There are circumstances, however, in which a defendant can be held liable even though they have violated no moral code. One who, for example, trespasses on the land of another in the reasonable belief that it is their own land is still liable for trespass. With the increasing popularity of no-fault torts, such as strict liability, we appear to be moving away from a need to cast moral judgment on a defendant's conduct. In contrast, tort law does not deal with all blatantly immoral acts. Although it may be morally reprehensible, for example, to allow a stranger to die when you could save them, in most circumstances you will have committed no tort.

Slippery-Slope Arguments

Case precedent, the effect of a ruling on a future case, is a major part of the development of tort law. Courts are often hesitant to crack open a legal door in a particular case for fear of creating a "flood of litigation,"

which are ever on the alert to avoid. For that reason, some types of flagrant misdeeds are not vindicated by tort law. Relatively trivial concerns must also go by the wayside in an effort to minimize the flood of litigation. Many of our most grievous hurts are inflicted in the context of interpersonal relationships and yet most of these must go without redress. Lovers are jilted, children are verbally belittled by parents, friends are "used," and so on. The law cannot become enmeshed in these psychically damaging events if the legal system is to avoid the administrative nightmare created by an onslaught of cases. Clearly, not all human wrong can be remedied.

Perhaps you have heard of the **slippery-slope argument**, which means, essentially, that use of an argument in one case will allow application of that same argument in innumerable other cases. The metaphor is used to show that once you take the first small step, it can lead to a long chain of events that can result in a significant event often with a negative or disastrous outcome. The slippery-slope argument is, in essence, an administrative concern. A court fears that if it finds negligence on behalf of the sympathetic plaintiff before it, hundreds of thousands of similarly situated individuals or those whose situations are analogous to the case will also seek similar redress. The precedential effect of allowing medical prescriptions for marijuana use can lead to the argument of everyone thinking it is acceptable to use marijuana and everyone legalizing it for recreational use. This is one of the many slippery-slope issues considered by the courts.

Keep in mind that, although courts are to focus on the long-term in making their decisions, they sometimes are understandably sympathetic to the plight of the individuals before them. In such cases they often render decisions that meet the short-term goals of justice but that prove untenable over the long run. Justice, you will soon discover, is an illusory goal that often eludes capture by even the most conscientious judge.

Creation of Case Law

Tort law is largely a product of **case law**, which involves case-by-case decision making by the state courts. This decision-making process is affected, to some degree, by statutes, which the courts are mandated to follow, unless statutory gaps exist that leave

a court with unanswered questions. This is where case law comes into play. Some statutes, such as the wrongful death and survival acts, directly address issues that arise in the context of tort law. Others, such as certain criminal statutes, serve as guidelines to the courts in establishing policy. A statute, for example, that makes it a misdemeanor to drive while under the influence of alcohol sets forth the standard of care expected of drivers. A driver having a blood alcohol level in excess of the statutory limit would be considered to have breached the duty of care they owed to those around them.

Another guideline that courts use in formulating their holdings is the *Restatement of the Law of Torts*. The *Restatement* was compiled by eminent legal scholars and practitioners in an attempt to provide lawyers and judges with **black-letter principles** (legal principles generally accepted by the legal community, also referred to as black-letter law) of tort law. Adopted in many jurisdictions, the *Restatement* is frequently cited in court opinions and has been updated several times over the years.

Although criticized for creating the impression of uniformity in the law where there is none, the *Restatement* is nevertheless a frequently used guide through the maze of tort law decisions. For this reason, the *Restatement* is often cited throughout this text. Keep in mind, however, that your state may not have adopted the *Restatement* position. Be sure to consult the case law in your state when dealing with a specific case.

Relationship between Tort Law and Other Areas of the Law

Torts versus Crimes

How does a tort differ from a crime? Although the two share several similarities, they differ in terms of the interests affected, the remedy granted, standard of proof, and procedural mechanisms used (see Exhibit 1–2). A crime is considered an offense against society, whereas a tort is an offense against

another individual or group of individuals. The purpose of prosecuting someone who has committed a crime is to vindicate the interests of society by punishing the offender. The purpose of suing under tort law, in contrast, is to compensate the victim.

