

Having looked at the great shifting field of negligence, we now turn to what are often described, in contrast to negligence as the 'intentional torts'. The behaviour that is captured by sanctioned by the tort action (law suit) was , with some exceptions, intended, rather than being the product of carelessness.

From the perspective of the victim, we are going to look at torts that are concerned with:

1. Injury to the person:- Assault and Battery
2. Injury to property or one's enjoyment thereof:- Nuisance and Trespass
3. Injury to one's liberty:- False Imprisonment and Malicious Prosecution
4. Injury to ones reputation:- Defamation

1. **Injury to the person:- Assault and Battery.**

Battery

You would claim damages for 'battery' if someone has physically assaulted you. Any deliberate touching without your informed consent is a battery. The law regards bodily integrity as having such fundamental importance that in a battery suit it is not necessary to prove injury in order to receive an award of damages. Of course if you did suffer consequential loss such as bodily injury, medical expenses, time lost from work, future loss of income etc, you would lay that proof before the court to receive damages calculated to cover those losses. But even if you could show none of those things, the court would still make a modest award of damages simply arising from the fact that you were deliberately hit or touched without your consent.

The issue of consent is very important. A doctor may not touch you without your 'informed' consent. That is why when a plaintiff alleges that the doctor did not inform him/her of the risks associated with surgery and something goes wrong, then the plaintiff will allege battery by the doctor

as well as negligence. The 'battery' claim is that the doctor, having failed to obtain the plaintiff's informed consent, had no right to touch the patient.

Assault

If what we ordinarily call 'assault' is called 'battery' in tort law, then what does the law mean by **assault**? In tort law, the cause of action known as 'assault' is a claim that the defendant threatened the plaintiff with immediate battery. In short, 'assault' is the threat and 'battery' is the deed. Like 'battery', 'assault' is *actionable per se*; meaning that the plaintiff need not prove injury or loss in order to obtain an award of damages.

Not many people will sue for 'assault' in the absence of 'battery' but from time to time it does happen; in particular where a person is badly shaken by the threat but not to the extent of lasting psychological harm (for that situation see below). But even if, as a practical matter, most people do not bother with a law suit in such circumstances, the position of the law is important. By reason of the tort of 'assault', the law is clear that a wrong has been committed at the stage of the threat and believing she is about to be struck, she does not have to wait for the aggressor to land the first blow, she is entitled in law to use reasonable force to pre-empt the attack. Thus when she breaks his nose and he sues her for 'battery' it would be complete defence to that suit for her to prove that he threatened her and she believed he was about to strike her. *Most B.C. school-boards have repudiated these ancient rules of just conduct and children are not allowed to fight back. There may be good reasons for a policy that would draw no distinction between Churchill and Hitler and suspend them both because "after all, they were both fighting weren't they!" But the Common Law takes a more robust view. It is aggression that the law seeks to suppress, not reasonable self-defence.*

Wilkinson v. Downton

What about a situation where a person intentionally inflicts physical harm on a person but does not touch them either directly or with an object. In the case of Wilkinson v. Downton, the courts confronted that issue and

more. The defendant, as a sort of practical or malicious joke, told the plaintiff that her husband had been severely injured in an accident and that she ought to go to him. In fact, as the defendant knew, there was no accident and the husband was fine. The plaintiff became seriously physically ill as a result of this shock to her nervous system. The court found that the defendant had intended to shock the plaintiff and was therefore bound to compensate her for the foreseeable consequences of his act. This 1897 case is important and still cited as precedent in new cases because it was a foundational case in the law's approach to psychological or psychiatric injury. We have already read that the law requires that such damage be describable as a recognized psychiatric illness or disorder. In practice that means, as counsel for the plaintiff:-

- i) You must send your client to see a clinical psychologist or psychiatrist;
- ii) That expert must be able to truthfully say that your client is mentally ill or injured and that his/her condition is recognized as such within the profession. What the courts are trying to get at is the distinction between the ordinary but sometimes very painful ups and downs of life, for which the court will not provide compensation, and something more serious.

