# 1

# Introduction

The purpose of this book is to provide something that in my view has so far not been provided in the literature: a reasonably comprehensive, functionalist presentation of tort law that hews closely to doctrine. As I worked on the manuscript, I envisioned the final product serving as a textbook, mainly for law students. But I have also held onto the vision that it would provide a more thorough policy-grounded justification for the common law of torts than has been provided to date.

I use the word functional here as a less formal way of saying utilitarian. It conveys my immediate goals while helping me avoid being dragged into debates about the merits of utilitarianism as a theory of law. If you do not like utilitarianism, at least you should have some interest in understanding the functions of common law doctrines, or the effects these doctrines are likely to have on rational agents, or the manner in which they influence social interaction and its consequences. Another sense in which the word functional is useful to me is that it signals an interest in advancing a positive theory of the law rather than a normative theory. Positive theory seeks to understand, explain, and justify the legal doctrines that exist, rather than to design anew some area of the law, which is the aim of normative theory. Utilitarianism can provide a framework for redesigning the law, as Bentham demonstrated. But I have made few efforts toward this end in this book. I have criticized specific decisions, and specific portions of the case law, but on the whole the aim here is to explain and make sense of tort doctrine as it is. To that end, I offer a set of consistent policy perspectives that might enable one to better predict the outcomes of tort disputes.

Another way of describing this book is to compare it to paleontology. Studying individual cases is like studying parts of the skeleton of an animal buried in the ground for millennia. One can know the details of the skeleton's parts without having a sense of how the animal moved. The approach of this book is to study the parts of tort law with a goal of understanding how those parts, as well as the whole body, move. Discerning the policies that shape tort law is crucial to determining how the law should work, and often how it actually does work.

Functional, utilitarian explanations of tort law have their roots in Holmes's third and fourth chapters of *The Common Law*.[1] I have had the pleasure of recognizing substantial pieces of this book, such as its chapter on strict liability, anticipated in brief passages of Holmes. But Holmes did not try to provide a comprehensive discussion of tort law. There are vast parts of most torts casebooks that are not discussed, or mentioned only in passing, in Holmes's book.

The other major examination of tort law in this vein is that of Prosser.[2] Prosser's hornbook is on nearly the opposite end of the spectrum from Holmes: Whereas Holmes is light on case law and heavy on fundamental doctrines and policy, Prosser is heavy on doctrinal detail and comparatively light on policy. Still, if one makes an effort, the core functional explanations of tort law that are offered here can be gleaned from Prosser. Prosser addressed practical questions and held the work of judges in too high regard to scrape arguments from their opinions to advance purportedly novel theories of the law, but the basic utilitarian premises of Holmes are visible throughout his book.

This book aims to fill the gap between Holmes and Prosser. Although it presents policy arguments directly, theory is put to the service here of making sense of tort law. I explore tort law in greater detail than Holmes, though not as much as Prosser. I have integrated policy arguments with law to a much greater degree than Prosser. For the new student, this book offers an introduction to the law and to policy reasoning at a level of depth not typically found in law textbooks. For the expert, this book offers an integration of policy and law that offers new insights on the macrostructure of tort law – its divisions between categories of intent, negligence, and strict liability – as well as doctrinal details within each category. Functionalism as an approach to tort law has been around for a long time, but criticized for giving short shrift to the fine points of doctrine and therefore dismissed by some on this ground. I aim to show that the functionalist perspective not only is capable of accounting for the fine points of doctrine, but also often offers the account that fits best with doctrinal details, resolving some superficial inconsistencies and puzzles along the way.

Modern functional and utilitarian theories in the legal academy typically come in the form of "law and economics" analysis today. Because of this, the scholarship of Judge Guido Calabresi and of Judge Richard Posner deserves a special place in the literature on torts.[3] Calabresi and Posner pioneered the use of economics to understand tort doctrine, though with very different approaches, since Calabresi's work is mostly normative while Posner's is positive. I make use of arguments drawn from economics in this book; but, again, the arguments are put to work in understanding the law, and they appear where necessary to understand the policies that shape tort doctrine.

[1] Oliver Wendell Holmes, Jr., The Common Law (Little, Brown & Co. 1881).
[2] William L. Prosser, Handbook of the Law of Torts (West Pub. Co. 4th ed. 1971).
[3] Guido Calabresi, The Costs of Accidents: A Legal and Economic Analysis (Yale Univ. Press 1970); Richard A. Posner, Economic Analysis of Law (Aspen Pub. 8th ed. 2010).