Although the primary purpose of criminal law is punishment and the primary purpose of tort law is compensation, there is some overlap between the two. Compensation given to the victim of a crime (known as **restitution**) is frequently used by the courts as part of an offender's sentence. By the same token, punitive damages, which are intended to punish the **tortfeasor** (one who has committed a tort), are used in certain circumstances in tort law. Despite this overlap, the primary functions of criminal law and tort law remain distinct.

Moreover, the rules of civil procedure are used in tort cases, whereas the rules of criminal procedure are used in criminal cases. Also, the plaintiff's burden of proof in a tort case requires proof by a **preponderance of the evidence** (the preponderance must be proven to be greater than 50% true under this burden of proof); the state's burden of proof in a criminal case is proof **beyond a reasonable doubt** (the highest burden of proof and no doubt whatsoever in the defendant's guilt). The rules of evidence applicable in criminal cases vary from those applicable in civil cases.

Many acts may be both a crime against the state and a tort against the individual. If a drunk driver, for example, is involved in a vehicular accident, they may be charged with a criminal offense as well as

Exhibit 1–2 Torts versus Crimes

	Torts	Crimes
Purpose	Compensation	Punishment
Standard of Proof	Preponderance of Evidence	Beyond a Reasonable Doubt
Interests Violated	Individual's Interest	Society's Interest
Procedural Rules	Civil Rules	Criminal Rules



In the News

To learn more about the American Law Institute, which publishes the *Restatements*, and to gain a better understanding of what the *Restatements* are and how they are compiled, go to www.ali.org/publications to see all the different restatement publications they publish.

sued by the injured parties for negligence. For this reason (among others) those charged with criminal offenses often plead **nolo contendere** (no contest). If they were to plead guilty, their admission of guilt could be used against them in a subsequent civil trial, whereas a plea of *nolo contendere* could not. This is true, however, only if the issue tried in the criminal case is also relevant to some aspect of the tort action. Because of the lower standard of proof in a civil case, the plaintiff in a tort case will have an easier time establishing liability than the state will have proving guilt in a criminal case. In the trial of the twentieth century, the defendant O. J. Simpson was acquitted of criminal charges and found liable for the same conduct under tort principles in a civil case. (See the Joan Rivers case involving her death from routine surgery.)

Clear and convincing evidence is a standard required in some administrative hearings and certain civil and criminal proceedings. It is a standard above preponderance of the evidence and below beyond a reasonable doubt. It requires the party proving a contention that the contention is substantially more likely than not that it is true. This standard can be used in civil as well as some criminal trials. This standard is used for cases involving property that is subject to forfeiture as well as the burden for plaintiffs who allege fraud and is also applicable to paternity and some probate issues.

Torts versus Contracts

Tort law differs from contract law in terms of the voluntariness of entering into an agreement. When two or more parties create a contract, they each agree to give up something in return for receiving some benefit. In a contract action, the parties have voluntarily and knowingly assumed duties or obligations to others. In tort law, by contrast, duties are imposed by the law without the express consent or awareness of those involved (Exhibit 1–3). If a guest is injured on a landowner’s premises, the landowner is liable, not

because they expressly contracted to prevent injury to the guest, but because the law imposes certain obligations on them by virtue of being a landowner.

The remedy in a contract case is to compensate the prevailing party with the benefit of the bargain. In other words, the remedy is to provide them with what was expected under the contract. In a tort case the remedy is much broader and the victim of a tort may be awarded monetary damages for pain and suffering, economic damages, and punitive damages.

Just as with criminal law, however, there is an overlap between tort law and contract law. Certain tort duties may coincide with those duties set forth in a contract, for example, so that if a party fails to live up to its obligations, an action may lie in either tort or contract. Additionally, some quasi-contractual obligations (such as the obligation to act in good faith) are imposed by law without the consent of the parties, just as in tort law.

