

CED: An Overview of the Law

Torts

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Part II – Principles of Liability

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II.1.(a): Principles of Liability – Standard of Liability – Intention

See Canadian Abridgment: TOR.XXII Torts — Miscellaneous

Under certain causes of action, the plaintiff must establish that the defendant intended to cause the plaintiff's injury. Intent may be established by showing that the defendant desired to cause certain consequences that were the result of his or her act or that the defendant believed certain consequences were certain to result from that act.

In some intentional torts the onus may be placed on the defendant to disprove intention after the plaintiff has established the basic elements of the cause of action. Constructive intent, where the intention of the defendant is presumed in the absence of evidence to the contrary, may arise as the relevant standard of liability.

In addition, it has been said that a defendant may be held liable for an intentional tort on the basis of transferred intent: when the defendant intends to do one thing, such as injure B, but fails and injures C, the intention to cause injury may be transferred from B to C to provide C with a cause of action. Therefore, where the defendant intends to commit the tort of battery, but misses the plaintiff and only causes flight, the necessary intent for the tort of assault is present.

Although intention may be a requisite to liability in certain torts and the most onerous standard of liability to establish, intention to cause injury to a person will not, by itself, found liability. An act that is legal in itself will not be made illegal because the motive of the act was bad.

II.1.(b): Principles of Liability – Standard of Liability – Negligence

See Canadian Abridgment: TOR.XVI.2 Torts — Negligence — Duty and standard of care

In other instances, it is sufficient for the plaintiff to establish that the defendant was negligent, that he or she had failed to adhere to an objective standard of care regardless of the actual subjective intention, in order to found liability. Negligence by itself will also not always

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found liability in tort. Although the defendant may have breached a duty of care to the plaintiff which has been previously recognized under the law, the damage to the plaintiff must fall within recognizable limits of remoteness and causation, and must also be of a type which is remediable under the law.

II.1.(c): Principles of Liability – Standard of Liability – Strict Liability

See Canadian Abridgment: TOR.XVI.6 Torts — Negligence — Strict liability (rule in *Rylands v. Fletcher*)

In some instances, the defendant will still be held legally responsible when neither an intentional nor a negligent act is found and it is only proven that the defendant's act did result in injury to the plaintiff.

II.2: Principles of Liability – Volition

See Canadian Abridgment: TOR.XXII Torts — Miscellaneous

Intention is distinguishable from volition. There is no right of action for any tort whether one of intention, negligence or strict liability, unless the act or conduct of the defendant was voluntary. Voluntary means that the act or conduct must be conscious; the defendant's mind must prompt and direct such act or conduct. A person who inflicts an injury and at the time is in a condition of complete automatism, will not be held liable under the principles of tort law. The onus is on the defendant to show that the act or omission complained of was involuntary.

The courts have often merged and confused the concepts of volition and capacity, particularly where the defendant's lack of control over an act does not result from external forces, but from an internal condition.

It is no defence to a voluntary, wrongful act or omission that the defendant did not appreciate its natural consequences.

II.3: Principles of Liability – Motive

See Canadian Abridgment: TOR.XXII Torts — Miscellaneous; TOR.XIV.2.b.iv Torts — Malicious prosecution and false imprisonment — Establishing elements — Malice — Motive imputing malice

Motive is distinct from intention. Intention refers to the defendant's desire to bring about certain consequences; motive is the underlying reason for the conduct. Except in cases of malicious prosecution, injurious falsehood, abuse of process, maintenance, abuse of public office and conspiracy, the motive for a tortious act is irrelevant. An act that is legal in itself is not made illegal because the motive of the individual committing the act is bad, that is, done

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with the intent to injure or to effect some ulterior purpose.

If conduct is tortious, a good motive will not excuse the defendant. If conduct is lawful apart from the motive, a bad motive will not make the defendant liable. Where the defendant's conduct is tortious, liability can be imposed, even where the plaintiff actually benefits from the defendant's actions or where the defendant merely intends to play a practical joke.

A bad intent may render illegal an act done in combination with others which would have been legal if committed by one person only. A bad or wrongful motive will defeat the defence of privilege in an action for defamation.

II.4: Principles of Liability – Mistake

See Canadian Abridgment: TOR.XXII Torts — Miscellaneous

Mistake refers to the situation where the defendant intends to produce a particular result but mistakenly believes that his or her conduct is innocent. The mistake may be one of fact or law. Where the defendant is in full possession of all facts of the situation giving rise to the injury, failure to apprehend the tortious character of his or her conduct is a mistake of law. A defendant acting under a mistake of law is not excused from liability.

The defendant who mistakenly but honestly and reasonably believes in a state of facts which, if true, would provide a complete justification for his or her conduct is acting under a mistake of facts. The relevance of mistake of fact on all intentional torts is uncertain, but it is generally no defence to intentional interference with property interests.

