16. Introduction to Intentional Torts

“What did you mean to do? And why was I the only one you didn’t do it to?”


The Context of the Intentional Torts Within Tort Law

There are seven traditional intentional torts – battery, assault, false imprisonment, intentional infliction of emotional distress, trespass to land, trespass to chattels, and conversion. These are the subject of the next several chapters.

The intentional torts are the most basic tort causes of action. And most of the doctrine of intentional torts pre-dates the development of negligence. Because of this, many torts courses start with intentional torts.

Whether you are starting to read the book here, or whether you studied the preceding chapters first, it is helpful to take a moment here to compare intentional torts to accidental torts.

*The intent/damages trade-off:* When it comes to the accidental torts, such as negligence, it is no defense for the defendant to say, “I didn’t mean to do it.” The law can hold a person responsible for loss even without intent. But the accidental torts require as part of the prima facie case that the plaintiff show an actual injury – physical damage to the plaintiff’s person or property.

In contrast, the intentional torts do not require proof of physical injury or damage. So, for example, intentionally spitting on someone qualifies as the tort of battery – even if there is no injury.

At the broadest level, considering both intentional and accidental torts together, there is a sense in which we can think of the defendant’s intent as an alternative to the existence of damages. If the defendant intended to invade your legally protected interests in your
body or property, then you may be able to recover regardless of whether actual harm has been suffered. That’s intentional torts. On the other hand, if you have actually been hurt, then you may be able to recover regardless of whether the defendant intended any harm or offense.

So when we look at the intentional torts and the accidental torts together, tort law seems to take the stance that unless you’ve been hurt, or unless the defendant acted with bad intent, you should not bring your grievance to court.

**Differences in doctrinal structure:** Another point of contrast between the intentional torts and the accidental torts is how the doctrine is structured. For accidents, there is really just one big cause of action – negligence, which takes care of the vast majority of claims arising from accidents. The other causes of action – strict liability, products liability, and informed-consent actions – could be categorized as modifications of negligence that are relevant in limited circumstances. By contrast, in intentional torts, there is no general tort of “intentigence.” Instead we have seven specific intentional torts.

Painting with a broad brush, we can make some additional generalizations: While negligence is broad and flexible, the intentional torts tend toward the narrow and rigid. Correspondingly, while the doctrine of negligence is complex and its contours fuzzy, intentional torts doctrine is comparatively simple, with harder, more well-defined edges.

Take, for instance, the cause of action for battery. The elements are: (1) an action, that is (2) intentional, and which results in a (3) harmful or offensive (4) touching of the plaintiff. Those elements are mostly self-explanatory. There are a few clarifications that will have to be made. For instance, does hitting someone with a thrown object count as a “touching”? (It does.) But such questions are relatively straightforward, and they have relatively straightforward answers. By contrast, the first element of the negligence cause of action is that “the defendant owed the plaintiff a duty of due care.” That is not
self-explanatory at all. Understanding what it means requires a lot of work.

None of this is to say that there are no difficult cases in intentional torts. There are, of course, hard cases on the margins. And novel facts can pose challenges to established doctrine. But, by and large, the intentional torts are generally about applying well-formed rules, not about balancing factors or making policy choices.

The bottom line is that moving between accidental torts and the intentional torts requires a little bit of a mental adjustment. So if you’re starting out with intentional torts, don’t expect the same degree of rule-intensiveness when you move to negligence. And if you are arriving here after studying negligence, you can look forward to legal questions that tend more to have a “right answer.”

**A Quick Overview of the Intentional Torts**

Let’s take a fast look at the basics of the seven intentional torts.

First up are the four personal intentional torts – battery, assault, false imprisonment, and intentional infliction of emotional distress.

The most basic of these is **battery**. Battery is the intentional touching of the plaintiff in a harmful or offensive way. The concept of “touching” is quite broad. It would include, for instance, poisoning the plaintiff’s meal. But in keeping with the theme of the intentional torts, no actual harm need be done. A sturdy plaintiff, for instance, might not be harmed at all by a punch thrown by a weak defendant. Regardless, a punch is “harmful or offensive,” even if no harm results, so a punch is an actionable battery.

Next is **assault**. Assault is the intentional creation of an immediate apprehension of a harmful or offensive touching. That is to say, an assault is the apprehension of an oncoming battery. Throwing a punch and missing is an assault.

The third intentional tort is **false imprisonment**, which is the intentional confinement of the plaintiff to a bounded area by force, threat of force, or improper assertion of legal authority. Locking the plaintiff in the cellar would count. So would brandishing a firearm and saying, “Move and I shoot.” False imprisonment is a civil cause
of action that is analogous to – though not completely overlapping with – the crime of kidnapping.

