

Introduction to Torts



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Learning Outcomes

After completing this chapter, you should be able to:

- Describe the historical development of tort law.
- Explain the rationale for tort law.
- Describe the ways in which tort law differs from criminal law, including with respect to procedural differences.
- Describe the different categories of tort.

Introduction

If you are reading this text, you have likely embarked on a course of study for aspiring paralegals. During the program in which you are enrolled, you will take classes that introduce you to the history and development of Canada's common law system, as well as classes in various substantive areas of law. The **law** can be described as a system of rules that are enforced by institutions of the state, including the courts. These rules govern our relationship with the state, as well as our relationships with each other.¹

law

a system of rules that are enforced by institutions of the state, including the court

tort

a type of civil wrong committed by one person against another

contract

a legally enforceable agreement between two or more parties

tortfeasor

the person who commits a tort

injunction

a court order prohibiting someone from engaging in certain conduct

plaintiff

a person who initiates civil proceedings against another person

defendant

a person against whom a plaintiff has initiated civil proceedings

negligence

a tort based on careless conduct or conduct that creates a reasonably foreseeable risk of harm when a duty of care is owed to another and reasonable care is not used, resulting in damage or injury to another

This text, intended to be used in a course focused specifically on business law, introduces the legal concepts of torts and contracts. Stated briefly, a **tort** is a type of civil wrong that one party commits against another. The historical development of tort law and a brief outline of the different categories of torts will be provided below. Specific torts will be explored more comprehensively in the remaining chapters of Part I of this textbook. A **contract**, meanwhile, is a legally enforceable agreement between two or more parties. Contract law will be the subject of Part II of this textbook.

Paralegals in Ontario may represent clients in Small Claims Court, which means that you will be able to handle matters dealing with the torts discussed in the following chapters in respect of claims for up to \$35,000.

Historical Roots and Development of Tort Law

The word “tort” derives from the Latin word “tortus,” which means “twisted.” The word eventually evolved into the French word “tort,” which means “wrong.”² As described above, a tort is a type of civil wrong committed by one person against another. The wrong may be committed against the person's body, reputation, property, or even business interests. A wrongdoer who commits a tort (known as a **tortfeasor**) may be held liable and ordered to pay damages to the person wronged.³ Equitable remedies, such as an **injunction**, may also be available in certain circumstances.

Tort law has a long history, having evolved in English courts for over a thousand years to address a variety of wrongs. The distinction between private wrongs committed against another person and public wrongs committed against the state has not always been clear, and tort law developed alongside—and at times overlapped with—criminal law. Suffice it to say that the English common law system eventually adopted a system separate from that of criminal law by which a person (the **plaintiff**) could initiate private proceedings against another person (the **defendant**) to claim compensation for damages. While for hundreds of years, tort law was primarily concerned with intentional wrongs, such as assault and trespassing, the law developed in the 19th and 20th centuries to include unintentional wrongs, also known as **negligence**.⁴ The Canadian provinces and territories other than Quebec inherited this English system.

1 John Fairlie, *Introduction to Law in Canada*, 3rd ed (Toronto: Emond, 2023) at 4-5.

2 Chris DL Hunt, “From Right to Wrong: Grounding a ‘Right’ to Privacy in the ‘Wrongs’ of Tort” (2015) 52:3 *Alta L Rev* 635 at 641, DOI: <<https://doi.org/10.29173/alr26>>.

3 Margaret Kerr, JoAnn Kurtz & Laurence M Olivo, *Canadian Tort Law in a Nutshell*, 5th ed (Toronto: Thomson Reuters, 2019) at 1.

4 *Ibid* at 1-4.

Distinguishing Torts from Crimes

There are a number of differences between tort and criminal law, as discussed below.

The Purpose of Tort Law

Tort law is important to victims of wrongdoing because in addition to discouraging harmful action, tort law provides victims with the ability to seek compensation from a wrongdoer regardless of whether the person has been punished criminally. For example, imagine that your laptop is stolen while you are studying at the library. While calling the police in this case may result in the thief being arrested, charged, and ultimately convicted of a crime, the criminal justice system would do little to address the fact that you now have to spend money to purchase a replacement laptop. Tort law—and in this case, specifically, the tort of conversion—would provide you an avenue for taking civil action against the thief for the value of your laptop.

Federal Versus Provincial Jurisdiction

Authority over criminal law and tort fall to different levels of government. Under section 91(27) of the *Constitution Act, 1867*,⁵ criminal law falls under the jurisdiction of the federal Parliament. As a result, Parliament has adopted the *Criminal Code*,⁶ which applies across Canada and sets out the various criminal offences and punishments for which a person can be prosecuted.