II.5: Principles of Liability – Duty to Injured Party

See Canadian Abridgment: TOR.XVI.2 Torts — Negligence — Duty and standard of care; TOR.VII.3.a Torts — Fraud and misrepresentation — Negligent misrepresentation (Hedley Byrne principle) — Nature and extent of duty of care

No person can be held liable in tort unless the act or omission with which he or she is charged was a breach of a duty owing by that person to the plaintiff or to a class to which the plaintiff belongs, and the plaintiff has suffered individual damage therefrom.

A relationship based on proximity or reliance may exist between the plaintiff and defendant, giving rise to an actionable duty of care.

II.6: Principles of Liability – Interest Harmed

See Canadian Abridgment: TOR.XXII Torts — Miscellaneous

Injury that is recognized as actionable under the law may be caused by the direct act of

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the defendant, the indirect or consequential act of the defendant, the omission or failure of the defendant to act or by a general legal responsibility imposed upon the defendant because she or he has a special relationship to the individual who actually caused the injury. For instance, an employer may be vicariously responsible for the act of an employee, a principal for that of an agent or a publisher for the defamatory statement of a writer.

Interests protected by the law of torts can be classified as injury to the person, injury to the property of the plaintiff and injury to the financial interests of the plaintiff.

In some instances, injury or damage is presumed when the defendant's act has violated what can be considered to be the absolute right of the plaintiff. For instance, in defamation and in battery, the law presumes that injury has occurred from the act that constitutes the cause of action itself.

II.7: Principles of Liability – Burden of Proof

See Canadian Abridgment: TOR.V.4.c Torts — Defamation — Justification — Burden of proof; TOR.V.5.b.v.B Torts — Defamation — Privilege — Qualified privilege — Malice — Burden of proof; TOR.VII.4.b.ii Torts — Fraud and misrepresentation — Duress and undue influence — Undue influence — Burden of proof; TOR.VII.5.e Torts — Fraud and misrepresentation — Remedies — Burden of proof; TOR.XIV.2.b.ii Torts — Malicious prosecution and false imprisonment — Establishing elements — Malice — Burden of proof; TOR.XVI.14.e.iii Torts — Negligence — Practice and procedure — Evidence — Burden of proof; TOR.XVII.4.b Torts — Nuisance — Practice and procedure — Burden of proof; TOR.XX.5.b Torts — Trespass — Practice and procedure — Burden of proof

The plaintiff must establish facts from which the judge or jury may reasonably draw the inference that the wrongful act of the defendant was the probable cause of injury. The burden of proof is whether on a balance of probabilities the defendant constituted the cause of the plaintiff's injury.

When a plaintiff has been injured by one of two defendants, in circumstances where both defendants have acted carelessly, and the effect of the carelessness has been to make it impossible for the plaintiff to show which one of the defendants actually caused the injuries, both defendants should be found liable unless they can exculpate themselves.

The doctrine of *res ipsa loquitur* is expired and is no longer a separate component of negligence actions. If the plaintiff's direct and circumstantial evidence establishes a *prima facie* case of negligence on the balance of probabilities, the defendant must present evidence negating the plaintiff's evidence or the plaintiff will necessarily succeed.

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II.8: Principles of Liability – Concurrent Liability in Contract and Tort

See Canadian Abridgment: TOR.VII.3.d Torts — Fraud and misrepresentation — Negligent misrepresentation (Hedley Byrne principle) — Relationship between contract and tort

Liability may be imposed upon a defendant for both a tortious wrong and breach of contract. Where a contract exists between the parties, the plaintiff must establish, to succeed in an action for tort, that there also existed a special relationship that gives rise to a common law duty of care in tort. If the breach alleged is of a duty arising out of the obligations undertaken by the contract, which cannot be established without reference thereto, the action must be founded in contract.

Concurrent liability may exist where the plaintiff can establish that a common law duty of care was owed because there was a relationship of sufficient proximity between the parties to constitute that duty and there is no valid policy reason for negating the duty. The terms of the contract may indicate the nature of the relationship but the express duty must not depend upon the obligations set out under the contract and must exist independently at law. The plaintiff may assert the right or cause of action which is most advantageous, unless there is an express exclusion or limitation of liability in the contractual terms between the parties. This election may have a bearing upon the relevant limitation of action provision, the commencement of the limitation period, the type of damages that can be claimed and the applicability of statutes that apportion liability.

The plaintiff's election to sue in tort or contract may affect the heads of damage available. It is clear that punitive damages may be awarded in tort actions, but such an award is very rare in contract cases. Punitive damages may be awarded in respect of conduct which is of such nature as to be deserving of punishment because of its harsh, vindictive, reprehensible and malicious nature.

In Canada, the courts have held that the amount of damages recoverable should not depend on whether the plaintiff brings a cause of action in tort or contract. The difference between “reasonably foreseeable” (the test in tort) and “reasonably contemplated” (the test in contract) is semantic and not substantial.

A plaintiff cannot recover both in tort and for breach of contract when the tort and breach of contract result from the same act. The plaintiff must either elect one of the two or be deemed to have so elected. The recovery of one judgment in respect of two distinct and technically incompatible causes of action is impossible.