One other distinction between contract and tort law is that in contract law, obligations are made to specific individuals by virtue of an agreement of the parties; whereas in tort law, duties are imposed by law and owed to society. In tort law, one is bound to act as a reasonable person toward all other persons, but in contract law one is bound in contract only to specific individuals. This distinction is not completely valid, however, in that tort law principles impose special duties in some cases because of the relationship one has with another. An employer, for example, owes duties of care to their employees that they do not owe to other persons.

You will find as you pursue your study of torts that this area of law overlaps with most other areas of law. Therefore, you will frequently find yourself referring to knowledge that you have gained from tort law when you study property law, constitutional law, criminal law, contract law, corporate law, and others.

Exhibit 1–3 Torts versus Crimes

	Torts	Contracts
Duties Assigned	Imposed by Law	By Parties' Consent
Obligations Made To	Society in General	Specific Individuals

Brief History of Tort Law

If this is the point in most textbooks where you skip ahead, try to persevere. You might be surprised at how interesting the evolution of tort law really is (Exhibit 1–4).

In barbaric societies the only “law” that seemed to control group behavior had its roots

Exhibit 1–4 Evolution of Tort Law

Blood feud (no fault)
Action in trespass (no fault)
(<i>Vi et armis</i>)
(Direct use of force)
Trespass on the case (wrongful intent or negligence)
(No force or indirect injury)
Negligence (fault required)
Strict liability (no fault)

in the blood feud. The protocol of the blood feud required that the clan go to war against any outsider who inflicted harm on a clan member, thereby dishonoring the clan as a whole. Atonement for the humiliation suffered by the victim's kin seemed the primary goal.

Despite the obvious deterrence this system of justice provided, its inherent violence and its toll on those who were obligated to protect family and clan members prompted reform. Ultimately a negotiation process was developed in which the victim summoned the perpetrator to the "moot"—a forum in which the victim pleaded their case to the community and asked for a redress of their grievance. Community members offered advice about how best to resolve the dispute. When a solution acceptable to both victim and perpetrator was found, the parties dispersed and the blood feud was averted.

When the law first became more civilized, the remedies created served as substitutes for the feuding process, and thus emerged the concept of monetary compensation. Early in Anglo-Saxon history, individuals were assigned a monetary value based principally on their rank. Money instead of blood was offered as a remedy for injured clan pride. Compensation was directed toward the clan rather than the individual, and awards were distributed proportionately among the injured person's relatives. There was no distinction between crimes and torts. Furthermore, there seemed to be no concern regarding issues of fault or blameworthiness. Even the most

remote causal connection was sufficient to justify the imposition of punishment.

Interestingly enough, during this same time period, vengeance was exacted on whatever was determined to be the immediate cause of death, even if it was an animal or inanimate object. The offending object, be it a horse or a sword, might be turned over to the victim or the victim's family to be used as they saw fit, or delivered to the king.

Action in Trespass

Over time the moot process of dispute resolution led to the establishment of certain fundamental rules. Communities discovered, through trial and error, those decisions that led to the greatest peace and harmony. Following the Norman Conquest, the dispute resolution process fell to the royal justices of the king's courts. They soon discovered that following the already established local rules provided optimal efficiency in resolving conflict. As a result, the local rules eventually evolved into what is now known as the common law.

The **action in trespass**, which emerged sometime in the middle of the thirteenth century, was one of the products of the common law evolution. This action, which was basically of a criminal nature, dealt with serious and forcible breaches of peace. One of its requirements was the showing of force and arms, referred to as *vi et armis*.

The plaintiff had to allege that the defendant had used force directly on the plaintiff's person or property, thus the term *vi et armis* appeared in every writ of trespass as a matter of course. No further showing of blameworthiness or fault on the part of the defendant was necessary. As time went on, however, even mild, innocuous physical contact was sufficient for the plaintiff to prevail in a trespass action, and the pleading of *vi et armis* became a mere technical device.