Section 92(13) of the *Constitution Act, 1867*, on the other hand, grants authority over “property and civil rights” to the provinces. In this case, “civil rights” refers to private rights, including torts and contracts. Thus, a tort that exists in one province may not exist in another.

Source of Law

Further, criminal law is based in statute. As mentioned above, the *Criminal Code*, as well as other statutes, sets out crimes for which a person may be prosecuted. Common law crimes have generally been abolished in Canada, and as such a person cannot be prosecuted for an offence that does not exist in legislation.⁷

In respect of the provinces and territories other than Quebec, the torts discussed in the following chapters, as well as many of the contract law principles outlined in Part II of this textbook, emerge primarily from the common law. This means that the torts originate in legal decisions issued by the courts rather than legislation. The law related to individual torts may evolve with the case law over time according to the principle of **stare decisis**, and courts can even recognize new torts that previously did not exist.

stare decisis

the principle under which courts are generally bound to follow earlier decisions in respect of the same legal issues

5 30 & 31 Vict, c 3, reprinted in RSC 1985, Appendix II, No 5.

6 RSC 1985, c C-46.

7 See *Criminal Code*, s 9. A common law crime is an offence that, similar to a tort, emerged out of the common law. A notable exception to the abolition of common law crimes is the offence of contempt of court where someone has, for example, interfered with judicial proceedings or disobeyed a court order.

That said, some aspects of tort law have been codified in statute, such as in the case of Ontario's *Occupiers' Liability Act*.⁸

Criminal Procedure Versus Tort Procedure

The process for prosecuting a criminal offence is also markedly different than the process for bringing a private action against a tortfeasor. Criminal law is generally intended to protect wrongs against society, and crimes are thus prosecuted by a **Crown prosecutor** on behalf of the state. The Crown has the responsibility of moving the case forward, deciding on strategy, and ultimately working to secure a conviction. The Crown calls witnesses to the stand and questions them. While the victim of the crime may be called to testify, they are not generally involved in deciding how the case proceeds (or whether it proceeds at all). However, the Crown has a high **burden of proof** to ensure a conviction. If the Crown cannot prove its case **beyond a reasonable doubt**, the accused will be acquitted. A defendant in a criminal prosecution may thus be found not guilty of an offence even if the judge or jury believes that it is more likely than not that the defendant committed the crime. Assuming the wrongdoer is convicted, various punishments may be imposed, including incarceration, probation, and fines.⁹

An action based in tort, on the other hand, is a civil action. This means that the person against whom a tort has been committed (the plaintiff in the court action) must bring a lawsuit against the tortfeasor (the defendant) in civil court to obtain a remedy, which is typically compensation. When a plaintiff brings a lawsuit, the **cause of action** and the facts that support it are described in a document called a **statement of claim**. The elements of and the facts supporting any defence that will be relied on by the defendant are set out in the **statement of defence** filed in response to the statement of claim.

In Ontario, actions for up to \$35,000 are brought in Small Claims Court. If the victim of the tort decides not to bring an action, the tortfeasor will not be held liable. Where an action is initiated, it is the plaintiff's responsibility to move the case forward by satisfying the various requirements to, for example, provide disclosure to the defendant (and receive disclosure from the defendant), attend a settlement conference, and set the action down for trial. A civil trial is also procedurally different than a criminal one, with the plaintiff (or their lawyer or paralegal) calling and questioning witnesses. Further, unlike in a criminal action, the plaintiff need only prove their case on a **balance of probabilities**. This means that the plaintiff need only prove that it is more likely than not that the defendant committed the tort. This is a lower burden of proof than in criminal actions, as a defendant may be held liable in a civil action even in the face of reasonable doubt.

One Incident, Two Actions

Finally, it should be noted that as mentioned above, the same incident may give rise to both a criminal prosecution and a tort action. For example, imagine that you punched someone at a restaurant after a verbal altercation. In this case, you could be prosecuted by the Crown for the criminal offence of assault. The person that you punched could

Crown prosecutor
the lawyer that prosecutes criminal offences on behalf of the state

burden of proof
the threshold a prosecutor or plaintiff must meet to make their case

beyond a reasonable doubt
in criminal cases, the burden of proof the Crown must meet before the accused can be convicted

cause of action
a set of factual elements that entitle a plaintiff to sue

statement of claim
the document setting out the cause of action and supporting facts that a plaintiff typically prepares and files to initiate a lawsuit

statement of defence
the document prepared and filed by a defendant in response to a statement of claim

balance of probabilities
in civil cases, the burden of proof the plaintiff must meet to prove their case, specifically that it is more likely than not that the defendant committed the tort

⁸ RSO 1990, c O.2.