The last personal intentional tort is **intentional infliction of emotional distress**, often abbreviated “IIED,” and sometimes known by its shorter and pithier name, *outrage*. This tort results when the defendant intentionally engages in outrageous conduct that causes the plaintiff severe mental distress. The key is that the action has to be *truly outrageous*. Telling someone that a close family member is dead – when that’s not true – would likely qualify. Teasing or insulting someone, however, is usually not enough. Also, the mental distress suffered by the plaintiff must be *severe*. Physical effects – such as cardiac problems or tooth-grinding damage – are not necessary, but where they occur, they are helpful in showing the required severity.

It should be said that IIED is something of an anomaly among the intentional torts for a couple reasons. First, intent is not strictly required. Recklessness will suffice. Also, IIED is an arguable exception to our general observation that the intentional torts do not require a showing of damages. While there is no need to prove physical injury, property damage, lost wages, or the like, there is the requirement that the plaintiff suffer actual distress. If a plaintiff, perhaps because of a reserve of inner strength, were not caused severe distress despite the plaintiff’s intentional and outrageous conduct, then there would be no cause of action.

The remaining three intentional torts are trespass to land, trespass to chattels, and conversion – all of which involve invasions of rights over tangible property.

The tort of **trespass to land** is the intentional tort that applies to invasions of interests in real property, which includes land and things attached to the land, such as trees, buildings, improvements, and fixtures. An action for trespass to land requires an intentional act to invade someone’s real property. Traipsing across someone else’s land – or even putting a foot on it – satisfies the elements. The invasion can be momentary and does not need to do any damage to be actionable.
The remaining two intentional torts are for invasions of interests in chattels. Chattels are the moveable kind of property, and they include any item of tangible property that is not part of real property. Cars, computers, clothing, and animals are all examples of chattels.

The tort of trespass to chattels requires an intentional action that substantially interferes with a plaintiff’s chattel. What counts as “interfering” is a little tricky. The law here is stricter than it is with trespass to land. With trespass to land, merely putting a foot on the plaintiff’s land creates liability. The analogous is not true for trespass to chattels. Merely running up and touching the plaintiff’s chattel does not count. Making a substantial use of the plaintiff’s chattels does count as interference, as does depriving the plaintiff of the opportunity to use them. Damage, where it occurs, always counts as interference.

The last intentional tort is conversion. An alternative to trespass to chattels, the tort of conversion is an intentional interference with the plaintiff’s chattel that is so severe that it warrants a forced sale of the chattel to the defendant. Conversion is essentially trespass to chattels, but with a heightened threshold that triggers a more powerful remedy. Here’s an example: A defendant steals the plaintiff’s car, puts a cinder block on the gas pedal, and causes it to propel itself off a cliff. That plaintiff has an excellent cause of action for conversion. Thus, the plaintiff can get the market value of the car before it was taken, and the defendant will take title to the smoldering wreck at the bottom of the canyon.

A Preview of Intentional Torts Defenses

Affirmative defenses play a starring role in the world of the intentional torts. The main defenses are consent, self-defense, defense of others, and necessity.

Most importantly, consent is a complete defense to the intentional torts. You can’t successfully sue your invited party guests for trespass to land because you consented to their entry on your land. Likewise, you can’t successfully sue your aunt for giving you a big hug, because you consented – impliedly if not expressly – to her touching you.
And of, course, if someone tries to hurt you, you’re entitled to use force in **self-defense**. If someone runs at you with a knife, you can sweep the leg and knock them to the ground without incurring liability for battery. Similarly, **defense of others** allows you to avoid assault liability for aiming a gun at the assailant who is mugging your friend.

Finally, the defense of **necessity** allows you to avoid tort liability when you are acting to prevent a greater harm. For instance, you’ll incur no trespass-to-chattels liability for absconding with a bowl of punch if you’re using to put out a fire.

**The Place of Damages in the Intentional Torts**

As already emphasized, it is possible to plead and prove a claim an intentional tort claim without a showing of damages. Nonetheless, the concept of damages does have an important place with the intentional torts.

At the outset, we need to note that there is often little point in bringing a lawsuit unless it is for damages. Therefore, in the real world, intentional tort cases will often include claims for compensatory damages.

Also, for many intentional torts, proving damages may be the quickest path to proving a prima facie case. For a battery claim, proving a physical injury makes it unnecessary to debate the issue as to whether the touching counts as “harmful or offensive.” In an action for trespass to chattels, proving that the plaintiff’s actions damage the chattel means the “substantial interference” requirement is fulfilled – end of discussion.

But what about situations in which the plaintiff never succeeds in proving compensatory damages? What does the plaintiff get for prevailing in such a lawsuit? In such situations, courts will award **nominal damages**. “Nominal” here means “in name only.” Nominal damages are usually one dollar, or a similar amount.