Law would be simpler if we all had the same measurable stock of resilience. But of course we don't. There is variation between us and within each of us over time and circumstance. What is the practical advice we might give an articulated student seeking a sense of this area of the law:-

- i) The more outrageous the defendant's conduct, the less will be needed to persuade the court that the plaintiff suffered damage (sexual assault of a child, for instance);
- ii) Conversely, if the tortious behaviour seems minor on the face of it, then solid expert evidence will be needed to persuade the court that, despite the fact that the person was previously of ordinary robustness, real and lasting damage has been done.

The law's wariness of psychiatric damage is waning as we understand more about how the brain and nervous system work. However, it is still

true, that in an appropriate case, one can argue that the plaintiff should not be allowed to recover damages because, being of an unusually nervous disposition, he/she has suffered nervous damage that 'an ordinarily robust person' would have avoided.

This requirement of robustness as a starting point is in clear distinction to the situation where the injury is plainly physical. Because problems of proof (and therefore avoidance of fraud or exaggeration) are so much less difficult for physical injury and because, while mental blows in life are unavoidable, physical blows ought to be avoidable, the law's very different stance, in the case of physical injury, is this:- You take your victim as you find him. If you hit him and it turns out he has a thin skull, then you will pay all that follows from breaking his head.

Note also that speech, that foreseeably produces physical or psychiatric injury, is not protected. You may indeed be sued for the speech that hurts. Thus, in the words of United States Supreme Court Judge Oliver Wendell Holmes, Jr.:-

*'The most stringent protection of free speech would not protect a man falsely shouting fire in a theater and causing a panic.'*¹

2. Injury to property or one's enjoyment thereof:- Nuisance and Trespass

Just to be awkward, we will start with Trespass (to land).

It is less common now, but at one time it was common enough to see signs on private property that said, 'Trespassers will be Prosecuted', where prosecuted means, at the first instance, sued. It is the Crown, not the private land owner, that ultimately decides who will be 'prosecuted' in the criminal law sense of the word. The sign means in plainer english, 'Private Property, stay off'. And the law supports you in such a stand. No-one has the right to enter onto your property without your permission and if they nonetheless do come onto your property, you may sue them and obtain damages without proof of damage to

¹ From *Schenck v. United States*, 249 [U.S. 47](#) (1919) To Abbie Hoffman we may owe, "Free speech is the right to shout 'theater' in a crowded fire."

your property or land. That is the measure of how seriously the law takes the inviolability of your 'castle', however humble it may be. But, you say, people are coming onto my property all the time: the postal worker, the flyer delivery person, the newspaper fellow- what about them? Indeed, unless you post a sign saying 'stay off', you are offering an implied permission for people to enter onto your property for the purpose of making reasonable inquiry of you (The gentleman offering the Jehovah's Witness publication) or to provide you with some service that you have requested. But, as the person in legal possession of the property (ownership is not necessarily required) you are free to cancel that implied permission to come onto your property at any time for any reason. Of course, do have the right to come onto your property - the Hydro guy to read your meter, the city to fix a broken sewer line etc. But the importance of trespass law is that those people need special continuing legal authority to enter, without which they have no better right to be on your property than anyone else. The common law recognizes no special category of naturally important people whose natural rights are greater than yours or mine. As to the law pertaining to what the government may do in its relations with each of us, well you must take the course in Public Law, next fall.

In the North, trespass is often about trees, and in particular the fellow who is logging adjoining land, accidentally or not, strays onto your property and takes your trees too- or at least some of them. First, it matters not whether he accidentally trespassed or did it deliberately - he will still be liable in damages both for the trespass and for the value of the trees, and if he has damaged or destabilized the land, maybe for the cost of the reclamation (but remember the Peevyhouse case - if the cost of reclamation is greater than the loss of value in the land caused by the trespass, then there will be an argument at trial about how damages ought to be calculated). If the fellow is shown to have deliberately trespassed and cut your trees down then he may have to pay aggravated or punitive damages in addition to the damages otherwise due. In short, trespass by accident is not excusable, but deliberate trespass is worse. In the bush being a good neighbour means being careful about and respectful of property lines. Some people earn a reputation for stealing first and claiming 'gee, shucks' ignorance about the location of the 'pin' until they are caught. So, if you are getting land cleared, be careful to clearly flag the line that the loggers are not to go beyond and take the time to get the line right.