⁹ See *Criminal Code*, part XXIII.

also sue you for the torts of assault and battery. The criminal prosecution would occur in a criminal court and follow criminal trial rules and procedures, while the civil case would occur in civil court under a different set of rules and procedures. While the criminal action would seek to punish you for the offence you committed, the purpose of the tort action would be primarily to allow the plaintiff to pursue compensation for any damages you caused. The damages could include such things as medical expenses and lost wages due to time off work. The remedies available in a tort action will be discussed in Chapter 8.

TABLE 1.1 Compare and Contrast Essential Elements of Civil and Criminal Cases

Essential Elements	Civil	Criminal
Style of cause	<i>MacLaren v Smith</i>	<i>R v Jonas</i>
Initiating document	Statement of Claim/ Application	Information
Standard of proof	Balance of probabilities (at least 51 percent likelihood or probability that respondent committed wrongful conduct)	Beyond a reasonable doubt that accused committed wrongful conduct
Onus of proving case	Plaintiff/Applicant	Crown Attorney
Carriage of case	Plaintiff/Applicant	Crown Attorney
Party responding to proceeding	Defendant/Respondent— person, persons, or entity being sued	Person accused of criminal offence
Trier(s) of fact	Judge or (more rarely) a jury of 6 jurors; unanimity not required	Judge or jury of 12 (fewer in the territories); jurors must be unanimous
Role of alleged victim	Plaintiff/Applicant and witness	Witness

Classification of Torts

The most common, and probably most logical, model for classifying individual torts organizes torts according to the nature or level of intent possessed by the tortfeasor.

Intentional Torts

Intentional torts are torts where the tortfeasor intends the conduct that gives rise to the tort. Generally, other than in the case of some business torts, this means that the tortfeasor only needs to intend to commit the physical act itself but does not necessarily need to intend to commit a wrong or to cause damage.

For example, the tort of trespass to land would occur if you intended to step, and did step, onto your neighbour's land without consent, even if you did not intend to trespass or cause damage to your neighbour's property. You would be committing a trespass even if you believed the property was actually yours. Since you intended to step onto the land in question (and actually did so), you have committed the tort.

Intentional torts can include actions that cause harm to people (e.g., battery and false imprisonment), physical property (e.g., trespass to chattel and conversion), reputation (e.g., defamation), and economic interests (e.g., inducing breach of contract). Intentional torts will be examined in greater detail in Chapters 2, 3, and 4.

Negligence

Negligence is referred to as an unintentional tort. Negligence occurs where someone who owes you a duty acts unreasonably or carelessly and, in doing so, causes you reasonably foreseeable damages. In essence, a person that acts negligently does not commit an act intentionally but does so due to carelessness or recklessness. For example, if your friend intentionally hit your leg with a hockey stick, they may have committed the intentional tort of battery. Your friend in that case intended to swing the stick at you. If, however, you tripped on a hockey stick that your friend carelessly left laying on their porch steps, causing you to fall and hurt yourself, your friend could be liable for negligence. In that case, your friend did not intend to strike you with their hockey stick, but rather was arguably careless in leaving their hockey stick in a place that may cause you harm.

Negligence lies at the heart of tort law, and the bulk of modern personal injury and property damage cases are based on negligence. There are also subcategories within the law of negligence—for example, occupiers' liability, which covers the duty owed by occupiers of property, and product liability, which deals with the duty that product manufacturers and others owe to users of their product. Negligence will be discussed in Chapters 5 and 6. Distinct subcategories of negligence will be examined more closely in Chapter 7.

Strict Liability

strict liability
a type of tort that provides for liability in the absence of negligence or intentional conduct

Strict liability torts are those that may see the defendant held liable even if the defendant did not intend the conduct that caused harm to the plaintiff and did not act carelessly (and thus was not negligent). Consider, for example, a case where your neighbour on a hillside property has excavated their backyard for a pool. They've followed all applicable laws and acted in a reasonable manner. However, a rainstorm causes a mudslide that sweeps their excavated soil onto your property, damaging your house. Your neighbour was not negligent since they acted reasonably, but they may be held strictly liable for the damage to your property.

The doctrine of strict liability provides a remedy in a narrow range of cases in which there are public policy reasons for requiring a morally innocent, or near-innocent, party to pay for unexpected harm. Strict liability torts are rare and have been recognized in only limited circumstances, notably when harm is caused by the escape of something from a landowner's property.

