Intentional Torts – a research of the American Common Law
Common Law, Equity, Torts Law

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Abstract

Our thesis, entitled "*Intentional Torts – a research of the American Common Law. Common Law, Equity, Torts Law*", encompasses a portion called "*Introductory Words*" and a number of three titles.

The "*Introductory Words*" start with Oliver Wendell Holmes's view: "*even a dog can distinguish between being stumbled over and being kicked*"[1]. Holmes's passage would suggest that identifying the so-called intentional torts is rather easy. At least sometimes, such a suggestion appears to be acceptable.

The portion named "*Introductory Words*" shows the reason why we have chosen the category of intentional torts, rather than other theories (*e.g.*, negligence).

Of course, a *caveat* was brought to the reader's attention: mainly, our study is to be understood as a foreign law paper, and not a comparative law one. Nonetheless, we have indicated that, at times, certain comparisons will be noticed.

At the end of the "*Introductory Words*" we have underlined the tripartite structure of our endeavor.

Title I, which goes by the name of "*Common Law, Equity, and Torts Law. A brief historical flight*", is divided in no less than six chapters.

Chapter 1 is named "*The Common Law*". In the first paragraph, we try to point out the meanings of the expression *Common Law*. After this is done, the reader encounters a story: the Roman period is underlined, then the Anglo-Saxon period is brought into the light. The Norman Conquest is regarded as a crucial event. In the battle of Hastings, Harold II, the last Anglo-Saxon king, was defeated by William. The latter (*i.e.*, William of Normandy or the Conqueror) became the king of England.

The Normans did not desire to alter the existing law, but they aimed at creating a uniform system. Gradually, a uniform law, common to the entire realm was forged.

[1] O. W. Holmes, *The Common Law*, Lexington, Kentucky, 2012, p. 2 (the paper was written in 1881 and it was reprinted in 2012).

La comune ley or common law was the masterpiece of the Royal Courts of Justice, called Courts of Westminster. Apparently, the Common Law Courts may be shortened to three: the Exchequer, the Common Pleas, and the King's Bench[2].

Chapter 1 of Title I discusses the three Royal Courts. It is pointed out that these Common Law Courts operated in connection with the so-called writs. The writ system is not forgotten by Chapter 1. Also, the weaknesses of the Courts of Westminster are highlighted.

Chapter 2 of Title I talks of Equity. The various meanings of the word are indicated. It seems that the majority prefers the following meaning: a body of rules.

The Chancellor and the Court of Chancery are placed into the light by Chapter 2. The procedure that took place before the two entities was not set aside. For instance, it is shown that the Chancellor was called upon by an informal complaint, and later a subpoena was issued.

Among other things, Chapter 2 of Title I points out the troubles encountered by the Court of Chancery. Delay was a problem of this court. *E.g.*, Lord Eldon reached a conclusion after some serious time. His decrees were excellent, but they were too slow. Perhaps because of this slowness, Eldon was called Lord Endless. His court was characterized by these words: *oyer sans terminer* (to listen without finishing).

The maxims of Equity are not ignored by Chapter 2. Thus, one may observe ideas such as Equity will not suffer a wrong to be without a remedy, Equity follows the law, Equity acts *in personam*, Where there is equal equity, the law shall prevail etc.

Chapter 3 of Title I was given the following name: "*Common Law and Equity. The English Common Law in modern times*". This portion starts with a discussion regarding the relationship between the Common Law Courts and the Court of Equity. The interaction between them was one characterized by ups and downs. Sometimes, the relationship was amicable. Other times, turbulences occured. The rivalry of the courts culminated with the case of *Earl of Oxford*. In *Earl of Oxford*, the issue was whether the result promoted by the Common Law Courts or the one imposed by the Chancery Court shall prevail. The Common Law Courts decided in favor of Magdalene College. The Chancery issued an injunction and it did not allow the use of the Common Law Court's decision. We may notice that the Common Law Court established one thing (*i.e.*, Magdalene College must triumph); the Chancery reached another conclusion (*i.e.*, Magdalene may not make use of the decision handed down

[2] *See* A. R. Hogue, *Origins of the Common Law*, Liberty Fund, Indianapolis, 1986 (reprinted), p. 189 ("*indeed, one might safely shorten the list of common-law courts to three: Common Pleas, King's Bench, and Exchequer*").

in its favor by the Common Law Court). The dispute was presented to King James I and he decided in favor of the Chancery: "*in case of clashes between equity and the common law, equity shall prevail*".