Why would anyone bother to file a lawsuit to get nominal damages of $1? Well, they almost never do. But there are a few reasons that a plaintiff might be motivated to pursue an intentional tort claim
without damages. For one, an award of nominal damages might be useful as a means of establishing a legal right. A judgment in a trespass to land case, even without damages, can be used as the basis for an injunction against future trespasses. Then, further trespassing can be deterred by the threat of contempt sanctions.

Probably the most lucrative function of nominal damages is as a hook upon which to hang an award of punitive damages. Let’s go back to the case of a defendant spitting on the plaintiff, but let’s embellish it a little: Suppose the defendant is a spoiled A-list movie star who spits on a waiter at a restaurant. On top of nominal damages of $1, the waiter might convince a jury to award punitive damages in an amount sufficient to deter the defendant from such conduct in the future. And such an amount, for a rich celebrity, might be quite a lot of money.

Putting all practicality aside, a victory in court and $1 in nominal damages might, if nothing else, give a wronged plaintiff a feeling of satisfaction. And suing out of a sense of indignity happens more often than you might imagine.

**Intent and its Various Iterations**

Now that we have a sketch of the intentional torts and understand their relation to negligence and other torts, it is helpful to look a little more closely at the concept of intent itself.

In general, “intent” means that the defendant either acts with the purpose or goal of bringing about a certain consequence, or at least does so with *substantial certainty* that the consequence will occur. The substantial certainty idea expands the concept of intent beyond the defendant’s goals.

Suppose a defendant testifies in court, “I didn’t really want to shoot the plaintiff. What I wanted to do was shoot the jukebox that the plaintiff was standing in front of. So, yeah, I pretty much knew the plaintiff was going to get shot. But that wasn’t my goal.” Here, the defendant’s testimony establishes the requisite intent, since the defendant acted with substantial certainty. It doesn’t matter that shooting the plaintiff wasn’t the goal.
Beyond the fundamentals, the concept of intent begins to diverge among the various intentional torts. We said that intent means that the plaintiff acted purposely or with substantial certainty of producing a certain consequence. What “consequence” must be intended depends on the tort. With battery, for instance, the defendant generally must intend to commit a battery. But for trespass to land, the defendant does not need to intend a trespass at all – the defendant only needs to intend the action that causes the trespass. So, the intent to walk a certain path – even if undertaken in the earnest attempt to stay off the defendant’s property – will satisfy the intent requirement of trespass to land. That is, the intent to put one foot in front of another is intent enough, even if it was a genuine mistake to cross the property line. By contrast, the intent to raise your arms is not requisite intent for battery if you didn’t think doing so would inflict a harmful or offensive touching on anyone.

Strangely, there is one intentional tort – intentional infliction with emotional distress – that, despite the word “intentional” in its name, requires only proof that the defendant acted with recklessness. (This may be one reason many people prefer the name “outrage” for the tort.)

Our discussion of intent is not complete without mention of the plaintiff-friendly doctrine of transferred intent. Where it applies, the doctrine of transferred intent allows the intent required by one intentional tort claim to be satisfied by showing the defendant’s intent to commit a different intentional tort. Intent is said to be able to “transfer” from tort to tort or from person to person, or even between torts and persons at the same time.

The concept is best explained with an example: If a defendant intends to hit Bart with a baseball, but errantly throws wide left so that the ball whizzes right by Ashanti’s head, then the tortious intent to inflict a battery on Bart can be “transferred” to Ashanti for an assault claim. In this case, the intent transfers both from battery to assault and from Bart to Ashanti.

Under the most traditional view of transferred intent, intent can transfer among persons and among any of the torts of battery,
assault, false imprisonment, trespass to land, and trespass to chattels. Thus, acting with the purpose of trespassing on land could count as the requisite intent for a battery. Many courts today, however, apply transferred intent more narrowly, restricting tort-to-tort transfer to assault and battery only.

One last thing to point out is that intent is an issue for the jury. You may have wondered, how can you truly know what another person intended? In a metaphysical sense, perhaps there is no way to truly know the subjective mental experience of another person. But a jury’s job isn’t to engage in metaphysics. A jury decides, based on the preponderance of the evidence, whether the defendant acted with the requisite intent. The defendant might testify under oath that she or he did not intend the tortious action, but the jury can choose to disbelieve the defendant and decide, looking reasonably at the circumstances, that the defendant in fact did act with intent. That might not count as “proof” for a philosopher, but it counts as proof in a courtroom.

That’s the general lay of the land with intent. The main takeaway should be that you cannot guess at what intent means based on your common understanding of the word “intent.” You will need to carefully apply the specific rules – explained in the following chapters – for each intentional tort.