To see an example of a trespass in action, read the whimsically written case of Schultz and another v. Frank. Do not be concerned if you do not fully understand the legal arguments, because we have not yet discussed the legal concepts at issue. In essence, this case discusses filing a trespass in action case over a regular trespass case to recover damages.

Case

Schultz and Another v. Frank

1 Wis. 352, 1853 WL 1722

Supreme Court of Wisconsin

“In trespass on the case. The plaintiff declares in damages, and complains of the defendants for this, to wit: That on or about the third day of December, 1851, and on divers other days, until the 22d day of December, 1851, in the town of Concord and the town of Ixonia in Jefferson county, the said defendants did willfully, maliciously, carelessly, and neglectfully, by their own acts and by the acts of their hired men servants and those in their employ, damage, injure and destroy a certain quantity of broom-corn brush, the property of the said plaintiff in the following manner, to wit: by tearing the same to pieces with pitchforks, trampling upon it with their feet, breaking the covers and rendering the same unfit for use. And the said plaintiff further complains of the said defendants for this, to wit: On the above named day and in the above named places, said defendants and their hired men did strew, scatter, and leave in the fields and highways, a portion of the said broom-corn brush; leaving the same to be destroyed. Said plaintiff further complains of the said defendants for throwing a portion of said broom-corn brush into a pile, together with hay, straw, oats in the sheaf, and other things improper to be thrown into and mixed with said broom-corn. Said plaintiff also complains of said defendants for this, to wit: That on the day and times and places first above named, said defendants did, by their own neglect, and the neglect of those in their employ, suffer horses, hogs, sheep, turkeys, fowls, and cattle to run, trample, feed and roost upon said broom-corn. Said plaintiff further complains of said defendants for this, to wit: That on or about the 3d day of December, 1851, said defendants did, in the town of Concord, open the fence and fixtures of the said plaintiff, thereby leaving the same open and down, and suffering divers cattle to remain over night in said plaintiff’s barn, upon grain and grass seed, the property of said plaintiff, to the damage of the said plaintiff one hundred dollars.

The declaration in this **case** is informally and inartificially drawn. It is just such a declaration of the cause of **action**, as might be supposed, drawn by one ignorant of the forms of law, before a tribunal, of which technical precision is not required, but to which the substantial equity of the law makes its most frequent appeals...

To relieve justices of the peace from the embarrassments which frequently arise, to perplex even higher tribunals, out of the logical distinction between **actions** of **trespass** on the **case**, and **actions** of **trespass**, the 43d section of ch. 88 of the Revised Statutes was doubtless enacted. This section provides that, “when by the wrongful act of any person, an injury is produced, either to the person, property, or rights of another, or to their servant, child or wife, an **action** of **trespass** on the **case** may be brought to recover damages for such injury, whether it was willful, or accompanied by force or not, and whether such injury was a direct and immediate consequence from such wrongful act, or consequential and indirect.”

The design of this section was, to abolish, in regard to **actions** brought before justices of the peace, all distinction between **trespass** and **trespass** on the **case**. By adopting the one, therefore, instead of the other, no implication can arise against the plaintiff. By bringing **case**, he cannot be considered as waiving the taking, or the force. We cannot, therefore, admit the position assumed by the plaintiffs in error, that the defendant in error has admitted in his declaration and proof, that the plaintiffs in error had a right to remove the broom corn. Neither do the **cases** cited, in our opinion, sustain that position. The same latitude of proof was extended to the plaintiff below in the **action** of **case**, that would have been in the **action** of **trespass**.

The proof before the justice shows, that the plaintiffs in error seized a quantity of broom corn, belonging to, and in possession of the defendant in error, and removed the same from his barn, in the town of Concord, to the barn of Adams, in the town of Ixonia. It appears from the testimony of Ram say, that the corn was in good condition in *Frank’s* barn. That when the bundles, in the moving, became untied, the plaintiffs in error and his assistants did not tie them again. That “the hens would knock the corn down, and the colt would run on it.” It also appears from the testimony, that the corn was taken from the possession of the defendant in error and removed to the barn of Adams, where it remained some four weeks. It is equally clear

(continued)