



LITIGATION AS A TORT

A SHORT EXERCISE WITH CONSEQUENCES

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ALL LITIGATION INFLECTS INJURY. This is not just a question of cost. It is also a question of injury to reputation, emotional distress, restrictions on personal freedom, and other dignitary insults. A simple hypothetical case can both demonstrate the truth of this statement and provide some estimate of the frequency and severity of litigation injury. All that is needed is to assume there is no litigation privilege, and then to identify the torts that the participants would appear to have committed.

“Litigation privilege” is the privilege that normally protects lawyers, judges, and even witnesses from tort liability for statements made and actions taken during litigation. With respect to defamation, § 586 of the *Restatement (Second) of Torts* says an “attorney is absolutely privileged to publish defamatory matter concerning another in communications preliminary to a judicial proceeding, or in the institution of, or during the course and as a part of a judicial proceeding in which he participates as counsel.” Courts have extended the privilege to prevent actions for intentional interference with contract, intentional infliction of emotional distress, and sometimes even fraud.¹ An even stronger immunity protects judges from

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¹ *Simms v. Seaman*, 69 A.3d 880 (Conn. 2013) (discussing history of privilege); *Cantey Hanger LLP v. Byrd*, 467 S.W.3d 477 (Tex. 2015); T. Leigh Anenson, *Absolute Immunity from Civil Liability: Lesson for Litigation Lawyers*, 31 Pepp. L. Rev. 915 (2004).

tort suits for acts taken in connection with their official duties.² And witnesses generally enjoy tort immunity, even if they commit perjury.³

The privilege enables those protected by it to perform their roles in the adversary system without fear of personal liability. For the attorney, it means that the attorney can advance the client's interest without fearing for his own. The lawyer's undivided loyalty to the client enhances the client's ability to be fully and effectively heard by the court. Other remedies, such as bar discipline or criminal prosecution, are thought sufficient to deter misconduct.⁴

But the privilege imposes a social cost. One way to measure that cost is by the law's own standards, i.e., to look at a hypothetical case to see what conduct, absent privilege, would appear to be an actionable tort. The injury is the same, after all, even if privilege prevents it from being compensable.

To eliminate assertions that the author has stacked the deck, everything in the following hypothetical would be protected by privilege. In it the reader will find no abuse of process, no ethical violation, and not even any sanctionable misconduct by parties or counsel. Nor is the reader asked to think creatively, as those who would apply product liability law to legal briefs and test them for design defects might be tempted to do.

Rather, the assigned task is simply to assume away litigation privilege and examine ordinary litigation conduct to see to what extent it requires conduct that might otherwise be an actionable tort in some state. The format is that of a torts examination. Readers are invited to spot the issues, which are discussed in the footnotes.

THE HYPOTHETICAL

The sheep of Abel, the herdsman, destroyed the corn of Cain, the farmer. Each blamed the other for leaving open the gate that separated their fields. Instead of resorting to the violence that made the Biblical

² *Stump v. Sparkman*, 435 U.S. 349, 355-65 (1978).

³ *Crain v. Unauthorized Practice of Law Comm. of the Sup. Ct. of Tex.*, 11 S.W.3d 328, 335-36 (Tex. App. 2000) ("Any communication, even perjured testimony, made in the course of a judicial proceeding, cannot serve as a basis for a suit in tort.").

⁴ See *Simms*, 69 A.3d 880; L. Munford, *The Peacemaker Test: Designing Legal Rights to Reduce Legal Warfare*, 12 Harv. Nego. L. Rev. 377 (2007); RESTATEMENT (THIRD) OF THE LAW GOVERNING LAWYERS § 57, cmt. b (2000).

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figures for whom they were named famous, they went to court.

Cain's suit sought money for the loss of corn, the unjust weight gain of Abel's flock, and Cain's emotional distress. He asserted that Abel's cruelty to his employees had caused them to sabotage the gate.⁵ Abel, on the other hand, claimed that Cain left the gate open after a failed attempt to steal a sheep.⁶ Both retained counsel.⁷

Discovery commenced. Under the discovery rules, each party had the power to compel the other party to produce documents and answer interrogatories.⁸

Abel subpoenaed Cain's medical records. They revealed that Cain took medicine for unexplained mental lapses which indicated incipient dementia.⁹ Cain propounded a document request and learned that Abel had fired

