AN INTRODUCTION
TO THE
COMPARATIVE STUDY OF
PRIVATE LAW
READINGS, CASES, MATERIALS

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PART TWO:
TORT LAW

I. THE SCOPE OF THE RIGHTS PROTECTED

1. Introduction: the structure of tort law
   a. Civil law

   The Civil Codes

   In modern civil codes, much of tort law depends on short, general provisions that say that a person is liable for harm (or certain harms) that he causes through his fault.

   French Civil Code

   ARTICLE 1382

   Any act of a person which causes harm to another obligates the person through whose fault the harm (dommage) occurred to make compensation for it.

   ARTICLE 1383

   A person is liable for the harm that he causes not only by his acts but by his negligence or imprudence.

   French commentators explain (correctly) that art. 1381 was meant to govern harm caused intentionally. Taken together, then, these provisions mean that the defendant is liable if he intentionally or negligently causes “harm” to the plaintiff.

   Nothing in the French Civil Code or in its drafting history explains what is supposed to count as “harm.” French courts have had to work that out for themselves.

   The analogous provision of the German Civil Code is a bit different.

   German Civil Code

   § 823(1)

   A person who intentionally or negligently unlawfully (widerrechtlich) injures the life, body, health, freedom, property or similar right (sonstiges Recht) of another is bound to compensate him for any damages that thereby occurs.
The word "unlawfully" is used to make it clear that a person may intentionally or negligently harm another and still not be liable because he is not at fault: for example, if he harms another in self-defense. Of course, in that case he is not liable in France either, but the point is not explicit in the French provisions.

Moreover, according to § 823(1), a person is not liable for any harm to another. He is liable for harm to life, body, health, freedom (meaning freedom of movement), property or a "similar right." One reason for the provision is that the drafters believed that there were certain harms for which the plaintiff should not recover. In particular, they believed that he should not recover for harm to privacy or dignity, or for an economic loss unaccompanied by harm to person or property. The drafters also wanted to say something definite about the harms for which the plaintiff could recover. Nevertheless, they realized that they could not make an exhaustive list of such harms. So they added the phrase "or a similar right." That phrase allows German courts to protect additional rights which they regard as "similar."

The drafters also extended liability in other ways. They added a second paragraph to § 823 to deal with the violation of rights created by particular statutes.

**German Civil Code**

§ 823(2)

The same obligation rests on a person who infringes a statute intended for the protection of others. If, according to the provisions of the statute, its infringement is possible even without fault, the duty to make compensation arises only in the event of fault.

The drafters also provided that in the case of intentional misconduct, the plaintiff could recover for "harm" he suffered even if the rights described in § 823 had not been violated.

**German Civil Code**

§ 826

A person who intentionally causes harm to another in a manner contrary to good morals (*gute Sitten*) is bound to compensate him for the harm.

**From Roman law to the Modern Code Provisions**

The French Civil Code was enacted in 1804. The German Civil Code came into force in 1900. Most other continental countries have enacted civil codes as well. Before the law was codified, the law in force in much of Germany and France and most of continental Europe was Roman law. Nevertheless, even where Roman law was in force, the law of delict or tort was understood rather differently by the 18th century than it had been by the Roman jurists.
The Roman jurists themselves had little to say about torts in general, or, for that matter, about contracts in general. They had a law of particular torts and particular contracts, each with its own rules. Gaius was the first Roman jurist to distinguish two general classes of obligations, delictus and contractus, tort and contract.¹ But he did not describe the general principles of tort or contract law. He discussed particular torts.

Two of these torts became the basis for later continental law. One was called an action for injuria. It could be brought for many different kinds of offensive behavior such as insulting someone by striking him. The plaintiff could recover for a blow. He could also recover if he “be not in fact struck but hands are raised against him and he is frequently afraid of a beating, though not in fact struck. . . .” Dig. 47.10.15.1. He could recover if the defendant entered his house without permission. Dig. 47.2.21.7. He could also recover in a variety of instances in which he was insulted or his reputation was adversely affected.