Chapter 3 pays attention to the fusion between the Common Law courts and the Chancery. Though the Courts merged, one sensitive point is the unification between the Common Law and Equity. We have indicated that the distinction between Common Law and Equity cannot be easily forgotten.

The same Chapter 3 looks at the Superior Courts of England; these jurisdictions seem important for the outside observer. Legal professionals are embraced by Chapter 3 (*e.g.*, barristers, solicitors, judges). The legal literature of England is also mentioned. The sources of law are shown (*e.g.*, case law or judge-made law, statutes).

Towards the end of Chapter 3 we have signaled the English Common Law's migration to other places (*e.g.*, Australia, New Zealand). We might be tempted to believe that this English Common Law, which was taken to places such as Australia and New Zealand, was altered, so that, in the end, it became *other Common Laws* (*e.g.*, Australian Common Law, New Zealand Common Law).

Chapter 4 of Title I is concerned with the American Common Law. First of all, we have asked ourselves if the expression "American Common Law" is an accurate one? We have underlined that a great number of opinions support the United States' belonging to the Common Law. *E.g.*, Langbein, Lerner, and Smith employ the following words: "*the American Common Law*"[3].

The American Common Law is narrated in Chapter 4. The judicial organization of the United States is not unnoticed. The legal profession is subjected to analysis. Also, the legal literature is placed within Chapter 4's body. Some attention is given to the legal education. The sources of law enjoy a certain amount of interest within Chapter 4.

Chapter 4 of Title I ends with a few observations in regard to a deviation that may be noticed in the United States: Louisiana. This state may very well be included in the category of mixed systems of civil law and common law. Louisiana appears to be different from the rest of the sister states.

Chapter 5 of Title I, "*Torts Law – the picture*", enters the stage with an attempt to discover the meanings of the word "*tort*".

[3] J. H. Langbein, R. L. Lerner, B. P. Smith, *History of the Common Law. The Development of Anglo-American Legal Institutions*, Wolters Kluwer, 2009, p. 847.

We do show that placing the word "*tort*" next to the word "*delict*" is, at best, a simple approximation; the two words are not the same thing; a synonymy may not be noticed.

We also underline that "*two common law writs are the genesis of tort law ...*"[4]. Among other things, the distinction between the writ of trespass and the writ of case is brought into the light.

We continue by enumerating the intentional torts. Of course, we indicate that we will not insist on them; these torts may be consulted in Title II.

Chapter 5 of Title I takes into account torts such as negligence, strict liability, and vicarious liability.

In respect to negligence, its elements are recited: (i) duty to use reasonable care, (ii) breach of the duty, (iii) causation, which is divided into cause in fact, and proximate cause, (iv) damage.

Strict liability is also considered in Chapter 5. Some cases are underscored, when this tort is covered: *e.g.*, *Spano v. Perini Corp.*, *Greenman v. Yuba Power Products, Inc.*

Vicarious liability is the final tort theory that Chapter 5 of Title I notices. The cases are not absent: *Bussard v. Minimed, Inc.*, *Murrell v. Goertz*, *Petrovich v. Share Health Plan of Illinois, Inc.*

Chapter 6 of Title I goes by the name of "*Conclusions – a substitute*". In this portion, we admit that orthodoxy would desire some conclusions. Nevertheless, temporary, we allowed ourselves to deviate from the righteous path. The conclusions were replaced by some observations regarding the Common Law and Civil Law legal traditions.

Title II of our thesis, "*Intentional Torts*", is formed of six chapters, just like Title I. This Title II is the main part of the thesis, at least from the length's perspective.

Chapter 1 of Title II bears the following name: "*The work plan. Preliminary mentions. Intent*". In Chapter 1, it is possible to encounter a structure: Chapter 2 (Intentional Torts to Persons), Chapter 3 (Intentional Torts to Property), Chapter 4 (Dignitary Torts), Chapter 5 (Economic Torts), and Chapter 6 (Conclusions).