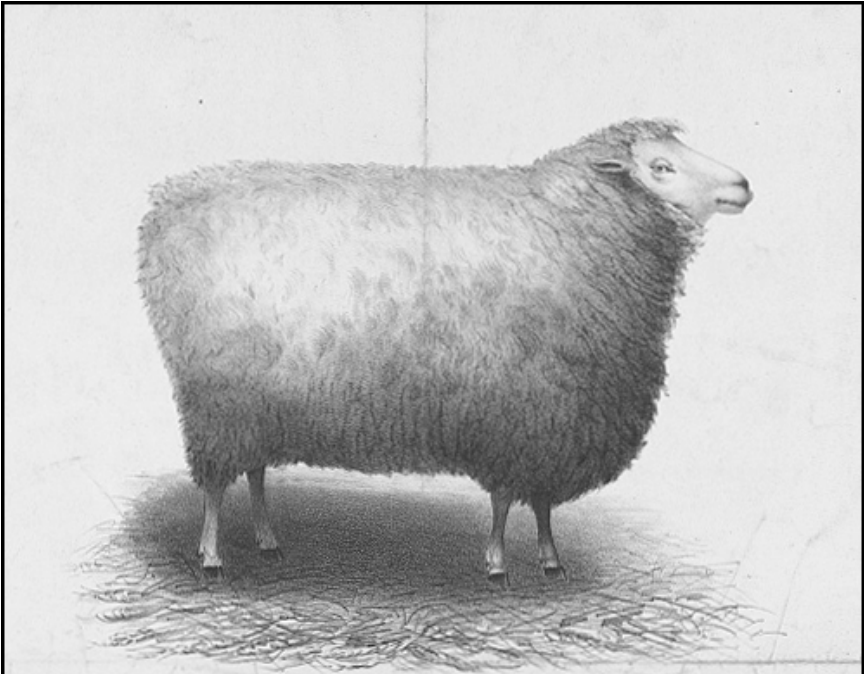
⁵ An allegation that casts false aspersions on the character of a farm corporation and damaged its reputation as an employer is actionable. *Di Giorgio Fruit Corp. v. Am. Fed'n of Labor & Cong. of Indus. Organizations*, 30 Cal. Rptr. 350 (Cal. Dist. Ct. App. 1963) (general damages of \$10,000 awarded).

⁶ An allegation of sheep stealing is defamation per se. *See* *Lowe v. Brown*, 235 P.395, 397 (Or. 1925) (affirming \$50 slander per se judgment in favor of plaintiff falsely accused of stealing sheep); *Harman v. Cundiff*, 82 Va. 239, 1886 WL 2990 (1886) (\$800 slander per se judgment affirmed).

⁷ The exceptionally alert will note that a conspiracy has been formed to commit the preceding torts and those that follow. An agreement among two or more persons to slander a plaintiff is a conspiracy. *Compare* *Wildee v. McKee*, 2 A. 108 (Pa. 1886) (conspiracy to defame a teacher by saying he was not in his "right mind") *with* *Kruegel v. Murphy*, 126 S.W. 343, 345 (Tex. Civ. App. – Dallas 1910, writ ref'd) (attorneys immune from suit alleging conspiracy with client).

⁸ A question would be whether the power to compel action by another would create a fiduciary duty to act in that party's best interest. A party "breaches a fiduciary duty by actively utilizing some power, control, or opportunity to destroy, injure or gain a preferential advantage over the party with whom it has a mutual interest." *Carter Equip. Co. v. John Deere Indus. Equip. Co.*, 681 F.2d 386, 392 (5th Cir. 1982). Here each party can compel the other to do something through the discovery rules, but neither party will act in the best interest of the other.

⁹ Public disclosure of private facts is a tort if disclosure would be highly offensive to a reasonable person and the disclosure is not a matter of public concern. *Compare* *Walgreen Co. v. Hinky*, 21 N.E.3d 99, 112 (Ind. Ct. App. 2014) (affirming \$1.8 million judgment for pharmacy disclosure of embarrassing medical information) *with* *Watters v. Dinn*, 666 N.E.2d 433 (Ind. App. 1996) (father privileged to disclose mental illness of ex-wife's new husband in custody litigation).



NEW OXFORD SHEEP.

Four Years Old, raised by Mr. William Newbold, near Delaware City, Delaware, under the care of
Joseph Newbound, 1853.

WEIGHT WHEN DRESSED, 269½ POUNDS.

Length from nose to insertion of the tail, 60 inches. Length from heel to heel over the shoulders, 72½ inches. Circumference
round the body behind the shoulders, 51 inches.

From a Daguerrotype by Moulson, 131 Chestnut Street, and Edgely Road and Calverhill Street, the only operator having obtained a patent from the U. S. for any improvement in the production of a
Photographic image.

PUBLISHED BY JOHN MOULSON.

Entered according to act of Congress in the year 1853 by John Moulson in the Clerk's Office of the District Court for the Eastern District of Pennsylvania.

