

**Background Memo #2**  
**What in the Heck is Torts?**

**Fall 2021**

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Torts (the legal term, as opposed to the dessert of tortes<sup>1</sup>), has been a mainstay of the 1L curriculum for more than a century.

This is not surprising: many Torts concepts are also foundational to many other areas of the law, from Constitutional Law to Business Law.

But why a law of Torts?

It makes sense that every society has a law of crimes to punish and deter the unfortunate human inclination for misbehavior. As a result, there are laws identifying what conduct is unacceptable (usually, but not always, written into a “code”) plus an adjudicative process to determine guilt (typically, but not always, involving a government official, often a “judge” and sometimes a group of laypeople to assist the judge--a “jury”), and sanctions that typically involve a loss of liberty.<sup>2</sup>

But why go further and also establish a system that provides compensation when the conduct that causes harm but isn’t covered by the law of crimes, for example, when one neighbor accidentally kills another’s cow or a person drives onto the land of another without

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<sup>1</sup> <https://www.dictionary.com/browse/torte>

<sup>2</sup> You will note that I hedge many of my statements by using terms like “usually” and “typically.” This is because the law is made up of general rules and LOTS of exceptions to those rules, so sweeping statements are often technically incorrect. A good lawyer speaks or writes with nuance.

permission? The casebook identifies a number of general policies that support the establishment of a civil justice system. What are they?<sup>3</sup>

Torts in the United States is considered part of the “**Common Law**,”<sup>4</sup> which was transplanted from England to the New World by early colonists.<sup>5</sup> This meant that a judge would identify and then apply the principles found in the daily dealings between Englishmen, as opposed to looking to laws propounded by the church (Ecclesiastical Law) or laws propounded by legislatures or kings (often called “Roman Law” or more generally “**Civil Law**”).<sup>6</sup>

Because the Common Law is built upon community practices and values, it implicitly acknowledges that the law is not, nor should it be, impervious to changes in society. In fact, Common Law judges have always adjusted the law in response to new realities. This flexibility has sometimes been criticized as “judicial activism,” which is an intrinsically conservative concept which means that judges should not “make up the rules” but rather should only apply the existing rules: that is, a

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<sup>3</sup> Read Casebook (“CB”), pp. 1.

<sup>4</sup> Define “Common Law.” Note that all professions have their own vocabulary or “terms of art,” so if you come across a Latin term or a technical term, seek out and learn the definition; also identify an example in practice. You can be sure that in class I will be asking for definitions and examples.

<sup>5</sup> Indigenous peoples had their own legal systems in place when the colonists arrived in the New World, although they were oral in nature. An interesting historical footnote: our school’s namesake, Roger Williams, was one of the few colonists who respected the humanity of the indigenous peoples who were living in the area when English colonists arrived, for example by insisting that they be paid compensation for the land that was being taken. Williams also learned the native language and wrote A Key into the Language of America, which was a blend of dictionary and anthropological study of the Narragansett tribe. <https://www.smithsonianmag.com/history/john-m-barry-on-roger-williams-and-the-indians-9322792/>

<sup>6</sup> There is one exception in the United States: because Louisiana was founded by the French, it is considered a Civil Law, rather than a Common Law jurisdiction.

judge should just “call balls and strikes,” like an umpire in a baseball game.<sup>7</sup>

I am confident that you will come to realize that that this perspective is wrong, or at least misleadingly simple, and that judges often are required to interpret open-ended language that invites, if not requires, a judge to engage in interpretation. For example, from Tort Law, should a person facing an imminent risk of serious bodily harm be able to “stand their ground” and use deadly force in self-defense or should they be required to take an available escape route?<sup>8</sup> Or should the increasingly low cost of security cameras mean that a landlord must install them as part of its duty to use “reasonable care in the circumstances?” And from Constitutional Law, should a punishment that was common a century ago, like hanging, be considered “cruel and unusual” punishment in the 21<sup>st</sup> century? The list of such conundrums is endless, and it is often left to judges to make such decisions, which are considerably more nuanced than simply calling “balls and strikes.”<sup>9</sup>

However, too much change, too fast, is also a concern. The primary limit on judges making rapid or significant legal change is the doctrine of “stare decisis.”<sup>10</sup> This foundational policy exists because actors in society need to be able to go about their lives in reliance on existing law. In some areas this brake on change is more powerful than others:

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<sup>7</sup> <https://www.cnn.com/2005/POLITICS/09/12/roberts.statement/>

<sup>8</sup> Many states have “stand your ground laws” that can provide a defense to a criminal charge, as for example Florida, where George Zimmerman argued that his use of deadly force in a fight with Trayvon Martin was justified due to the state’s “stand your ground” law. <https://abcnews.go.com/US/trayvon-martin-stand-ground-laws-scrutiny-florida-shooting/story?id=15988474> We will consider “stand your ground” defenses when we discuss self-defense in the Torts context.