Chapter 1, in a paragraph entitled "*Preliminary mentions*", shows that the examination of intentional torts cannot turn a blind eye on two writs: trespass and case. Among others, we have meditated on the origins of those two writs.

Chapter 1 of Title II focuses on a concept called intent. *Garrat v. Dailey*[5] is a case that was taken into account.

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[4] V. E. Schwartz, K. Kelly, D. F. Partlett, *Prosser, Wade and Schwartz's Torts. Cases and Materials*, twelfth edition, Foundation Press, 2010, p. 3.

Transferred intent is another issue that was approached in Chapter 1. The discussion has its beginnings in a case: *Davis v. White*[6].

Other cases of transferred intent were underlined. In *Nelson v. Carrol*[7], the defendant tried to hit the plaintiff in the head with a loaded gun. The gun fired accidentally and the plaintiff was injured. Intent transferred from assault to battery.

Some cases were more delicate. In *People v. Washington*[8], the defendant threw a garbage can at her victim, but she missed, and hit the victim's car instead; the good was damaged. The court did not talk about transferred intent or any other theory when it mentioned the so-called civil liability. Nevertheless, we underscored that, in *Washington*, most likely, it is possible to observe an intent that transferred from assault to trespass to chattels.

O course, we will note that, in a certain measure, *Nelson* and *Washington* are similar. In both cases the defendant tried to hit the plaintiff with an object (a loaded gun, in *Nelson*; a garbage can, in *Washington*). Considering that, to a certain extent, the facts are alike, we might believe that at least one tort is common to both cases; that tort is assault.

Chapter 2 of Title II is dedicated to the so-called "*Intentional Torts to Persons*".

Battery and assault were first analyzed. Prosser mentioned that "*assault and battery go together like ham and eggs*"[9]. Goldberg and Zipursky wrote that "*in legal and popular usage, one encounters the couplet <<assault and battery>> so often that it is natural to suppose that it is the name of a single wrong, just like <<macaroni and cheese>> is the name of a single dish*"[10]. Indeed, setting aside the culinary inclinations of the cited authors, we will notice that battery and assault go hand in hand, at least in general.

In respect to battery, its elements were shown: (i) intent, (ii) physical contact, and (iii) harmful or offensive contact. Also, we have indicated that "... *the tort of battery is said to*

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[5] *Garratt v. Dailey*, Supreme Court of Washington, 1955, *in* V. E. Schwartz, K. Kelly, D. F. Partlett, *Prosser, Wade and Schwartz's Torts. Cases and Materials*, twelfth edition, Foundation Press, 2010, p. 17-20.

[6] *Davis v. White*, 18 B.R. 246 (Bankr. E.D. Va. 1982), *in* Fr. L. Maraist, J. M. Church, W. R. Corbett, H. A. Johnson, T. E. Richard, *Tort Law. The American and Louisiana Perspectives*, second edition, Vandeplas Publishing, 2012, p. 23-25.

[7] *Nelson v. Carroll*, 735 A.2d 1096 (Md. 1999), *in* The American Law Institute, *Restatement of the Law Third Torts: Intentional Torts to Persons*, *Preliminary Draft No. 1*, 2013, p. 124 (unpublished).

[8] *People v. Washington*, 222 N.E.2d 378 (N.Y. 1966), *in* The American Law Institute, *Restatement of the Law Third Torts: Intentional Torts to Persons*, *Preliminary Draft No. 1*, 2013, p. 125 (unpublished).

[9] W. L. Prosser, *Handbook of the Law of Torts*, fourth edition, *Hornbook Series*, West, 1971, p. 41.

[10] J. C. P. Goldberg, B. C. Zipursky, *The Oxford Introductions to U.S. Law. Torts*, Oxford University Press, 2010, p. 218.

protect one's interest in physical or bodily integrity"[11]. To put it another way, battery is built around a simple idea: "*Hands Off; Do Not Touch!*"[12].