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his experienced but highly paid shepherd because Abel was in serious financial difficulty.¹⁰

Both sides then noticed depositions and compelled witnesses to appear.¹¹ Abel's counsel asked Cain about the poor quality of his corn crop and, assuming facts not in evidence, asked if Cain's father was still a thief.¹² Cain's counsel cross-examined Abel with evidence of his financial embarrassment and his numerous instances of careless management.¹³

The trial court called for a venire of 60 people to appear so that it could select 12 jurors for the two-day trial.¹⁴ Cain's wife left the courtroom in tears after being questioned about her husband's mental competence.¹⁵ Abel's medical witness mistakenly denied the authenticity of cer-

¹⁰ A statement that a plaintiff had been in financial difficulty can be an invasion of privacy if the information comes from a private source. *Trundle v. Homeside Lending, Inc.*, 162 F. Supp. 2d 396, 401 (D. Md. 2001). *But see* *In re Residential Capital LLC*, 563 B.R. 477, 492 (S.D.N.Y. 2016) (witness immunity bars conspiracy claim based on witness testimony concerning plaintiff's debts).

¹¹ False imprisonment has been defined as the "unlawful restraint of another's liberty." *Scofield v. Critical Air Med., Inc.*, 52 Cal. App. 4th 990, 1000 (Cal. Ct. App. 1996) (collecting authorities on tort and affirming \$60,000 judgment for child taken on 600-mile flight by wrong air evacuation company even though no force involved). Damages can be recovered for, among other things, emotional suffering, humiliation, loss of time, business interruption, and damage to reputation. *Id.* at 1009.

¹² A defamatory statement about the father. *See* n.6, *supra*. "Nothing is better established in the law relating to libel and slander than the rule that a defamation is none the less such merely because it is in the form of a question. The most vicious and harmful defamations are often couched in that form, with the hope to avoid legal responsibility, and at the same time do all the damage that a direct charge would do." *Ill. Cent. R.R. Co. v. Wales*, 171 So. 536, 537 (Miss. 1937).

¹³ And so it was that, in a case alleging the infliction of a financial loss which caused emotional distress, emotional distress was inflicted. Under *Restatement (Third) of Torts: Liability for Physical and Emotional Harm* § 45, cmt. a (2012), "[e]motional harm . . . encompasses a variety of mental states, including fright, fear, sadness, sorrow, despondency, anxiety, humiliation, depression . . . and a host of other detrimental – from mildly unpleasant to disabling – mental conditions." A defendant is liable who "by extreme and outrageous conduct intentionally or recklessly causes severe emotional harm to another." *Id.* § 46.

¹⁴ Another false imprisonment, this time multiplied by 60. *See* n.11, *supra*.

¹⁵ On intentional infliction of emotional distress as a technique of cross-examination, see the cross-examination of Humphrey Bogart as Captain Queeg in the movie, *The Caine Mutiny* (1954).

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tain hospital records, a false statement that Cain's lawyers exposed after retaining an expensive rebuttal expert.¹⁶

The jury found in favor of Cain but awarded him only \$1 in damages. They believed Abel's closing argument that Cain's corn crop was so poor that Abel's sheep could not have done it measurable harm.

The trial court denied a new trial in an opinion that mistakenly accused Cain's counsel of "being disingenuous" and "misrepresenting the facts."¹⁷

CONSEQUENCES

People take for granted the adversity that accompanies many vital tasks. Breathing requires work, walking demands labor, and transportation inflicts noise.

In the life of the law, litigation injury is taken for granted. Law schools do not teach it. Those who look to legal rules as an exercise in economics assume it away. Those who favor court resolution of disputes over settlement do not consider it.¹⁸ It is not easily counted,¹⁹ and so there is an assumption that it does not count.

But, as this hypothetical demonstrates, litigation injury not only exists but, by the standards of tort law itself, it can arise out of even the simplest litigation. The hypothetical illustrates a dozen or more different injuries for which tort damages might lie but for litigation privilege – and that does not include false imprisonment of an entire venire. Each of these injured parties would, absent the privilege, have causes of action for which thousands of dollars might be awarded.

¹⁶ "One who, in the course of his business . . . supplies false information for the guidance of others in their business transactions, is subject to liability for pecuniary loss caused to them by their justifiable reliance upon the information, if he fails to exercise reasonable care or competence in obtaining or communicating the information." RESTATEMENT (SECOND) OF TORTS § 522 (1977).

¹⁷ See *Walls v. General Motors Inc.*, 906 F.2d 143, 147 (5th Cir. 1990) (claims in brief "patently disingenuous in light of [lawyer's] misstatements"). If this were not true, a statement falsely accusing a professional of lying in the performance of his professional duties would be actionable. See *Albert v. Loksen*, 239 F.3d 256, 267 (2d Cir. 2001) (Sack, J.).

¹⁸ See, e.g., Owen Fiss, *Against Settlement*, 93 Yale L. J. 1073, 1085 (1984) (courts should be given every "opportunity to expound on the law").

