

# Introduction to Torts

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## Introduction

The law can be described as a system of rules that is enforced by institutions of the state, including the courts. These rules govern our relationship with the state and our relationships with each other.<sup>1</sup> This textbook is focused specifically on tort law. 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 in this chapter. Specific torts will be explored more comprehensively in the remaining chapters of this textbook.

## Historical Roots and the 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.”<sup>2</sup> 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 wronged party.<sup>3</sup> Equitable remedies, such as an **injunction**, may also be available in certain circumstances.

Tort law has a long history as it has 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

### **tort**

a type of civil wrong committed by one person against another

### **tortfeasor**

a person who commits a tort

### **injunction**

an equitable remedy in which a court may order a defendant to act in some way or, more commonly, to refrain from engaging in certain conduct

### **plaintiff**

a person who initiates civil proceedings against another person

- 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.

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**.<sup>4</sup> The Canadian provinces and territories—other than Quebec—inherited this English system.

## 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 actions, 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 must spend money to purchase a replacement laptop. Tort law—and in this case, specifically, the tort of conversion—would provide you with an avenue for taking civil action against the thief for the value of your laptop.

### Federal Versus Provincial Jurisdiction

Authority over criminal and tort law falls to different levels of government. Under section 91(27) of the *Constitution Act, 1867*,<sup>5</sup> criminal law falls under the jurisdiction of the federal Parliament. As a result, Parliament has adopted the *Criminal Code*,<sup>6</sup> which applies across Canada and sets out the criminal offences 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

**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

4 *Ibid* at 1-4.

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

6 RSC 1985, c C-46.

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 the 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.<sup>7</sup>

With respect to the provinces and territories other than Quebec, the torts discussed in the following chapters emerged primarily from the common law. This means that the torts originated in legal decisions issued by the courts rather than in legislation. The law related to individual torts may evolve with case law over time according to the principle of *stare decisis*, and courts can even recognize new torts that previously did not exist. That said, some aspects of tort law have been codified in statute, such as in the case of Ontario's *Occupiers' Liability Act*.<sup>8</sup>

## Criminal Procedure Versus Tort Procedure

The process for prosecuting a criminal offence is also markedly different from 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 the strategy, and ultimately working to secure a conviction. The Crown also calls witnesses to the stand and questions them. While the victim of a 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

### *stare decisis*

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

### **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

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, which occurs when someone has, for example, interfered with judicial proceedings or disobeyed a court order.

8 RSO 1990, c O.2.

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.<sup>9</sup>

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 a **statement of defence**, which is filed in response to the statement of claim.

In Ontario, actions for up to \$35,000 are brought in Small Claims Court, while actions above that amount are brought in the Superior Court of Justice. If the victim of a 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 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 from a criminal one in that the plaintiff (or their lawyer or paralegal) calls and questions the witnesses. Further, unlike a criminal action, the plaintiff only needs to prove their case on a **balance of probabilities**. This means that the plaintiff only needs to prove that it is more likely than not that the defendant committed the tort.

**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

9 See *Criminal Code*, part XXIII.

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.

## Multiple Actions for One Incident

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 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 primarily be 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 14, Damages and Remedies.

## Classification of Torts

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

### Intentional Torts

Intentional torts are torts committed by a tortfeasor who 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 cause damage.

For example, the tort of trespass to land would occur if you intended to step (and did actually 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 Chapter 2, Intentional Torts Against the Person, and Chapter 3, Property Torts. Defences to intentional torts will be discussed in Chapter 5, Defences to Intentional Torts.

## Negligence

Negligence is referred to as an unintentional tort. Negligence occurs when someone who owes you a duty of care acts unreasonably or carelessly and, in doing so, causes you reasonably foreseeable damages. In essence, a person who 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 had left on their porch steps, causing you to fall and hurt yourself, your friend could be held liable in 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 in 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 Chapter 6, Negligence: Duty and Standard of Care, and Chapter 7, Negligence: Damages and Causation. Defences to negligence will be discussed in Chapter 8, Defences to Negligence and Apportioning Liability, while distinct subcategories of negligence will be examined more closely in Chapter 9, Liability of Occupiers and Hosts, and Chapter 10, Product Liability and Professional Liability.

## Strict Liability

**Strict liability** torts are those that may see the defendant held liable even if they did not intend the conduct that caused harm to the plaintiff and did not act carelessly (and thus were not negligent). Consider, for example, a case where your neighbour on a hillside property has excavated their backyard for a pool. While they followed all applicable laws and acted in a reasonable manner, a rainstorm caused a mudslide that swept their excavated soil onto your property, which damaged 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 for a narrow range of cases in which there are public policy reasons for requiring a morally innocent, or

### **strict liability**

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

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 with respect to regulatory offences, such as 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 employees are acting in the normal course of business. For example, imagine that a loss prevention officer detained you against your will on the suspicion of shoplifting. If you were innocent and sued, a court may hold that in addition to the employee, the store owner—as the employer—is also liable due to the principle of vicarious liability. Strict liability and vicarious liability will be discussed in Chapter 11, *Strict Liability and the Rule in Rylands v Fletcher*, and Chapter 12, *Vicarious Liability*.

## Key Terms

absolute liability, 8

balance of probabilities, 5

beyond a reasonable doubt, 5

burden of proof, 4

cause of action, 5

Crown prosecutor, 4

defendant, 3

injunction, 2

negligence, 3

plaintiff, 2

*stare decisis*, 4

statement of claim, 5

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### 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