A Concept of Intentional Action for Intentional Torts

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Intentional Torts

• Trespass to the person (in the form of battery, assault and false imprisonment)
• Trespass to land
• Trespass to chattels or goods
• Conversion
• Detinue
• Action on the case
Intentional Torts

- Aim: Protection of Rights

- The actions related to trespass to the person aim to protect the rights to bodily integrity and liberty of individuals against direct and intentional infringements.
Questions

• Whether the performance of an intentional action by the defendant is a necessary condition for liability to arise under the aforementioned intentional torts

• If so: What does ‘intentional action’ should mean within this context?
Aim

• Part I: To argue that an intentional action by the defendant is a necessary condition for liability to arise under intentional torts.
• In parts two and three, this article explores some foundational work on the philosophy of action and offers a concept of intentional action to be used for describing the acts of the defendant in intentional torts and to differentiate them from negligence.
IS INTENTIONAL ACTION IRRELEVANT FOR INTENTIONAL TORTS?

• Contrast between two doctrinal views:

  The ‘intentional view’

  The ‘rights view’
Intentional View

• Claim:

The performance of an intentional action is a necessary condition for liability under the category of intentional torts
Intentional View

• Case Law basic authority. *Letang v Cooper* [1965] 1 QB 232, 239:

‘we divide the causes of action now according as [*sic*] the defendant did the injury intentionally or unintentionally. If one man intentionally applies force directly to another, the plaintiff has a cause of action in assault and battery, or, if you please to describe it, in trespass to the person [...] If he does not inflict injury intentionally, but only unintentionally, the plaintiff has no cause of action today in trespass. His only cause of action is in negligence, and then only on proof of want of reasonable care’
Rights View

• Claim:
  - The performance of an intentional action neither a necessary nor a sufficient condition within this context. It is irrelevant.
  - Cane: ‘far from being intentional torts, “right-based torts” basically impose strict liability’
  - Stevens: intentional torts protect rights, and rights ‘are capable of being infringed without proof of fault’
Comparing the views

Each view has a specific focus:

- The intentional view focuses on the actions and mental states of the defendant

- The rights view focuses on creating an effective protection for the rights of the plaintiff
Argument for the Rights View

• Cane: Intentions are irrelevant in infringements of rights

‘Rights create protected spaces (both physical and metaphysical); and crossing a boundary into a protected space without the permission of the right-holder is tortious in itself, regardless of whether it causes any harm to the right-holder and regardless of whether the boundary-crossing was negligent, reckless or intentional.’
Rebuttal

• Interferences with rights do not conceptually imply strict liability.
• Interferences with rights can also be analysed from the point of view of the agent.
• The law can also attach different legal consequences to interferences performed with different kinds of mental states.
• This is the case, for instance, in criminal law.
Argument for the Intentional View

• A literal interpretation of existing case law would rule out the claim on strict liability endorsed by the right’s view.

• The case law requires intentions in the agent
Rebuttal

• Intentions are difficult to prove

• Lack of intention is not a usual defense in the case of intentional tort
Reply and Final Argument for the Intentional View

• Intentions are not impossible to prove
• The defendant can prove lack of intention
• A modification of Chan’s and Simester’s suggestion: The wrongful character of the conduct of intentional torts appears only when it is connected with the intentions of the agent.
• Intentional torts involve intention-dependent wrongs.
Practical Importance of Intentional Action as Necessary Condition for IT

If there is not an intentional action, then the plaintiff can sue for negligence. However:

- In trespass the plaintiff does not bear the *onus* to establish that the injuries are of a kind that the defendant could reasonably foresee.

- In some jurisdictions (e.g. New South Wales), legislative restrictions to the employment of the action of negligence are not applicable to intentional torts.
A CONCEPT OF ACTION FOR INTENTIONAL TORTS

• Positive Act: Ambiguous

• The *Fagan* case

• Positive Act: a kind of action

• Concept of Action: genus and its *differentia specifica*
Actions as Events

An event is a change of state in an object or in regions of space that persist through time. Such change has occurred when an object acquires or loses some property. In this sense, an event is the instantiation of any property of one of the following forms; either an object or a region of space having a property $P$ at time $t$ but not having $P$ subsequently, or not having $P$ at $t$ but having $P$ subsequently.
Relevant Distinction for IT

• Conduct

• Consequences
Consequences as Event

A positive act exists only if there is an instantiation of any property of one of the following forms; either the plaintiff (in her bodily integrity of liberty) or one of her goods (including land) having a property $P$ at time $t$ but not having $P$ subsequently or not having $P$ at $t$ but having $P$ subsequently.
Incomplete concept

Defining positive acts as events and omissions as the maintaining of the states of the agent and the object is far from a full explanation of them. Earthquakes are also events but not positive acts.
Differentia Specifica of Positive Acts

- Some physical properties in the agent, related to her conduct and not to its consequences: certain bodily movements of the agent occur
- Mental state

Intention? Too stringent (no possibility of intentional actions)
Self-awareness+ Capability to intent
Self-Awareness

To know what one is doing: anticipating it and being able to name one’s own actions or, more specifically, to give a *prima facie* description of the consequences of the conduct.

Velleman: in doing something it is unavoidable for the agent to ‘know what sort of action it will turn to be’
A CONCEPT OF INTENTION FOR INTENTIONAL TORTS

The *differentia specifica* of intentional actions is that they are directed at the chosen end of producing the event.
An action is intentional only if the agent has chosen the relevant consequence as the end, aim, purpose, and objective of the action.
Conduct directed at the chosen end

• It implies having a desire to obtain the end.

• It also implies having the belief that by means of certain bodily movements a desired change will take place.
Properties of Intentions

• Bratman: an intention represents the result of the process of rational deliberation.
• It also implies a commitment to action or general plan of action to attain the chosen end.
• There cannot be conflicting intentions.
• Prio intentions and intentions in action
An intentional positive act is an event (that is, an instantiation of any property of one of the following forms: either the plaintiff (in this bodily integrity of liberty) or one of her goods (including land) having a property $P$ at time $t$ but not having $P$ subsequently or not having $P$ at $t$ but having $P$ subsequently) that is brought about by the defendant by means of certain bodily movements of which the agent is aware. In addition, the defendant must have chosen that event and her bodily movements must be directed at achieving them in the sense that the agent must be committed to achieve the chosen event with the belief that she will bring it about by means of her bodily movements.
Recklessness and Negligence

This concept of intentional positive act do not encompasses acts that are performed recklessly. Reckless acts imply only the awareness of the risk than an act may produce certain adverse consequences to which the agent is indifferent.

In a reckless act the agent has the desire to undertake the necessary bodily movements directed at creating an event that she has chosen, to which she is committed. If the side effect is harm or damage to another person to which the agent owes a duty of care, damages can be recovered by pursuing a claim in negligence.