<sup>9</sup> <http://law.emory.edu/elj/content/volume-61/issue-4/thrower-symposium-articles/balls-and-strikes.html>

<sup>10</sup> Define.

for example, who would enter into a contract if the words of an agreement were subject to brand new interpretations every time? On the other hand, for more than a century, local governments were free to restrict where certain races could live but few would now argue today that the US Constitution allows governments to impose such restrictions.<sup>11</sup> This tension between stability and dynamism is central to all of law, including Torts.

With these general background norms in mind, the next challenge for you is to define **Torts**. I encourage you to root around online to seek an answer that is neither too broad (“over-inclusive”) or too narrow (“under-inclusive”). As you will see, this is a challenge.

At the outset, we can make some general observations, if only in the form of what Torts does NOT involve.

1. Torts cases are not handled by the criminal justice system, but rather by the civil justice system. This has a number of important consequences: in the criminal context, a government official has “prosecutorial discretion” whether to bring charges, who to charge, what to charge, and whether to agree to a compromise (“plea bargain”) while in the civil context a private citizen (typically assisted by a lawyer) decides whether to pursue a Torts claim, who to sue, what theories to assert, and whether to compromise (“settle”).
2. Unlike criminal cases, where the state brings charges against an individual, the parties in Torts cases are generally private parties (although, as we will see, there are important pockets of the law

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<sup>11</sup> By the way, racially exclusionary zoning is now illegal because well-trained lawyers—like you will be in three years--successfully advocated that such restrictions were unconstitutional while other lawyers drafted statutes to give the victims of such misconduct a civil remedy.

[https://docs.rwu.edu/law\\_fac\\_fs/217/](https://docs.rwu.edu/law_fac_fs/217/)

in which the defendant is a government entity or actor, for example, when a victim pursues a civil action for damages arising out of police misconduct).

3. The result of a successful criminal prosecution is generally a loss of liberty for the Defendant (“D”), while in a successful Tort action the D must pay the Plaintiff (“P”) money damages.
4. The standard of proof is different: in the criminal context the state must prove its case “**beyond a reasonable doubt**,” while in a civil action the P only needs to prove the case by a “**preponderance of the evidence**.”<sup>12</sup>
5. Lawyers who represent injured people generally charge a “**contingent fee**.”<sup>13</sup>
6. The role of insurance in Tort Law is pervasive; in fact, many lawyers will not take a case, even if meritorious, unless the defendant has the liquid assets to pay the judgment or has “liability insurance” that could provide the payout. Stated differently, most lawyers for injured people need to identify and then be able to file a lawsuit<sup>14</sup> against a “deep pocket” to justify the cost and effort of litigation.<sup>15</sup>
7. Torts cases are primarily litigated in state courts and the law applied by state judges is primarily state law, made by state

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<sup>12</sup> Define both terms. How are they different? Why are they different?

<sup>13</sup> Define. How is a contingent fee different than a “**flat fee**” or an “**hourly fee**,” the typical ways that defendants pay their lawyers? Why might contingent fees be controversial? Why might they nevertheless be a “necessary evil”?

[https://www.whatistortreform.com/2005/01/contingency\\_fee.html](https://www.whatistortreform.com/2005/01/contingency_fee.html)

<sup>14</sup> You will learn how to initiate and then prosecute a civil action in Civil Procedure.

<sup>15</sup> How is this “search for the deep pocket” related to the practice of lawyers for Plaintiffs in Tort actions charging a contingent fee?

judges; as a result, we will read relatively few decisions from federal courts.<sup>16</sup>

8. The institution of the civil jury--typically 6 non-lawyers<sup>17</sup> “randomly selected” for a single trial<sup>18</sup>—is central to our civil justice system in general, and Tort cases in particular.<sup>19</sup> Indeed, no other country gives non-lawyers as big a role in deciding non-criminal cases as we do in the United States.<sup>20</sup>
9. The United States Constitution protects the right to a jury trial in both the criminal and civil contexts,<sup>21</sup> on the view that citizens need protection from the abuses of government and other powerful institutions.<sup>22</sup>
10. Beyond the democracy-based arguments, what are the advantages of having important legal matters decided by a

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<sup>16</sup> Even though Tort cases are primarily litigated in state courts and apply state law, federal law is “supreme,” so a state court must follow the US Constitution if applicable. On the other hand, there are some Torts cases that are tried in federal courts, by federal judges applying federal procedural law but state substantive law. It’s complicated!

<sup>17</sup> Criminal juries generally have 12 members. Why the difference?