For example, he could recover if someone composed or recited a song attacking him. Dig. 47.10.15.27. He could recover if someone attacked his reputation in a petition presented to the emperor. Dig. 47.10.15.29. He could recover if someone beat his slave. Dig. 47.10.15.34. He could recover if the defendant assembled people at his house to raise a loud and offensive clamor. Dig. 47.10.15.2.

The defendant was also liable for injuria if he “accosted” a woman or abducted or removed her attendant—a companion every woman was supposed to have when she appeared in public. According to the jurist Ulpian, “To accost is with smooth words to make at attempt upon another’s virtue.” Dig. 47.10.15.20. Defendant was also liable for following a woman “assiduously.” Dig. 47.10.15.22. Also, “one who uses base language does not make an attempt upon virtue, but he is liable to the action for injuria.” Dig. 47.10.15.21.

From the Middle Ages through the eighteenth century, the action was generalized so that it provided relief for almost any act wrongfully impairing another’s dignity or reputation. Reinhard Zimmermann gives some examples from eighteenth century Germany:

It could be injurious to taunt his person with his natural impediment by calling him a cripple, or a hunchback. To refer to someone, ironically, as a “bonus patiens vir” (and thus suggesting that he was a cuckold), to state emphatically “ego saltem scortator non sum” (and thus insinuate that a particular other person is a fornicator), to use obscene language, particularly in the presence of a virgo, to address a clergyman “du pfaff,” or to use the familiar “du” when talking German to persona honorabilis. These are all cases of verbal injuries. Pulling faces, putting out one’s tongue at another or kissing a woman against her will are examples of injuriae reales.” (The Law of Obligations: Roman Foundations of the Civilian Tradition (1990), 1065–66) [footnotes omitted].

Another Roman tort was an action under the lex Aquilia. It is the ancestor of provisions like arts. 1382–83 of the French Civil Code and

¹. G. Inst. 3.88.
§ 823(1) of the German Civil Code. Today, French and German lawyers will sometimes say that these provisions create an “Aquilian” liability. There were two basic requirements for an action under the lex Aquilia. First, the defendant had to be at fault to be liable. That requirement will be described below when we deal with fault, but, in general, fault meant that he caused harm either intentionally or negligently, as it does in the modern codes.

Second, the plaintiff could recover only if he suffered certain types of harm. One Roman text said that the plaintiff had an action even if “the harm was not done physically nor an object physically injured.” Inst. 4.3.16. But in almost all the Roman examples, the plaintiff has lost the use of a physical object even if it was not physically injured: for example, he could recover for the loss of a cup whether it was smashed or thrown into a river where he could not get it back. The plaintiff could not recover if he himself was physically injured.

The closest the Romans came to allowing such an action was to let him recover if his son was injured while still under his authority. Here are two (almost the only two) texts that indicate that he can. Both are from the jurist Ulpian.

Julian also puts his case: A shoemaker, he says, struck with a last at the neck of a boy who was freeborn and whom he was teaching because he had done badly what he had been shown and so knocked out his eye. On these facts, Julian, says that the action for iniurias does not lie because he struck him not with the intent to insult but in order to correct and teach him. He wonders whether there is an action for breach of the contract for his services as a teacher, since a teacher is only permitted to punish lightly, but I have no doubt that an action can be brought against him under the lex Aquilia. Dig. 9.2.5.3.

If a man kills another in wrestling or boxing, provided he kills him in a public match, the lex Aquilia does not apply because the harm appears to have been done in the cause of glory and virtue and not for the sake of injury. . . . This applies when a son under authority has been hurt. Dig. 9.2.7.4.

Beginning in the Middle Ages, the Roman texts were interpreted to allow recovery for many other types of harm although the jurists never arrived at a clear rule. The Glossators (the jurists who wrote from about 1100 under the mid-13th century) said that the plaintiff could recover if he was physically injured, citing the first of the two texts just quoted. Citing the second text, the jurist Azo (who died about 1210) said that there could be recovery if a person was killed, whether or not he was a son in authority. The plaintiffs in such an action would be his heirs and relatives. By the 17th century it was widely accepted that his wife and children could recover for loss of support. By that time, it has also become accepted that the plaintiff could recover for pain and suffering.² Whether he could recover for