¹⁹ See *Munford*, *supra* note 4, 12 Harv. Nego. L. Rev. at 382-88 (pointing to historical, doctrinal, and medical evidence of the existence of litigation injury).

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Without litigation privilege, not only could the ordinary incidents of litigation be actionable torts, but litigation would have no end. This simple suit would spawn yet more suits as each character in the story sought redress for injuries suffered. Instead of settling disputes, litigation would create them. No one would want to be a lawyer, a judge, or even a litigant.

Seen from this point of view, litigation privilege is essential to the very existence of our court system, and is not, as some would have it, an antiquated relic to be cast aside based on the notion that lawyers should not be allowed to escape the tort doctrines they inflict on others.²⁰

But because of litigation privilege, conduct that society otherwise regards as being tortious is not only permitted but is also affirmatively encouraged. This fundamental recognition in turn has several important consequences:

- Litigation privilege explains the need for the attorney disciplinary system and admonitions of civility. The privilege removes the tort system as a regulator of what would otherwise be actionable misconduct. Bar discipline takes its place. It substitutes a neutral arbiter who understands what conduct is necessary to litigation and what is not and violates norms of professional conduct.
- While it might be thought that judges could also be a neutral arbiter, allowing judges to sanction attorneys for misconduct in cases before them runs the risk of undermining litigation privilege when the sanctions are sought by opposing counsel for vaguely defined offenses. To the extent the sanctions process relies on tort concepts, it creates the satellite litigation that litigation privilege is designed to prevent. For this reason, it is especially important to limit sanctions remedies. The remedies should not be compensatory.²¹ And the

²⁰ See Paul T. Hayden, *Reconsidering the Litigator's Absolute Privilege to Defame*, 54 Ohio St. L.J. 985 (1993) (arguing for qualified privilege).

²¹ See *Business Guides Inc. v. Chromatic Commc'ns Enters., Inc.*, 498 U.S. 533, 551-52 (1991) (adoption of Rule 11 did not violate Rules Enabling Act because remedies are more limited than those under the common law). *But see* *Goodyear Tire & Rubber Co. v.*

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sanction should only affect the resolution of the underlying litigation where the sanctionable conduct affected the opposing party's ability to litigate the merits of the underlying case.²²

- Because litigation is privileged tortious conduct, it has to be justified as serving an end that can justify the cost of that conduct. The traditional reason for civil litigation is to do something about disputes that would otherwise end in violence.²³ When the motive moves beyond that, the courts step onto treacherous ground.

There is, for example, little reason to believe that courts are better than government agencies when they are asked to resolve broad public policy issues concerning safety and risk.²⁴

Careful attention also needs to be paid when steps are taken to instigate litigation beyond the resolution of existing disputes between angry parties. Lawyer advertising runs the risk of creating disputes where none previously existed. Litigation funding introduces into the quarrel a third party whose interests may not be the same as the interests of the principal parties and may prolong the controversy. These things may yield benefits. But to the extent they result in the additional infliction of litigation injury, it should be kept

Haeger, 137 S.Ct. 1178 (2017) (sanctions levied under “inherent power of the court” may be compensatory).

²² In Texas, sanctions on the merits, called “death penalty” sanctions, “must be reserved for circumstances in which a party has so abused the rules of procedure, despite imposition of lesser sanctions, that the party’s position can be presumed to lack merit and it would be unjust to permit the party to present the substance of that position before the court.” *Gunn v. Fuqua*, 397 S.W.3d 358 (Tex. Ct. App. 2013), *quoting* *TransAmerican Natural Gas Corp. v. Powell*, 811 S.W.2d 913, 917 (Tex. 1991).

²³ “This doing of something about disputes, this doing of it reasonably, is the business of law.” Karl N. Lewellyn, *THE BRAMBLE BUSH: ON OUR LAW AND ITS STUDY* 12 (1960).

²⁴ Cass R. Sunstein, *RISK AND REASON, SAFETY, LAW AND THE ENVIRONMENT* 254-76 (2002) (discussing common mistakes in estimating safety risks and recommending creation of federal agency to assess them); W. Kip Viscusi, *Jurors, Judges, and the Mistreatment of Risk by the Courts*, 30 J. Legal Stud. 107 (2001).

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in mind that engaging in tortious conduct for a profit is exactly what our legal system otherwise deems punishable with punitive damages.

Without litigation privilege, our adversarial litigation system could not operate. Without privilege it would be difficult to find anyone who would want to risk being a lawyer, a judge, a juror, or even a witness. The privilege gives the lawyer freedom to speak for the client and gives others the power to act impartially, subject to professional constraints. But the cost of the privilege is high, and should not be overlooked or forgotten.