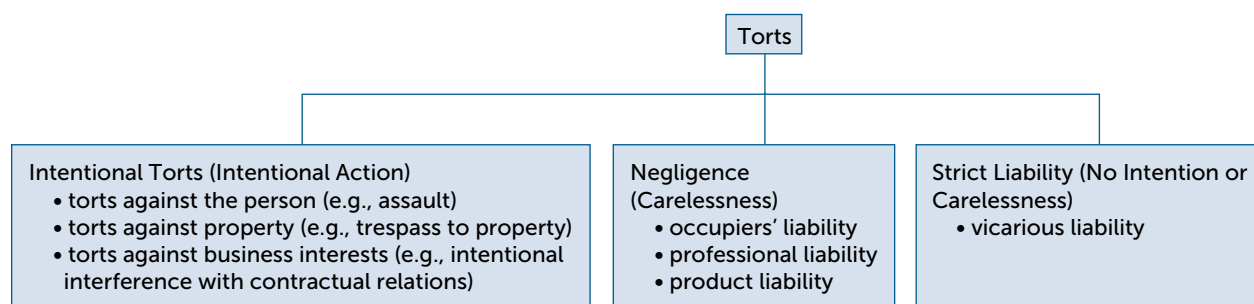
Notably, there are defences available to defendants alleged to have committed a strict liability tort. The availability of defences distinguishes strict liability from the concept of **absolute liability**, where there are no defences available. Absolute liability is typically relevant in respect of regulatory offences like speeding rather than torts.

Vicarious liability, which is sometimes referred to as a subcategory of strict liability, is the principle that a person may be held liable for the actions of another due to their relationship, such as where employers are held responsible for the actions of their employees when acting in the normal course of business. For example, imagine that a loss prevention officer detains you against your will on the suspicion of shoplifting. If you were innocent and sued, a court may hold that the employee and the store owner as the employer are both liable due to the principle of vicarious liability. Strict liability and vicarious liability will be discussed in Chapter 8.

absolute liability
liability that is imposed despite the lack of negligence or intent and for which no defences apply

vicarious liability
the liability of a principal (e.g., an employer) for the negligent or tortious acts of the principal's agent (e.g., an employee) done within the scope of the agent's authority or employment

FIGURE 1.1 Tort Classifications



CHAPTER SUMMARY

The objectives of this chapter were twofold. The first was to introduce the purpose of tort law and the context in which it exists, especially in contrast to that of criminal law. The second objective was to describe the system for classifying torts.

The most logical model for classifying torts is that based on the role of intent. Torts can be classified on an intent spectrum that runs from conscious intent at one end to complete lack of intent, or moral innocence, at the other. The major categories of tort, in the order that they fall on

this spectrum, are intentional torts, negligence, and strict liability.

Within the categories of tort, there are subcategories. In the context of intentional torts, the subdivisions are typically based on the subject of harm, whether that be a person, property, or business interest. In the context of negligence, the subcategories are distinguished on the basis of the nature of the activity that gives rise to the harm—for example, the delivery of professional services or the manufacturing of products.

KEY TERMS

absolute liability, **9**

balance of probabilities, **6**

beyond a reasonable doubt, **6**

burden of proof, **6**

cause of action, **6**

contract, **4**

Crown prosecutor, **6**

defendant, **4**

injunction, **4**

law, **4**

negligence, **4**

plaintiff, **4**

stare decisis, **5**

statement of claim, **6**

statement of defence, **6**

strict liability, **8**

tort, **4**

tortfeasor, **4**

vicarious liability, **9**

REVIEW QUESTIONS

1. What is the purpose of tort law?
2. What is the source of tort law?
3. If a wrongdoer is punished for a criminal offence, why would a victim sue privately?
4. Who is responsible for prosecuting a wrongdoer in criminal court? Who is responsible for pursuing the wrongdoer in civil court?
5. Why might someone who is found not guilty of a criminal offence be found liable if the victim sued in civil court?
6. What are three major branches of tort law, and how do they differ in terms of intention of the tortfeasor?

EXERCISES

1. Linda is upset that her professor's lecture ran late. While walking to catch the bus, she spots her professor's car in the parking lot and uses her keys to scratch the paint on the car's door. Linda has committed what kind of tort?
2. Felicity owns a flower shop, Felicity's Flowers, in Toronto. During the course of the morning, water spilled from some vases and onto the floor. Despite seeing the spill, Felicity did nothing to clean it up. A few hours later, a customer slipped and fell as a result of the slippery floor. Assuming Felicity has committed a tort, what kind of tort has she committed?
3. Raj owns a business in Ontario and wants to learn about the various torts that may be relevant to his business. Janice tells him that the best way to learn tort law would be to look up the relevant federal torts statute since torts in Canada apply nationwide and are codified in legislation. Is Janice correct?
4. Consider the case of a wrongdoer who, in a fit of anger, trespasses on your property and spray paints your garage door. You call the police, and the person is charged with vandalizing your house. You also want to pursue the wrongdoer in civil court to seek compensation for repairing your garage.

What are the differences between the criminal process and the civil process in this case? What category of tort would you be pursuing here? Do you think it's fair that the wrongdoer must engage in two different court processes?