economic harm that was not accompanied by physical loss was less clear, but jurists sometimes gave examples in which he did. For example, the medieval jurist Durandus said that the plaintiff could recover if the defendant put dung in the street in front of his house, and he therefore had to pay a fine imposed by statute. ³ One of the greatest medieval jurists, Baldus degli Ubaldi, said that the plaintiff could recover against his secretary who revealed his secrets. ⁴ In the 18th century, Lauterbach and Brunnemann said that a client could recover from an advocate who harmed him through lack of skill. ⁵ Thus, one change that had taken place by the time that modern civil codes were enacted is that a remedy was given under the lex Aquilia for many more kinds of harm than in Roman times.

Another change was that jurists had begun to theorize about the general principles of tort law. The medieval jurists were primarily interested in interpreting the Roman texts in a way that made sense to them. They were not trying to formulate a general principle or explain philosophically where it came from. Among jurists, that task began with the work of the so-called “natural law schools” which flourished from the 16th through the 18th centuries. The first of these schools (16th and early 17th century) was that of the “late scholastics” or “Spanish natural law school” whose leading members were Domenico Soto, Luis de Molina, and Leonard Lessius. The second was the northern natural law school founded by Hugo Grotius and Samuel Pufendorf in the 16th century. It influenced the French jurists Jean Domat and Robert Pothier who in turn influenced the drafters of the French Civil Code.

The late scholastics tried to explain Roman law with principles drawn from their intellectual heroes, the Greek philosopher Aristotle and the medieval philosopher and theologian Thomas Aquinas. They identified contract and tort with Aristotle’s concepts of voluntary and involuntary commutative justice. For Aristotle, while distributive justice guarantees each citizen a fair share of whatever resources were to be distributed, commutative justice preserves the share of each citizen. When citizens exchange resources voluntarily, commutative justice requires that they do so at a just price, a price that preserves their share. If one citizen is involuntarily deprived of resources by another, commutative justice requires the person who did so to restore his victim’s share of resources. ⁶ This distinction not only resembles the one we draw between contract and tort but may have been its lineal

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³ G. Durandus, Speculum iuris (1574), lib. iv, par. iv, De iniuriiis et damno dato, § 2 (sequitur) no. 15.
⁴ Baldus de Ubaldi, Commentaria Corpus iuris civilis (1577), to Dig. 9.2.41 (vulg.9.2.42) pr. in fine. In the 16th century, Zasius gave the same opinion in the case of the secretary, citing Baldus. Ulrich Zasius, Commentaria seu Lecturas eiusdem in titulos primae Pandectarum ad Dig. 9.2 no.1, in Opera omnia vol. 1 (1550) (repr. Scientia Verlag, 1966).
⁵ Wolfgang Lauterbach, Collegium theoretico-practici (1793), to Dig. 9.2 no. xv; Johann Brunnemann, Commentarius in quinquaginta libros Pandectarum (1762), to Dig. 9.2.8 no. 5. Horst Kaufmann has found many other examples from the practice of early modern times. H. Kaufmann, Rezepition und Usus Modernus der Actio Legis Aquiliae (1958), 46–56.
⁶ Nicomachean Ethics V.ii 1130b–1131a.
ancestor. Our distinction goes back to Gaius. Modern scholars think that he took it from Aristotle.\(^7\)

Having taken that step, the late scholastics concluded that the distinctions between *iniuría*, the *lex Aquilia*, and the other particular Romans torts was a mere matter of Roman positive law. In principle (or as they put it, as a matter of natural law), the defendant should be liable whenever, through his own fault, he deprived the plaintiff of anything that belonged to him as a matter of justice.\(^8\) They were not very specific about what belonged to a person as a matter of justice. Nevertheless, they thought that this principle explained not only recovery under the *lex Aquilia* but in the action for *iniuría* as well. In the action for *iniuría*, the plaintiff recovered for insult which deprived him of his reputation or his dignity.

Grotius borrowed many of his conclusions from the late scholastics, and this was an instance. In discussing tort law, he stated the same general principle but he also is not very specific about it:

Enough has been said about contracts. We come to what is due by the law of nature because of a wrong.