In the bush there are often too many trees for people to get emotionally attached to any one of them. But that is not true in town. Beware - the tree that you cut down to improve your view will turn out to be your neighbour's spiritual sanctuary, such that with the tree 'brutally savaged Your Honour' your neighbour claims life is now pointless and 'he doesn't even watch hockey anymore' as his wife dutifully testifies. All it takes for people to show how territorial they can be is trespass with a spirit of contempt - big deal , one tree, what's the fuss - the fuss will be significant damages, because the trespass is a symbol of the contempt of one person for the dignity of another. The courts get that, and if the judge thinks that, by your conduct, you don't get it, then he/she will make an award of damages designed to wise you up.

Courtesy of http://en.wikipedia.org/wiki/Trespassers_William

Winnie-the-Pooh in , Pooh and Piglet Go Hunting and Nearly Catch a Woozle by A.A. Milne:

"Next to [Piglet's] house was a piece of broken board which had: "TRESPASSERS W" on it. When Christopher Robin asked the Piglet what it meant, he said it was his grandfather's name...it was short for Trespassers Will, which was short for Trespassers William. And his grandfather had had two names in case he lost one— Trespassers after an uncle, and William after Trespassers."



Nuisance

The tort of (private) nuisance protects the owner or possessor of the land in his/her 'quiet enjoyment' of his property. If someone is doing something which is causing physical damage to your property, then you are entitled to sue for damages, and a measure of those damages may be not simply the diminution of the value of the land, but your loss of quiet enjoyment of your property. If the nuisance is a continuing one, then you may seek injunctive relief from the court - that is to say, an order that the defendant quit doing what constitutes the nuisance.

Physical damage to your property is not necessary for a finding of nuisance. If you can smell the pig farm down the road once in a while, well, that's country life. But it's the pig farmer's problem to fix if the smell is awful and unremitting such that you cannot enjoy being on your own land. Thus, smell, sight, sound, vibration, smoke - all can constitute actionable nuisance if bad enough to cause a reasonable Joe or Josephine to say, we cannot put up with this.

*I have attached an article, Climate change: Dogs of law are off the leash
By Richard Ingham (AFP) on litigation and climate change which you might
find interesting. Nuisance litigation could be a very big deal in the twenty-
first century.*

3. Injury to one's liberty:- False Imprisonment and Malicious Prosecution

Again, just to be awkward, we will start with Malicious Prosecution.

Sometimes private citizens or the police officers or the Crown prosecutors abuse the right to charge and prosecute to the serious detriment of the person charged. The common law provides a remedy but it must be understood from the outset that :

- i) just because you were charged and subsequently found not guilty, it does not mean that you will have a right to sue.
- ii) just because you were charged and subsequently the Crown dropped the charges it does not mean that you will have a right to sue.

It takes more and the most important thing more that it takes is malice.

Someone comes into your office and instructs you that she wants to bring a suit for malicious prosecution. You have a list of pre-conditions for launching such a suit in your mind and as you are talking to your prospective client you are running through that list in your mind.

1. The criminal proceedings must have ended in favour of the Client. Either she was found not guilty or the Crown dropped the charges.
2. There were no reasonable grounds to believe that your client had committed the offence.
3. There was malice.

Who are you going to sue?

Suppose that your colleague (C) at work claimed she saw you stealing petty cash. She tells your supervisor who phones the police. The police officer interviews C who repeats the allegation. The police officer forwards a copy of the statement given by C to the police and on the basis of that statement a charge of theft is laid. As trial approaches the police officer walks into the prosecutor's office and closes the door. He says to the prosecutor, "I've discovered that the Accused's husband used to go out with the complainant. I've got a bad feeling about this case". The prosecutor is silent for a moment and then says - go interview the complainant again. Put it to her that she has made this up to get the Accused for stealing her boyfriend." Two days later the prosecutor learns from the police officer that the latter's suspicions were correct and charges were dropped.