I have also drawn heavily from established torts textbooks. The main reason is that the textbooks tend to present cases that have been used to teach the law for many years and are likely to be recognized by most students who have studied torts. These familiar cases – chestnuts such as *Palsgraf v. Long Island Railroad Co.*[4] – provide excellent templates for exploring policy in greater depth than the casebooks and hornbooks typically permit. I therefore mined the Prosser hornbook repeatedly for cases and for explanations of doctrine.[5] The Epstein and Sharkey casebook[6] – formerly Epstein,[7] and before then Gregory and Kalven[8] – has been a major source of cases and ideas for the organization of topics. The organization of topics in this book follows that of Prosser, with deviations based primarily on my desire to impose functional coherence on the order of topics, because I view function and utility as the ultimate organizing principles for this material. For example, I present defamation law immediately after the chapter on strict liability because of the doctrinal and functional similarities between the two areas. The Wigmore casebook,[9] published in 1912, a national treasure in my view, has been another major source of cases and topics for this book.

The preface of Wigmore's casebook includes a list of "Wishes" that he hoped his book would further, one of which is that tort law would be made more scientific over time.[10] I am pleased to report that the scientization of tort law has progressed dramatically since Wigmore's day. Tort law has become a topic of study not only for the philosophically oriented, but also for economists, psychologists, and statisticians. Economic analysis of law has introduced mathematical models that permit a more rigorous study of the incentives created by tort law than had been available before.[11] The move toward science has required a shift from theorizing about a priori duties to a focus on facts and consequences, to better understand the policies reflected in the law. This shift has been controversial at times within the legal academy, but it has made such deep inroads into the policy arguments of courts that it is simply too late in the day to ignore its importance in understanding tort law. Although this book emphasizes legal doctrine, it also provides the student with an introduction to the increasingly interdisciplinary study of law.

[4] 162 N.E. 99 (N.Y. 1928).
[5] Prosser, *supra* note 2. Another hornbook I consulted is Dan B. Dobbs, Paul T. Hayden, & Ellen M. Bublick, The Law of Torts (2d ed. 2011).
[6] Richard A. Epstein & Catherine M. Sharkey, Cases and Materials on Torts (Aspen Pub. 10th ed. 2012).
[7] Richard A. Epstein, Cases and Materials on Torts (Aspen Pub. 9th ed. 2008).
[8] Charles O. Gregory & Harry Kalven, Jr., Cases and Materials on Torts (Little, Brown & Co. 1959).
[9] John Henry Wigmore, Select Cases on the Law of Torts (Little, Brown & Co. 1912).
[10] *Id.* at vii–ix.
[11] *See* William M. Landes & Richard A. Posner, The Economic Structure of Tort Law (Harvard Univ. Press 1987); Steven Shavell, Economic Analysis of Accident Law (Harvard Univ. Press 2007).

Of course, this leaves open the question: Why study tort law? This would have seemed an odd question to ask 100 years ago, but the popular view of law has changed so much in the recent past that it is a question that needs to be addressed today. There have always been two popular senses of the law. One is of law as a system of rules that constrain private actors roughly equally. Another is of law as a medium for sending orders from one person to another, or from one group to another.[12] In the first view, law puts us all on an equal footing and is indifferent to our identities. In the second, law is directed toward changing power relationships and is keenly aware of the identities of the affected parties. Society has increasingly embraced the second view, and law schools have followed the popular interest by replacing common law courses with "public law" courses on statutory subjects.

For law students, tort law remains a mandatory topic in the first year of school, so there is little pressure at the moment to answer the question "Why study tort law?" But the mandatory status of torts may change over time, given the increasing preference in law schools for public law statutory subjects. A defense for studying tort law will therefore need to go beyond simply pointing to the mandatory status of the course.

To justify studying tort law, one has to believe that the core common law subjects – tort law, contract law, criminal law, property law – are still important parts of a sound education in the law. I believe this is a defensible proposition. Almost all of the statutory subjects so popular today rely on fundamental doctrines developed in the common law. Antitrust law relies on notions of deterrence and causation developed in tort law. Labor law, another modern statutory subject, relies on theories developed in the common law of contracts. Intellectual property law relies heavily on theories from tort law, and large parts of intellectual property law (trademark law, trade secret law) developed as subfields of torts.[13] Lawyers and judges will be in much better shape to understand these areas of the law and to apply them wisely if they take advantage of the lessons embedded in the common law.