By a wrong, we mean every fault, whether of commission or of omission, which is in conflict with what men ought to do, either generally or because of some special characteristic. From such a fault, if damage is caused, an obligation arises by the law of nature, namely, that the damage should be made good.

Damage, *damnnum* (perhaps from *demo*) is when a man has less than what is his, whether it be his by mere nature or by some human act in addition such as ownership, pact, law. Things which a man may regard as his by nature are life, not indeed to throw away but to keep, his body, limbs, fame, honor, his own acts. The previous part of our treatise has shown how each man by property right and by agreements possesses his own not only with respect to property but also with respect to the acts of others. . . . \(^9\)

This text had an enormous influence on the history of tort law. It was followed by many jurists including the 18th century French jurist Robert Pothier who influenced the drafters of the French Civil Code. Pothier said:

A delict is an act by which a person through intent or malice causes a damage or injury to another.

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8. For examples, Lessius said that by a “thing” (*res*) taken from the owner he understands not only an object such as a horse, clothes or money but “what is owed as a matter of justice . . . such as a legacy left another or something which has been sold but which I still have.” Leonardus Lessius, *De iustitia et iure, ceterisque virtutibus cardinales libri quattuor* (1628), lib. 2, cap. 7, dub. 5, no. 19.

A quasi-delict is an act by which a person without malice but by inexcusable imprudence causes an injury to another. ¹⁰

Pothier, unlike Grotius, did not try to enumerate the different types of harm for which one could recover. When the French drafters wrote arts. 1382–83, they paraphrased Pothier. As a result, French courts today decide whether a plaintiff can recover without any guidance from the Code as to what constitutes a “harm.”

The stage was then set for the German jurists to be concerned about the vagueness of the term harm, and to try to give it a more definite content in the ways we have seen.

b. Common law

A list of torts

Common lawyers do not decide whether the plaintiff can recover by asking whether he suffered “harm” or whether the defendant violated a right which is “similar” to certain enumerated rights. They ask whether the defendant committed a particular tort for which common law courts give relief.

One of these torts is “negligence.” The defendant is liable if he negligently harmed the person or property of the plaintiff. “Negligence” was recognized as a distinct tort only in the 19th century. Before that, the defendant would sue in “trespass” if he had been injured in a straightforward manner: for example, if the defendant had struck him or carried off his goods. For injuries done in a less straightforward way (as some put it, for injuries done “indirectly” rather than “directly”), the plaintiff had to bring an action called “trespass on the case.” Instead of just claiming that the defendant struck him or came on his land, he alleged particular facts that entitled him to relief.

Trespass was actually a family of actions which today are recognized as particular torts. Americans usually describe them as “intentional torts” and say that to be liable, the defendant must have acted intentionally. If he acted negligently, he should be sued in “negligence.” In England, that view was taken by Lord Denning who said that the distinction between actions in trespass for direct injury and in trespass on the case for indirect injury has been superceded by one in trespass for intentional and negligent injury for negligence.² The House of Lords had not yet said whether it agrees, and English writers have different opinions. Some think that the defendant is liable in trespass if the contact was “direct” whether he acted intentionally or negligently.² The English do agree that

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¹⁰ Robert Pothier, Traité des obligations (1761), nos. 116, 118.
the defendant is not liable for committing these torts if he acted neither intentionally nor negligently.3

Here is a brief list of some of the torts which the common law courts have traditionally recognized as actionable in trespass together with a description of when the plaintiff could recover in modern English and American law.

(1) Trespass in assault and battery: Today we speak of two torts, battery and assault. In either case, the defendant is liable even if he did no harm although then the damages may be nominal.

To be liable for battery, he must make contact with the body of the plaintiff or something closely associated with the body such as a cane or a glass the plaintiff is holding. The contact must not be one that would normally be presumed to be acceptable. Thus the defendant is liable if he bashes the defendant on the head, or if he merely tweaks his nose or spits on him, but not if he merely taps the plaintiff on the shoulder to ask him the time.