<sup>18</sup> I say “randomly,” but that is not really accurate, especially in high stakes cases, where lawyers may hire experts in jury selection to “shape the jury.”

[https://en.wikipedia.org/wiki/Scientific\\_jury\\_selection](https://en.wikipedia.org/wiki/Scientific_jury_selection)

<sup>19</sup> We will discuss them the mechanics of the jury selection, aka “Voir Dire,” soon.

<sup>20</sup> <https://www.encyclopedia.com/law/legal-and-political-magazines/jury-system-promotes-democracy#:~:text=The%20Jury%20System%20Promotes%20Democracy%20Alexis%20de%20Tocqueville,as%20he%20told%20a%20friend%20in%20a%20letter.>

<sup>21</sup> <https://www.annenbergclassroom.org/resource/our-constitution/constitution-amendments-7-8/>

<sup>22</sup> <https://www.acslaw.org/expertforum/could-a-new-supreme-court-justice-help-restore-fundamental-civil-liberties/>

constantly-changing group of laypeople? What are the disadvantages of such a system?<sup>23</sup>

11. In a civil trial, the jury determines “what happened” (did D’s fist hit the plaintiff’s chin or just miss?); then the judge identifies the applicable law (it isn’t a battery without actual contact with the fist); then, if the conduct constitutes a Tort, the jury identifies the amount of damages that the D (the “**tortfeasor**”) must pay the P. As the semester progresses, we will see that this simple demarcation of institutional responsibilities between juries and judges, and the distinction between “**issues of fact**” for the jury and “**issues of law**” for the judge, is actually pretty complicated.
12. While juries play a crucial role in the civil justice system, the number of actual jury trials has dramatically decreased in recent decades.<sup>24</sup> That is, the vast majority of Tort claims (more than 95%) are terminated by “settlement” (the parties agree to resolve the case without further proceedings) or disposed of when the judge dismisses the case by granting a “dispositive motion” made by the D.<sup>25</sup>
13. It turns out that you can’t understand Torts without a basic understanding of “Civil Procedure,” the rules that govern the prosecution of civil claims, so even though your course in Civil Procedure is a year-long deep dive, you need to know the basics now in order to understand Torts. This will require you to become familiar with a number of technical terms that are set out below

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<sup>23</sup> <https://civiljuryproject.law.nyu.edu/>

<sup>24</sup> <https://civiljuryproject.law.nyu.edu/scholarship/the-declining-state-of-juries-in-america/>

<sup>25</sup> The “dispositive motions” are: **Motion to Dismiss for Failure to State a Claim**; **Summary Judgment**; **Directed Verdict (or Judgment as a Matter of Law)**; **JNOV**; and **Motion for a New Trial**. These are detailed below.

under the heading of ‘BASIC TORTS PROCEDURE.’ Start this journey by watching this video from the “Zero-L: Introduction to American Law” course from Harvard Law School:

[https://exed.canvas.harvard.edu/courses/1404/pages/the-stages-of-civil-litigation?module\\_item\\_id=27856](https://exed.canvas.harvard.edu/courses/1404/pages/the-stages-of-civil-litigation?module_item_id=27856), supplementing it with your own online research when necessary to understand ALL of the terms below.

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## BASIC TORTS PROCEDURE

### A. Pleading Stage

1. Complaint
2. Motion to Dismiss for Failure To State a Claim (“MTD”)
3. Answer

### B. Pre-Trial Stage

1. Discovery
  - a. Depositions
  - b. Interrogatories
2. Motion for Summary Judgment (“SJ”)

### C. Trial

1. Voir Dire
2. Opening Statement(s)
3. Direct Examination of a witness vs. Cross Examination of a witness
4. “Fact Witnesses” vs. “Expert Witnesses”



5. Motion for a Directed Verdict (or “Judgment as a Matter of Law” or “Nonsuit”) (“DV”)
6. Closing Arguments
7. Jury Instructions: The law to be applied
  - a. “Burden of Proof:” what is it and which side has it
  - b. The “elements” of the Prima Facie case that the P must prove
  - c. “Compensatory Damages”
  - d. “Punitive Damages”
8. Verdict (liability/damages)

#### D. Post-Trial

1. “Judgment Notwithstanding the Verdict” (“JNOV”)
2. Motion for a New Trial (“MNT”)

#### E. Appeal

1. How is an appeal procedurally different than a trial?
2. What issues can be appealed:
  - a. How the trial judge handled “dispositive motions” (MTD/SJ/DV/JNOV/MNT)
  - b. How the trial judge ruled on the admissibility of evidence, including the requirement for “Contemporaneous Objection” and the “Harmless Error Rule”
  - c. The trial judge’s jury instructions

We are now ready to learn some “INTENTIONAL TORTS”!