In addition to this, common law has developed through the public resolution of thousands of disputes. In each, a court has operated with discretion to consider the social consequences of its decision. As a result, the common law has developed into a fine-meshed system of regulation, with each pocket of the squares reflecting a balance struck with respect to the consequences for future parties, like the ones in the dispute, and for the system as a whole.

Tort law is not only a part of the common law; it is arguably the core of the common law. Wigmore referred to tort law as the study of "general rights."[14] One way of supporting this view is by comparing tort law to criminal law or to contract

[12] This distinction between views of the law is noted in Lon L. Fuller, The Morality of Law 63 (Yale Univ. Press rev. ed. 1969).

[13] Ronald A. Cass & Keith N. Hylton, Laws of Creation: Property Rights in the World of Ideas (Harvard Univ. Press 2013).

[14] Wigmore, *supra* note 9, at vii.

law. Criminal law consists of prohibitory rules (e.g., "do not steal") that developed societies state prominently to everyone. Contract law consists of rules that facilitate the process of making and enforcing promises.

Tort law differs from criminal law in that the rules of torts are often discovered through the litigation process. Many tort defendants are not aware that they have committed a tort until a court finds them guilty of it. While criminal law rules are fixed in advance and broadcast loudly to the public, tort law rules are dynamic, changing with society's preferences and technological capabilities, and understood to reflect norms of reasonable behavior that parties should adopt in social interaction. If an individual has not adopted the appropriate norm, a court hearing a tort dispute will consider itself free to state the norm publicly as a rule of law for the first time and apply it retrospectively to hold the individual liable.

Such dynamism and flexibility on the part of courts would be undesirable in criminal law. If criminal laws were generally unstated and applied retrospectively, law enforcers would have virtually unlimited power over citizens. They could choose individuals to punish on the basis of whatever outcomes the enforcers desired.

Tort law differs fundamentally from contract law in that the rules of tort regulate the conduct of parties directly whereas the rules of contract law seek mainly to facilitate the contracting process without controlling the terms of those contracts. In other words, whereas tort law sets rules that regulate the interaction between two individuals, contract law enables those individuals to choose the rules that regulate their interaction and to enforce the rules in an efficient manner. One could go so far as to say that contract law is an oxymoron, because the substantive regulation done by contracts is determined by mutual consent. But that would be an exaggeration; contact law includes many instances of substantive regulation, such as unconscionability doctrine. Still, it strikes me as fair to say that contract law has a largely procedural aim whereas tort law is decidedly substantive in nature.

Given the differences between tort law, on one hand, and contract and criminal law, on the other, tort law has a strong claim to be the core of the common law process, provided that we understand that process as the generation by courts of rules that regulate social interaction. If this claim is valid, then endeavoring to understand the policies that shape tort law is equivalent to endeavoring to understand the policies that shape the common law generally. And given the importance of common law to so many statutory subjects, to constitutional law, and to sound regulation in general, the study of tort law should be viewed as an important priority.

As I have done in my classes, I have emphasized rules in this book. It is possible to study tort law and walk away with the impression that there are no rules, that it is all a matter of weighing burdens and benefits in consideration of the facts of a dispute. This viewpoint implies that if a decision for the plaintiff is more costly to society than is a decision for the defendant, then the decision should be for the plaintiff. However, tort law does consist of rules, and a large part of this book is devoted to identifying them and stating them clearly.

Identification and statement of rules should be of interest to students of the law because legal argumentation involves the articulation and application of legal rules. A person who plans to argue in front of a court will have to be prepared to use the rules – judges for the most part are not interested in hearing one person's reasonableness or cost-benefit analysis. Finally, the law itself advances through the statement of rules. Rules give the law predictability and stability, which would not be observed if courts were left completely free to apply an unguided reasonableness analysis to every dispute.

Chapter 2 provides a survey of utilitarian and deontological (duty-oriented) theories of tort law. I present basic ideas from economic analysis of tort law and contrast them with the moral reasoning approach. This chapter also introduces the concept of externalities and the role of tort law in internalizing losses (negative externalities) to responsible actors. The term externality remains largely confined to the economics literature, which is unfortunate given its obvious relevance to tort law. Much of tort law would be described by economists as the law governing externalities. By introducing the concept of externalities early, I hope to put the reader in a position to see its usefulness in many specific areas of tort law. Of course, it should be kept in mind that the externality concept is important in understanding policy, and by this path gaining a deeper understanding of the law. The courts do not use the term externality much at all, and a course in tort law must in the end teach students how to present arguments to courts. For the most part, Chapter 2 is background material that can be assigned to students without teaching it. Alternatively, a teacher who uses this book might refer back to segments of Chapter 2 as he or she moves through the later chapters.