Americans generally agree that the defendant is liable for battery whether or not the contact was “direct.” Thus the plaintiff can recover if the defendant poisons his drink or puts filth on a towel so that the plaintiff will rub it on himself.4 Some English authors think that direct contact “may” still be required so that the defendant would not be liable for battery in these cases. He would be liable instead under the “principle in Wilkinson v. Downer” which will be described later (see p. xxx, below).5

To be liable for assault, the defendant must have done something that led the plaintiff to believe he may imminently be the victim of a battery. It is an assault to point a gun or throw a rock at someone. The plaintiff need not be in fear but he must think that contact is about to occur. He cannot recover if his back was turned when the defendant shot at him, and he did not realize what was happening until the defendant was disarmed. He can recover if he sees the defendant is about to squirt him with a water pistol. The contact must be expected imminently: the plaintiff can recover if the defendant swings a fist at him but not if the defendant threatens to break his legs next week.

(2) False imprisonment: The defendant is liable if he confined the plaintiff. The confinement may be in any space, large or small, and it does not matter how it is effected, by force or threats or fraud. The defendant is

3. In Stanley v. Powell, [1891] 1 Q.B. 86, the plaintiff claimed that the defendant was negligent, and the jury found that he was not. The court said that the absence of negligence was a defense in an action of battery, and that the defendant should prevail since the jury verdict established that he was not negligent. In Fowler v. Lanning, [1969] 1 Q.B. 156, the plaintiff merely alleged that “the defendant shot the plaintiff” The court held that the defendant had the burden of proving either intention or negligence. It was decided even earlier that the defendant is not liable for trespass to land if his entry was neither intentional nor negligent. River Wear Commissioners v. Adamson, [1877] 2 App. Cas. 743.


liable even if he mistakenly but reasonably thought he had the right to confine the plaintiff.

(3) Trespass quare clausum fregit: Today known as trespass to land. The defendant must enter, or cause something to enter, land in plaintiff’s possession. He need not know that the land belongs to the plaintiff and he is liable even if he believes it belongs to himself. A trespasser is liable even if he did no harm although then only nominal damages may be awarded.

(4) Trespass de bonis asportatis: Today known as trespass to chattels. The defendant must physically interfere with plaintiff’s goods, for example, by damaging them or carrying them off. Again, he is liable even if he thought they were his own.

As we will see, English and American courts have added to the list by recognizing new torts. But to recover, the plaintiff still has to identify a particular tort which the defendant committed.

From the forms of action to the modern torts

Traditionally, the common law was not organized into the categories of tort and contract. It was organized around particular actions like those just described. Originally, the English royal courts only heard cases when a “writ” was issued by the royal chancellor. At first, new writs were devised as the occasion demanded, but eventually the number became fixed. Consequently, to win, the plaintiff had to fit his case within one of the existing writs or “forms of action.”

The forms of action were not meant be a list of rights or interests that the law ought to protect. They were merely the types of cases which, in the 12th and 13th centuries, it was thought proper for the royal courts to hear.

In the 19th century, legislation was enacted abolishing the forms of action. The plaintiff no longer had to identify which writ covered his case. Supposedly, the law did not change. The courts would give a remedy only in the types of cases that would previously fit within one of the traditional forms of action. Nevertheless, the law did change as treatise writers and courts tried to make sense of the traditional law. Indeed, part of the reason for the change may have been that, for the first time, the common lawyers were trying to think systematically about their law. The first university courses in the common law were taught by William Blackstone in the 18th century, who was also one of the first to write a common law treatise: Commentaries on the Laws of England. Before his time, there was little legal literature except for a few medieval tracts and the reports of decided cases. The first treatise on the common law of contracts was written by Powell in 1790. The first treatise on the common law of torts was written by Hilliard in 1861. In the process of trying to understand the common law, the treatise writers innovated.

One innovation was to say, as Blackstone did, that certain of the traditional forms of action constituted a law of torts. These forms of action became the particular torts of the modern common law.

Another innovation was to say, as the civil lawyers had done for centuries, that the two principal grounds on which the defendant might be liable were intent and negligence. "Negligence" was recognized for the first time as a separate tort. There had never been a writ of "negligence," nor had the plaintiff ever had to allege that the defendant was negligent to bring any of the traditional actions.

