

These points can best be understood by bifurcating "intent" into its two components: state of mind (advertence) and the object to which the defendant's state of mind is directed.

3.2 Advertence and Object

Private tort law has taught us that there are two key issues in defining "intent": what state of mind is required, and the nature of the object to which that state of mind must be directed, in order to constitute a cause of action. We will turn first to the quality of advertence required, and second to the nature of the object to which the various intentional torts require the advertence be directed.

3.2.1 State of mind (advertence)

The most salient examples of the varying content which can be given to the state of mind requirement, are desire and knowledge. A defendant might be said to "intend" a result only when he or she affirmatively desires the result to come about. In such a case, the requirement that a plaintiff prove "intent" would be similar to requiring a showing of malice (itself a common-law label of much variability). By contrast, the defendant might be held to "intend" any result which he or she knew was substantially certain to follow.

38. Need a cite here; maybe intentional infliction of emotional distress

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The latter is the Restatement approach. In such a case, "intent" has nothing to do with ill-will; an intentional tort could coexist even with a sincere regret on the defendant's part that the harm "had" to be caused.

It is easy to understand why some courts might wish to treat the person who wants to cause harm the same as they treat the person who merely knows he or she will cause harm while pursuing some collateral goal; it is also easy to understand why a court might wish to distinguish between the two cases. Desire and knowledge are different concepts, and deciding what role each should play in triggering liability for "intentional tort" requires deliberate and difficult policy decisions.

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<Need illustrations here>

<Maybe deliberation is the appropriate test for advertence. If so, as Blackmun suggests, it would go beyond traditional lines dividing negligence from intent. Deliberate nonaction.>

3.2.2 Object

Perhaps even more variable than the issue of what kind of advertence counts as an "intentional" state of mind is the question of the object to

39. Cite to the Restatement (second) of Torts.

The question of how certain the knowledge has to be is itself subject to variation. The less certainty is required, the closer the "intent" requirement will come to negligence.

40. Apply to examples in the case-- intent re good time, intent re the forgotten note, etc.

which the state of mind is directed. To what must the defendant be advertent (desiring, knowing, or whatever) in order to be guilty of an intentional tort? This issue, the most important for section 1983 purposes, is often obscured, at least partly because the cases and Restatement seem to work hard to conceal the fact that intentional tort liability is often imposed for harm which in ordinary language one would call 'unintended', neither desired nor known. No matter how complete one's definition of the internal mental state which will constitute "intent", the law must still move on to another task, the task of deciding what entitlements should be free from such intended harm.

One might imagine that one need not define the object, and need only define state of mind. (That might be one interpretation of Justice Rehnquist's view.) That state of mind is not enough can be easily demonstrated, however. In negligence cases, the defendant often demonstrates a clear intent (whether intent is construed as knowledge or as desire). For example, the defendant in an automobile accident case may intend to drive at 90 mph and know he is driving too fast, or the defendant charged with negligently maintaining a building site may have intentionally decided to brace the ladders with only one sandbag instead of two. But the presence of intent does not make these cases of intentional torts. Since the intentional

41. One example of frankness on this score was in pre-Sullivan libel law, where a defendant who honestly thought he was writing fiction could be guilty of defaming someone whose name was the same as that of one of the defendant's characters. But libel at that stage often referred to as a "strict liability" tort, rather than as an "intentional" tort, so that its typicality of the general run of intentional torts is often ignored.

42. "The intent with which tort liability is concerned... is an intent to bring about a result which will invade the interests of another in a way that the law forbids." Prosser at 36 (emphasis added). The decision on what interests should be free from advertent acts is logically separate from the decision on what constitutes advertence.