Who can the accused sue?

C, because she made up the story and conveyed it to the police officer and was therefore instrumental in having the charges laid;

Not the police officer because he did the right thing;

Not the prosecutor because she did the right thing.

Suppose the Police officer knew that C had made up the story but failed to tell the Crown - then he could be sued too.

Suppose the prosecutor had said that it was too late to drop charges now, everybody is ready for trial- then she could be sued too.

In law malice does not require bad feeling. To prosecute, conscious of the fact that you do not have a case, is malice. To prosecute for an improper purpose is malice.

Malicious prosecutions are low probability high consequence events. Our justice system makes mistakes large and small all the time. There is no perfect justice and no perfect judges or juries. But it is not common for prosecutions to proceed maliciously, that is to say, in circumstances where if the Crown or the police or both were thinking right, someone would say -

hold on minute, we have to rethink this matter. When that fails to happen things have gone badly wrong.

I have attached four cases where things went very badly wrong.

Nelles v. Ontario SCC 1989

Proulx v. AG. Que SCC 2001

Dix v. Canada Alta Ct. Q.B. 2002

Kvello v. Miazga Sask. C.A. 2007

We need to discuss these cases in Class

False Imprisonment

If you were held by the government or a private citizen, such that you could not leave; then you may sue for false imprisonment. You need not prove injury, although if were injured during the course of your imprisonment, that fact would add to your damages. Such is the importance that physical liberty is given by the common law, that it is not necessary for the plaintiff to prove that his/her imprisonment was not justified by law; instead it is for the defendant to prove that the imprisonment was justified by law.

4. Injury to ones reputation:- Defamation

Before we look at the elements of the two great torts respecting reputation, which are collectively known as defamation but which are individually called 'slander' (oral defamation) and libel (written defamation), we should spend a minute asking what is going on, in this area of the law.

Reputation is an interesting phenomenon. It is a means by which we predict how other people will behave in the future. So, once again we have discovered a social mechanism that is designed to assist with our irremediable ignorance of the insides

of other peoples minds. Reputation is our best bet on your future behaviour, based on your past behaviour. This mechanism would not work well if it wasn't for the fact that each of us tends to care about what other people think of us. So each individual feels the need to be the guardian of his or her own reputation and each of us uses the reputation of others as an aid to predicting how they will behave. Humans use the mechanism. Do chimps, dogs, lions? Ants don't (he runs around in circles a lot; it drives me nuts!). How about birds?

Harry says on the bus, in front of all the other passengers that the driver, Ben, is a drunk who has been convicted of impaired driving. Some of the passengers instantly believe Harry and get off the bus as soon as possible, giving Ben disapproving looks as they go. Others, who know Harry to be a rather unstable character, suspect that Harry has gotten into some dispute with the bus driver and is trying to get even with him.

Ben is very upset and goes to see a lawyer and tells him all about it. The first thing the lawyer Sam says is, 'Are these allegations in part or in whole true? Are you a drunk and have you been convicted of impaired driving?'

Ben says 'No, No and No!'

Then Sam says, do you want to spend your next \$10,000.00, maybe \$20,000.00 on me or would you feel better if you spent that money lying on a beach in Mexico?'

Ben says, " But won't he have to pay me damages if we are successful?'

'Yes!', says Sam. 'Do you think he has any money?'

Ben looks crestfallen.'Probably not.'

'Then don't bother suing unless it represents the most important use of that money.'

There are three major defences to defamation:

i) Justification What was said is true. The burden is upon the defendant to show what he said was true. The plaintiff is not required to prove that what was said about him was false

ii) Privilege It is a matter of public interest that this issue be spoken about and even if you get it wrong and damage someone's reputation you cannot be sued unless you showed malice, which is to say, you knew it was false but you said it anyway. Privilege may be 'qualified' or 'absolute'. If it is absolute, then you are protected from suit even if you spoke with malice.

iii) Fair comment A comment or opinion upon a matter of public interest and not an assertion of fact.

I have attached two SCC cases and a BCCA case that are good expositions of these principles at work

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