Still another innovation, and the one that concerns us here, concerns the way that the particular torts were understood. Beginning with Blackstone, common law treatise writers identified the forms of action with different rights or interests which the law was attempting to protect. Blackstone distinguished actions that protected personal property (trespass de bonis asportatis and trover), those that protected real property (trespass quare clausum fregit), and those that protected the "personal security of individuals" against injuries to "their lives, their limbs, their bodies, their health or their reputations." While the treatise writers of the 19th and early 20th century proposed different classifications, like Blackstone, they looked for a correspondence between forms of action and interests to be protected. Hilliard and Addison, in two of the first treatises on tort law, explained that for the plaintiff to recover, he must have suffered some "injury" or "damage." Pollock and Salmond, in their more systematic works, said that he must have suffered some "harm." Later writers such as Harper and Prosser spoke of the violation of "interests demanding protection" or "legally recognized interests." All of them, like Blackstone, tried to identify the traditional forms of action with the protection of distinct types of interests or the prevention of distinct types of harm, damage or injury.

At the same time, they tried to formulate a definition or list of the elements that the plaintiff must establish to recover under each of the forms of action. Judges traditionally had not decided cases by asking what type of harm the plaintiff had suffered or by formulating such lists. They decided them by looking for resemblances to clear cases in which an action would surely lie.

One problem for the treatise writers was to find a formula that could fit decisions that had not been made by a formula but by looking for

9. Id. 119–27.
such resemblances. A further problem was that the cases did not always correspond closely to a distinct interest worthy of protection. When they did, it was easy for the treatise writers could define a particular tort in terms of that interest. For example, false imprisonment could be defined in terms of confinement which deprived the plaintiff of his freedom of movement. Otherwise, unless the treatise writers were to challenge the cases, their choices were limited. They could devise a formula that fit the cases and then invent some reason why it corresponded only roughly to an interest worth protecting. They could redescribe the interest in question to make it fit their formula more closely. Or they could ignore the problem.

For example, the earliest treatise writers said that battery protected a person against bodily harm. Yet bodily harm was not all that mattered, as one can see from their definitions of battery, which still looked more like graphic images than boundary lines. Battery is “violence” inflicted on a person or as “an angry, rude, insolent or revengeful touching.” Later definitions were less graphic. For example, according Bigelow and Salmond, battery is an “application of force” to “the person of another” that is “unpermitted” or “without lawful justification.” But force did not mean harm. Even a person who had not been harmed could recover. Some writers did not try to explain why. Some found a reason why legal protection extended beyond the interest supposedly in question. The reason, according to Clark, was “the very great importance attached by the law to the interest in physical security.” According to Seavy, a “very slight interference is sufficient” because the interest in bodily integrity is one of the “most highly protected.” Salmond redescribed the interest in question: it “not merely that of freedom from bodily harm, but also that of freedom from such forms of insult as may be due to interference with his person.” Harper, Prosser and the Restatements agreed, and so were able to redefine battery in a way that fit the cases and also corresponded to the interests that Salmond had identified: plaintiff can recover for “unpermitted unprivileged contacts with [his] person” for “harmful or offensive touching.”