After more discussion of battery, we reached the tort called assault. We have highlighted that, if one wants to compress assault, two elements might be observed: (i) intent, and (ii) apprehension of an imminent and harmful or offensive contact. Numerous cases can be seen when the portion dedicated to assault is read.

Among other things, we have indicated that punitive damages may be awarded in the context of battery and assault. Our paper embraces the following statement: "*courts often insist that <<punitive damages must bear some relation to actual damages>> ...*"[13]. Nonetheless, in *Jacque v. Steenberg Homes, Inc.*[14], punitive damages were accepted. In *Jacque*, there were no compensatory damages. Apparently, punitive damages were present without compensatory damages. Most likely, the idea that punitive damages must bear some relation with compensatory damages is not perfect; at times, punitive damages have no relation whatsoever with compensatory damages; it is practicable to imagine that the former show themselves without the latter.

After we talked about aspects such as interspousal immunity, discipline of children, military discipline, self-defense, defense of others, defense of property, and consent, we arrived at another tort: false imprisonment.

According to Section 35 of the Restatement (Second) of Torts[15], "*(1) An actor is subject to liability to another for false imprisonment if*

(a) he acts intending to confine the other ... within boundaries fixed by the actor, and

(b) his act directly or indirectly results in such a confinement of the other, and

(c) the other is conscious of the confinement or is harmed by it".

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[11] Fr. L. Maraist, J. M. Church, W. R. Corbett, H. A. Johnson, T. E. Richard, *Tort Law. The American and Louisiana Perspectives*, second edition, Vandeplas Publishing, 2012, p. 25.
[12] J. C. P. Goldberg, B. C. Zipursky, *The Oxford Introductions to U.S. Law. Torts*, Oxford University Press, 2010, p. 198.
[13] C. Morris, *Punitive Damages in Tort Cases*, 44 Harvard Law Review, 1931, p. 1180.
[14] *Jacque v. Steenberg Homes, Inc.*, 209 Wis.2d 605, 563 N.W.2d 154 (1997), *in* V. E. Schwartz, K. Kelly, D. F. Partlett, *Prosser, Wade and Schwartz's Torts. Cases and Materials*, twelfth edition, Foundation Press, 2010, p. 69.
[15] The American Law Institute, *A Concise Restatement of Torts*, second edition (compiled by E. M. Bublick, D. B. Dobbs), American Law Institute Publishers, 2010, p. 20.

The elements of false imprisonment are these: (i) intent, (ii) confinement, and (iii) awareness or consciousness. Besides observing the elements of the tort, we took a look at remedies and defenses.

Chapter 2 of Title II reveals other torts: false arrest, malicious prosecution, wrongful institution of a civil action, and abuse of process. Malicious prosecution was illustrated by an example. Steve is a bookseller. Michael is the former's employee. Some books disappear from Steve's store. Steve knows that Michael did not steal the books, but he wants Michael to pay for them, because the books disappeared while Michael was on the job. Steve complains to the authorities that Michael stole the books, and the latter is arrested in front of his co-employees. In the end, Michael is acquitted. Under such facts, Michael may say that Steve committed malicious prosecution: (i) Steve initiated a criminal proceeding against Michael; (ii) there was no probable cause (*i.e.*, there was no reasonable belief in the truth of the theft charge); (iii) Steve was animated by another purpose than bringing Michael to justice (*i.e.*, Steve wanted payment for the books); (iv) the proceeding ended favorably for Michael, since he was acquitted; (v) probably, Michael could prove damages (*e.g.*, the humiliation suffered when he was arrested).

Another tort placed in Chapter 2 of Title II is IIED (intentional infliction of emotional distress).

We cited some authors and have indicated that "*... the intentional infliction of emotional harm tort ... has three elements (1) extreme and outrageous conduct by the defendant, (2) intent to cause severe distress ..., and severe distress caused by the conduct*"[16].

Of course, in connection to IIED, we did not forget the remedies, nor the possible defenses.

Chapter 2 also brings out the so-called employment discrimination.

Chapter 3 of Title II, "*Intentional Torts to Property*", includes three torts: trespass to land, trespass to chattels, and conversion.

As it seems, trespass to land has two elements: (i) intent to enter or to commit the equivalent of an entry, and (ii) tangible entry.

