

Allen M. Linden and Bruce Feldthusen, Canadian Tort Law, 8th Ed.
CHAPTER 1 - INTRODUCTION: THE FUNCTIONS OF TORT LAW

The law of torts hovers over virtually every activity of modern society. The driver of every automobile on our highways, the pilot of every aeroplane in the sky, and the captain of every ship plying our waters must abide by the standards of tort law. The producers, distributors and repairers of every product, from food to machinery, must conform to tort law's counsel of caution. No profession is beyond its reach: a doctor cannot raise a scalpel, a lawyer cannot advise a client, nor can an architect design a building without being subject to potential tort liability. In the same way, teachers, government officials, police, and even jailers may be required to pay damages if someone is hurt as a result of their conduct. A blogger booting up a computer must take care. Those who engage in sports, such as golfers, hockey-players, and snowmobilers, may end up as parties to a tort action. The territory of tort law encompasses losses resulting from fires, floods, explosions, electricity, gas, terrorism, and many other catastrophes that may occur in this increasingly complex world. A person who punches another person on the nose may have to answer for it not only in a criminal case but also in the civil courts. A person who says nasty things about another may be sued for defamation. Hence, any one of us may become a plaintiff or a defendant in a tort action at any moment. Tort law, therefore, is a subject of abiding concern not only to the judges and lawyers who must administer it but also to the public at large, whose every move is regulated by it.

Although it is relatively easy to point to the activities within the compass of tort law, it is not so simple to offer a satisfactory definition of a tort. The term itself is a derivation of the Latin word, *tortus*, which means twisted or crooked. The expression found its way into the early English language as a synonym for the word "wrong". It is no longer used in everyday language, but it has survived as a technical legal term to this day.

Many authors have striven to define tort law and to mark it off from criminal law, contract law and quasi-contract law, but none of them has been entirely successful. Perhaps the best working definition so far produced is "A tort is a civil wrong, other than a breach of contract, which the law will redress by an award of damages."² But even this formulation does not tell us very much. It merely asserts that a tort consists of conduct for which the courts will order compensation, which is almost as circular as saying that a tort is a tort. Nevertheless, it is true that "A 'tort' is a legal construct . . . , [which] only exists where the law says it exists."³

A more promising description of tort law can be obtained by focussing on function. In tort litigation, the courts must decide whether to shift the loss suffered by one person, the plaintiff, to the shoulders of another person, the defendant.⁴ The principles and rules of the law of torts, which have been developed over the centuries, assist the courts in this task. No definition could possibly depict the richness and variety of the subject matter of tort law. In order to know what tort law is, it is necessary to study in some detail what it aims to do and what it does in fact, as well as the basic principles incorporated within it. . . .

Tort law is not one-dimensional; it serves several functions.⁵ It is "pluralistic".⁶ [T]ort law serves a potpourri of objectives, some conscious and some unconscious. . . .

A. Compensation

First and foremost, tort law is a compensator. A successful action puts money into the pocket of the claimant. This payment is supposed to reimburse the claimant for the economic and psychic damages suffered at the hands of the defendant. The repa-

ration function of modern tort law is so fundamental that some commentators have asserted that it is tort law's only legitimate task.

B. Deterrence

The second historic function of tort law is deterrence or the prevention of accidents. Such legal luminaries as Bentham, Austin, and Salmond believed that the purpose of tort law was not much different from that of the criminal law. Lord Mansfield once wrote that damages acted "as a punishment to the guilty, to deter from any such proceedings in the future . . .". This should surprise no one in view of the common roots of tort and criminal law.

C. Education

Tort law is an educator. Along with criminal prosecutions, coroners' inquests, royal commissions and the like, a tort trial is a teacher. It educates the public, not just potential tortfeasors but all of us. . . . Tort law is also a reinforcer of values. Like the criminal law, tort law enshrines many of the traditional moral principles of Anglo-American society.

D. Psychological Function

Tort law may perform certain psychological functions. For example, the tort action, like the criminal law, may provide some appeasement to those injured by wrongful conduct. Lord Diplock has contended that no one would suggest using tort law for the purpose of vengeance. Nevertheless, though it is distasteful to most of us, this has always been one of the unexpressed uses of tort law and criminal law.

E. Market (General, Indirect) Deterrence

The law of tort may reduce accidents through market deterrence. This must be distinguished from the type of deterrence discussed above, whereby tort law directly attacks the specific occasions of danger. Market or general deterrence functions indirectly. It lowers accident costs by making those activities that are accident-prone more expensive by requiring them to bear the full costs of the mishaps they produce. This renders safer substitutes more attractive, because they cost less.

F. Ombudsman

Tort law is an ombudsman. It can be used to apply pressure upon those who wield political, economic or intellectual power; in short, it empowers the injured.

2 Fleming, *The Law of Torts*, 9th ed. (1998), p. 1; *Prosser and Keeton on the Law of Torts*, 5th ed. (1984), pp. 1-2, reproduces several definitions. . . .

3 See in *Angus v. Hart*, [1988] S.C.J. No. 75 , 52 D.L.R. (4th) 193 , at p. 199 (*per La Forest J.*). See also Cory J.'s definition of a tort in *Hall v. Hebert*, [1993] S.C.J. No. 51 , [1993] 2 S.C.R. 159 , 15 C.C.L.T. (2d) 93 , at p. 118.

4 Wright, *Cases on the Law of Torts*, 4th ed. (1967), Introduction.

5 See Williams, "The Aims of the Law of Tort", [1951] *Current Legal Problems* 137; Fleming, "The Role of Negligence in Modern Tort Law" (1967), 53 *Va. L. Rev.* 815 ; R. Keeton, "Is There a Place for Negligence in Modern Tort Law?" (1967), 53 *Va. L. Rev.* 886.

6 See England, *The Philosophy of Tort Law* (1993).