16. Hilliard, Torts 1: 201. See Addison, Wrongs 2: 692 (“the person of a man is actually struck or touched in a violent, rude or insolent manner”); Burdick, Torts 268 (“touching of another in anger”); Thomas M. Cooley, A Treatise on the Law of Torts or the Wrongs which arise Independent of Contract (1880), 162 (“injury ... done ... in an angry or revengeful or rude or insolent matter”).
19. For example, Bigelow, Torts 101 (“any forcible contact may be sufficient”); Salmond, Torts 382 (force may be “trivial”).
22. Salmond, Torts 383.
23. Prosser, Torts 44–45; Harper, Torts 38; Restatement of Torts ch. 2, titles of topics 1 & 2 (1934); Restatement (Second) of Torts ch. 2, titles, topics 1 & 2 (1965).
24. Prosser, Torts 43.
Similarly, according to the earlier treatise writers, an action of assault was supposed to protect a “right not to be put in fear of personal harm.” 26 Yet, as one can see even from the graphic, image-like descriptions of the earliest treatise writers, this action did not protect against all reasonable fear of harm, or only against fear of harm. They described assault as “an unlawful setting upon one’s person; or a threat of violence exhibiting the intention to assault, and a present ability to carry the same into execution.” 27 an “attempt . . . to offer with force and violence to do hurt to another.” 28 Later writers, somewhat more tamely, defined assault as “an attempt, real or apparent, to do hurt to another’s person, within reaching distance,” 29 “an attempt with unlawful force to inflict bodily injury upon another, accompanied with the apparent present ability to give effect to the attempt if not prevented.” 30 None of them claimed, however, that the plaintiff could recover always or only when he had been put in fear. As before, some like Seavy said that the reason was the importance of personal security as though that explained the matter. 31 Harper, Prosser and the Restatements, however, redefined the interest at stake as “the interest in freedom from apprehension of a harmful or offensive contact.” 32 That interest corresponded to their more precise definition of assault: it required the “apprehension of a harmful or offensive contact” where apprehension simply means the awareness that such a contact may imminently occur. 33

Similarly, the plaintiff’s property was supposedly protected by an action by trespass to land, his reputation by actions for libel and slander. Yet the plaintiff could recover for trespass if the defendant entered his land even if he did no physical damage. This time, none of the treatise writers managed to redescribe the interest at stake to make it conform to the circumstances under which the plaintiff could recover. Some of them found reasons why the law would impose liability when no harm was done. Some said that the law “presumes” 34 or “implies” 35 damage. According to Salmond, “[t]he explanation [is] that certain acts are so likely to result in harm that the law prohibits them absolutely and irrespective of the actual issue.” 36 According to Seavy, the reason was that like the interest in bodily integrity, the interests “in the possession and ownership of land, are [among] the most highly protected.” 37 Some merely let the matter pass.

These explanations made it sound as though somebody—“the law”—had already decided what interests were worth protecting and how to protect them. Supposedly, for example, the law had decided to protect one’s interest in not being offended but only against offence by physical contact;
it had decided to protect one’s freedom from the apprehension of imminent harmful or offensive physical contact whether one was put in fear or not; it had decided not only to protect one’s interest in land or reputation but to allow recovery even when neither had suffered harm. The treatise writers suggested that the law had made all these decisions without saying that they themselves agreed on the merits. The matter is presented in much the same way in textbooks today. The common law torts are said to correspond to the legal interests that the law had decided to protect.

As an historical matter, however, such decisions had never been made. Trespass in assault and battery dates from a time when breaches of the peace often led to private vengeance, when the distinction between civil and criminal liability was not yet clear in everyone’s mind, and when the very concept of tort as a distinct body of law was centuries off. The rules governing trespass in land were laid down before there were declaratory judgments. As Prosser himself observed, an action in trespass was used, not merely to redress an injury, but to vindicate “a legal right without which the defendant’s conduct, if repeated, might in time ripen into prescription.” 38 Historically, it would be hard to reconstruct what the common law judges had in mind when they set boundaries to the traditional forms of action. Surely, however, they were not considering what interests each form of action should protect and the best way to protect them.

However that may have been, common lawyers still determine whether the plaintiff can recover by asking what tort, if any, the defendant has committed. Since the traditional torts did not represent a list of rights or interests in which the defendant ought to be protected, inevitably, cases arise in which, although he should be protected, there is no appropriate tort. In those cases, the court must either deny relief, or stretch the boundaries of some existing tort, or invent a new tort.

2. Harm to dignity
   a. Insult in general

Traditional common law

Before the enactment of a statute on “harassment” in England, and the recognition of a new tort of intentional infliction of mental distress in the United States, plaintiff had to bring his case within one of the traditional torts.

R.F.V. Heuston & R.A. Buckley, Salmond and Heuston on the Law of Torts (21st ed. 1996), 120

“[In English law], even to touch a person without his consent or some other lawful reason is actionable. Nor is anger or hostility essential to liability: an unwanted kiss may be a battery. For the interest that is protected by the law of assault and battery is not merely that of freedom from

38. Prosser, Torts 81.