In regard to the tangible entry element, we have underscored that it is sensitive; this element does not appear to be accepted by all courts, in the sense that some courts do not believe that a tangible entry is absolutely imperative.

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[16] D. B. Dobbs, P. T. Hayden, E. M. Bublick, *The Law of Torts*, second edition, *Practitioner Treatise Series*, volume 2, West, 2011, p. 549.

In "*Introductory Words*" we have exhibited the idea that our paper, mainly, is a foreign law study, and not a comparative law one. We have added that, nonetheless, some comparisons will present themselves. Explicit comparisons may be seen in the context of trespass to land.

The remedies that may be obtained in regard to trespass to land are not ignored; more precisely, we mentioned punitive damages and injunction.

Furthermore, the defenses connected to trespass to land were enumerated.

Of course, trespass to land and nuisance were distinguished.

Trespass to chattels is analyzed after trespass to land. First, it may be seen that trespass to chattels is intimately linked to *trespass de bonis asportatis*. Of course, regardless of the initial relation between trespass to chattels and *trespass de bonis asportatis*, things have changed to a certain degree; trespass to chattels took some distance from the old writ; the present tort requires actual harm.

The elements of trespass to chattels are identified: (i) intent to make physical contact with property, (ii) physical contact with property, and (iii) actual harm or damage.

The latter element (*i.e.*, actual harm or damage) is considered by a case: *Glidden v. Szybiak*[17]. In *Glidden*, Elaine, a four year old girl, left home to buy some candy. Once she arrived at the store, Elaine met a dog named Toby, and engaged in play. At some point, Elaine climbed on Toby's back, and started to pull its years. The dog bit Elaine's nose. In *Glidden*, damages were asked for the bite, and for the medical expenses that Elaine's father had to bear. The defendants responded that Elaine committed a trespass, and no damages were available to her. The court underlined that "*no claim was advanced ... that the dog Toby was in any way injured* ...". Thus, no trespass could be linked to Elaine. Briefly, trespass to chattels was not accepted, because the actual harm element was not noticed.

Regarding trespass to chattels, the remedies are taken into consideration, and, also, the defense of consent.

Conversion is another property tort underlined in Chapter 3 of Title II. A typical situation of conversion would be the theft and sale of a person's car or jewelry.

Though we admit that the elements of conversion are a delicate affair, they are placed into the light. Of course, the remedies and a defense were mentioned.

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[17] *Glidden v. Szybiak*, Supreme Court of New Hampshire, 1949, 95 N.H. 318, 63 A.2d 233, *in* V. E. Schwartz, K. Kelly, D. F. Partlett, *Prosser, Wade and Schwartz's Torts. Cases and Materials*, twelfth edition, Foundation Press, 2010, p. 74-76.

Also, the relationship between trespass to chattels and conversion was not ignored. A strange case[18] may be observed without great difficulties.

Prior to approaching Chapter 4, the so-called constitutional torts are brought up.

Chapter 4 of Title II, "*Dignitary Torts*", talks, in the beginning, about defamation.

We did underline that, if we remain at the surface, the elements of defamation may be enumerated: (i) intent, (ii) defamatory statement, and (iii) publication of the defamatory statement. If we are governed by the desire to penetrate deeper, everything becomes sensitive in regard to the elements.

We have indicated that the United States Supreme Court concerned itself with defamation in the form of libel. The cases that should be mentioned are these: *New York Times Co. v. Sullivan*[19], *Curtis Publishing Co. v. Butts*[20], and *Gertz v. Robert Welch, Inc.*[21].

Invasion of privacy is another tort that Chapter 4 of Title II talks about. Our thesis has in mind (i) *invasion of privacy – appropriation of name/likeness*, (ii) *invasion of privacy – intrusion*, (iii) *invasion of privacy – false light*, and (iv) *invasion of privacy – public disclosure of private facts*.

Intentional interference with important family relationships seems to be a dignitary tort.

Enticement, alienation of affections, and criminal conversation do not escape the scrutiny of Chapter 4 of Title II.

Stone v. Wall[22] appears determined to accept a tort that is known as intentional interference with the custodial parent-child relationship.