The economics presented in Chapter 2 may seem overly technical at times to law students, but the technical parts are short and not entirely necessary for understanding the basic lessons and implications for law. The student who prefers not to delve into economics can focus on the lessons for the law rather than the details of the analysis. Similarly, Chapters 5, 11, 17, and 18 delve into somewhat technical matters in economics (e.g., supply-demand analysis in Chapter 17, basic concepts of game theory in Chapter 11, present value calculation in Chapter 18), and there too the student can learn the basic lessons for tort law without having to master the details of economic analysis. On the other hand, perhaps gaining familiarity with modern tools of policy analysis, such as game theory, is a suitable goal for law students. Law increasingly demands an acquaintance with the analytical methods taught in business schools and in public policy schools. Under this view of the matter, the law student should be encouraged to study the technical material closely to prepare him- or herself for future challenges.

Chapter 3 covers intentional torts, such as trespass, battery, assault, and false imprisonment. Intentional torts, as a subject matter, has become less popular among torts teachers in recent years. I have talked to some who do not teach the subject at all in the limited time given in law schools today for teaching torts. However, I view

intentional torts as an important foundation for studying negligence, nuisance, and other torts topics. Tort law began with intentional torts before spreading its net wider to offer protection against negligent conduct. Studying intentional torts lays the groundwork for understanding the policies of negligence and nuisance law. Basic notions of intent, or mental state, are important in understanding the boundaries between nuisance, negligence, and trespass law. Such notions are also important for understanding the boundary between tort and criminal law and the function of punitive damages.

Chapter 4 is a review of ancient cases and the early development of tort law. A popular view holds that tort law has developed from a simple presumption of strict liability, in ancient times, to a more complicated set of doctrines relying on notions of fault. Under this popular view, the substantive regulatory nature of tort law changed between ancient and modern epochs. I suggest in Chapter 4 that the important differences between early and modern tort law are procedural rather than substantive.

Chapter 5 presents an introduction to the doctrine of strict liability and provides a functional, utilitarian view of the doctrine as established in *Rylands v. Fletcher* and related cases, drawing on concepts and analytical tools introduced in Chapter 2. The framework provides a policy-based explanation for the scope of strict liability, the boundary between negligence liability and strict liability, and notions of duty in tort law.

Chapters 6 and 7 introduce and explore negligence doctrine. Negligence is often described as a failure to act as a reasonable person. Moreover, the reasonable person standard is objective, in the sense that it does not take into consideration the idiosyncratic preferences or psychological features of the defendant. Chapter 6 examines common patterns in negligence theories and the extent to which the reasonable person standard varies according to individual traits and with respect to widely shared moral intuitions. Chapter 7 extends this examination to incorporate compliance with customs and statutes.

Chapter 8 addresses the problem of inferring negligence on the basis of circumstantial evidence and the doctrines and policies that courts have adopted to provide consistency in these cases. This requires an acknowledgment of the respective roles of judge and jury in the negligence determination. I also discuss the role of baseline probabilities and statistical reasoning in the law on inference.

Chapters 9 and 10 present the major defenses to negligence: contributory negligence, assumption of risk, and comparative negligence. In addition to explaining the law, I offer a framework for understanding the incentives created by these doctrines. Chapter 11 covers joint and several liability, and vicarious liability. These chapters all fit together because they deal with a similar problem: how to structure incentives under tort law to encourage care on the part of two or more actors who can affect the risk of injury to a victim. The doctrines in these areas have a surprisingly similar structure in spite of differences in labels, because they are designed to address similar incentive problems.

Chapters 12 and 13 present the tort law on causation, first factual causation and then proximate causation. In addition to presenting the law, my aim in these chapters is to simplify and identify a useful conceptual apparatus. Chapter 14 discusses the duty to rescue and other relationship-based duties, such as the duties of land occupiers to land visitors. These chapters strive toward a policy framework under which the cases can be organized. The treatment in many torts textbooks leaves the reader with the impression that the cases are scattered about with no unifying conceptual framework.

Chapter 15 explores the law on strict liability. This chapter uses the doctrine of *Rylands v. Fletcher*, examined in Chapter 5, to offer a general account of the ultrahazardous activities and nuisance cases and presents a common framework for the law governing ultrahazardous activities and nuisances.

Chapter 16 is on defamation and shows that the *Rylands* doctrine and policy both provide a framework for understanding defamation law. One puzzle I address is why expression, a socially beneficial activity, would fall under the same legal framework as ultrahazardous activities. However, defamation liability does not apply to expression in general, only to false and socially harmful expression. The general patterns of theories of liability, and of defenses, observed in strict liability and defamation law are very much alike. Defamation law is much easier to understand when its similarity to ultrahazardous activities doctrine is kept in view.

Chapter 17 discusses products liability law. Although often described as strict liability, that is a fair description of only a part of the law – that governing manufacturing defects. The rest of the law governs failures to warn and defective design litigation. These areas fall under negligence or negligence-like standards. The policy bases for these tests are examined closely. Supply and demand analysis is introduced to provide a foundation for understanding the effects of products liability rules.

Chapter 18, the final chapter, presents the law on damages, compensatory and punitive, and examines the influence of damages on the operation of the tort system. I provide an explanation of the functions of both compensatory and punitive damages. The chapter also includes a discussion of incentives to file suit, to settle, to waive tort claims, and to enter into subrogation agreements.

This book can be used as a text for a lecture-based course on tort law or to supplement a case book. I have tried to make the book "cross-platform" – that is, capable of being used along with any torts casebook, or without any torts casebook, by discussing mostly well-known cases. The heavy emphasis on policy makes this book especially suitable for courses that have a doctrinal and policy focus.[15] Readers of the more practice-oriented casebooks can also use this book to learn about the policies that have influenced tort law. In addition, this book may be appropriate

[15] Two casebooks that fit this description are the Epstein-Sharkey casebook, *supra* note 6, and Robert E. Keeton, Lewis D. Sargentich, and Gregory C. Keating, Tort and Accident Law (West Acad. Pub. 4th ed. 2004).

for undergraduate or non-law-school courses, where it may be more useful to get students to think about the broader rationales behind the law than to master specific legal rules. Indeed, one might create a course on modern tools for legal analysis,[16] using this book, by focusing largely on the more technical parts of the text (in Chapters 2, 5, 11, 17, and 18) and relevant applications to law.

This textbook is the culmination of many years of teaching and writing on tort law. My colleagues, speaking broadly of torts professors with whom I have interacted throughout my career, have contributed mostly by identifying puzzles in tort doctrine that, when examined closely, seem to reveal yet more difficult puzzles. And so many students have assisted my research on torts that it would be difficult to list all of them. Two, however, worked on the entire manuscript: Nina Prevot and Matt Saldana. I asked both of them to read the manuscript from the perspective of a new law student, and they identified numerous passages that had to be changed to make the argument clearer. With luck I will continue to find able and energetic students to work with me on this project.

[16] Some law schools now offer courses on tools for legal analysis. Two books in this area are Ward Farnsworth, The Legal Analyst: A Toolkit for Thinking about the Law (Univ. of Chicago Press 2007), and Frederick Schauer, Thinking like a Lawyer: A New Introduction to Legal Reasoning (Harvard Univ. Press 2009). Unlike these books, this book incorporates modern analytical tools in a detailed examination of a specific area of law.

# 2

# Policy and Tort Law

Tort law has been shaped by the policies, often unarticulated, that appear most attractive and persuasive to courts. The two main sources of policies embraced by courts are the fields of economic reasoning and moral reasoning. But there are other sources of policy in addition to these.

Policy rationales can provide either a positive or a normative theory of the law. A positive theory seeks to explain and understand the law as it is. A normative theory seeks to provide a description of an ideal legal system. Positive theories are presented in an effort to provide a deeper understanding of a body of case law. Normative theories, in contrast, are used to criticize existing law and to suggest alternatives, though they sometimes can provide a deeper understanding of the law too. Since this book aims primarily to describe and explain existing tort law, it draws on policy arguments as sources of positive theory for the most part. This chapter surveys the most prominent policies reflected in tort law.

## I. ECONOMIC PRINCIPLES

Economics has increasingly become an important perspective and set of tools to use in analyzing tort law. The reason is easy to see when you examine the cases. Many tort cases involve an explicit tradeoff between costly precautionary effort and risk. The standard example in our lives is driving. A driver can take more precaution by reducing his speed and looking to both sides of the road more frequently. Each time he does so he reduces the likelihood of running into a pedestrian or another car. But each additional precautionary effort costs the driver something – perhaps he arrives to work late as a result.

The tradeoffs tort law grapples with can be classified into two types. One is the tradeoff between instantaneous care and risk. Again, the typical example is driving with more or less care. The other is the tradeoff between activity and risk – that is, doing more or less of an activity, irrespective of how careful you are. For example,