After *Stone v. Wall*, our paper goes on to point out another segment: Chapter 5 of Title II, "*Economic Torts*".

The first tort that can be spotted is deceit. Kenneth Abraham's words show up: "*there are five elements to a cause of action for fraud*; *1) the defendant must have made a false statement of fact; 2) with knowledge that the statement is false or with reckless disregard of the truth or falsity of the statement ...*; *3) intending the plaintiff to rely on the statement; 4) the*

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[18] *Thyroff v. Nationwide Mutual Insurance Co.*, Court of Appeals of New York, 2007, 8 N.Y.3d 283, 864 N.E.2d 1272, *in* M. A. Franklin, R. L. Rabin, M. D. Green, *Tort Law and Alternatives. Cases and Materials*, ninth edition, Foundation Press, 2011, p. 938-943.

[19] *New York Times Co. v. Sullivan*, 376 U.S. 254 (1964), *in* R. A. Epstein, C. M. Sharkey, *Cases and Materials on Torts*, tenth edition, Wolters Kluwer, 2012, p. 1099-1106.

[20] *Curtis Publishing Co. v. Butts*, 388 U.S. 130 (1967), *in* R. A. Epstein, C. M. Sharkey, *Cases and Materials on Torts*, tenth edition, Wolters Kluwer, 2012, p. 1107-1111.

[21] *Gertz v. Robert Welch, Inc.*, 418 U.S. 323 (1974), *in* R. A. Epstein, C. M. Sharkey, *Cases and Materials on Torts*, tenth edition, Wolters Kluwer, 2012, p. 1116-1122.

[22] *Stone v. Wall*, Supreme Court of Florida, 734 So.2d 1038 (1999).

plaintiff must have justifiably relied; and 5) the plaintiff must have suffered damage as a result"[23].

As it seems, in the context of deceit, compensatory, and, probably, punitive damages are visible.

In a summary manner, securities fraud is approached.

Chapter 5 of Title II continues with inducement of breach of contract. It may be perceived that a typical inducement of breach of contract appears as a relation in three; there is a contract between P and T; D convinces T to breach her contract with P, and to do business with D.

Most likely, tortious interference with contract (*i.e.*, interference with contract or inducement of breach of contract) has its roots in *Lumley v. Gye*. In *Lumley*[24], the plaintiff, manager of the Queen's Theatre, made a contract with Johanna Wagner. The latter was bound to perform for a certain period of time. Wagner agreed not to perform somewhere else, during the term of her contract. Gye knew of the existence of the contract between Lumley and Wagner. This Gye, who was Lumley's competitor, offered Wagner more money "*... inducing her to breach her contract*".

The elements of inducement of breach of contract are enumerated. As to remedies, it seems that injunction is a possibility.

Chapter 5 of Title II points the reader towards intentional interference with prospective contractual or economic relations, and tries to highlight that this tort is different from inducement of breach of contract.

Chapter 6 of Title II presents some conclusions.

Title III of the current thesis is dedicated to the "*General Conclusions*". Among other things, we promoted the following words: essentially, our paper analyzed separately the so-called intentional torts. Yet, a person who terrorizes and tortures another has committed, in the same time, a number of torts: assault, battery, false imprisonment, and IIED[25]. Goldberg and Zipursky allow us to grasp that a certain factual scenario may permit us to notice the concomitant presence of various intentional torts.

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[23] K. S. Abraham, *The Forms and Functions of Tort Law*, fourth edition, Foundation Press, 2012, p. 314.

[24] *Lumley v. Gye*, Queen's Bench, 1853, 2 El. & Bl. 216, 118 Eng. Rep. 749, *in* V. E. Schwartz, K. Kelly, D. F. Partlett, *Prosser, Wade and Schwartz's Torts. Cases and Materials*, twelfth edition, Foundation Press, 2010, p. 1128-1129.

[25] *See* J. C. P. Goldberg, B. C. Zipursky, *The Oxford Introductions to U.S. Law. Torts*, Oxford University Press, 2010, p. 43.

Key words: Common Law, Equity, Torts Law, negligence, strict liability, vicarious liability, intent, intentional torts to persons, intentional torts to property, dignitary torts, economic torts.

Contents