

# **Background Memo #1**

## **What in the Heck is Torts?**

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Every organized society must have a law of crimes to punish and deter the unfortunate human inclination for misbehavior. As a result, there are “criminal laws” that identify what conduct is unacceptable (usually, but not always, written by the legislature and part of a “code”) plus an adjudicative process to determine guilt: there is a government official (the prosecutor) to file and prosecute charges; a lawyer who represents the person charged with a crime; a judge, a neutral to oversee the proceedings and to promote fairness; and typically a group of laypeople to determine the facts and if appropriate impose a sanction, typically a loss of liberty.<sup>1</sup>

Our state and federal governments also have a separate system—the civil justice system—because a criminal conviction typically provides no compensation for the harm the defendant caused to their body, property, or emotional security of the victim of crime. This civil justice system also is available to provide a remedy to people harmed by misconduct that is not criminal, for example, when a doctor misreads an x-ray or when a store owner lets ice accumulate on its stoop. The casebook identifies a number of general policies that support the establishment of a “civil justice system.” What are they?<sup>2</sup>

This civil justice system covers a broad array of wrongs, like whether an agreement between parties is an enforceable contract (your fall Contracts course) or whether a parent who dies can leave a bequest for some but not all of their children (your spring Property course). Our focus is on Torts (the legal term, as opposed to the dessert of tortes!), a mainstay of the 1L curriculum and the bar exam for more than a century. This is not surprising: Torts claims constitute a big percentage of the civil

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<sup>1</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.

<sup>2</sup> Read Casebook (“CB”), pp. 1-2.

claims filed in the United States and Torts concepts are foundational to many other areas of the law, from Constitutional Law to Business Law.

In the United States, Torts is considered part of the “**Common Law**,”<sup>3</sup> transplanted from England to the New World by early colonists.<sup>4</sup> The common law traditionally involved a judge who would identify and then apply the principles found in the “ordinary 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>5</sup>

Because the common law is built upon community practices and values, which of course evolve over time, the Common Law 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. When this occurs, the winners consider this to be “rendering justice,” while the losers complain that the result was an example of “judicial activism.” The latter critique, which is intrinsically conservative, is based on the notion that judges should not “make up the rules” but rather should only apply the existing rules: that is, a judge should only “call balls and strikes,” like an umpire in a baseball game.<sup>6</sup>

I am confident that you will come to realize that this perspective is wrong, or at least misleadingly simple, and that judges often are faced with open-ended language that invites, if not requires, a judge to engage in interpretation or confronts a new factual situation unimaginable to our ancestors, like cyberstalking or the mass killings that can be caused by modern assault rifles.

Here are a couple examples 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

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<sup>3</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 before class; also identify an example in practice. You can be sure that I will be asking for definitions and examples.

<sup>4</sup> Indigenous peoples in North America 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 in 1643 wrote [A Key into the Language of America](https://www.smithsonianmag.com/history/john-m-barry-on-roger-williams-and-the-indians-9322792/), 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/> Alas, late in his life Williams moved away from his tolerant attitudes. <https://www.providencejournal.com/story/opinion/2020/08/29/our-hidden-history-roger-williams-and-slaverys-quos-origins/42468467/>

<sup>5</sup> Louisiana was founded by the French, so it is considered a “civil law” jurisdiction.

<sup>6</sup> <https://www.cnn.com/2005/POLITICS/09/12/roberts.statement/>

self-defense or should they be required to take an available escape route?<sup>7</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” to protect tenants? 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>8</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>9</sup> This foundational policy exists because people 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: 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>10</sup> This tension between stability and dynamism is central to all of law, but especially 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

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<sup>7</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 [Travon Martin](#) was justified due to the state’s “stand your ground” law. Here is a [link](#) to a recent case from New York, which does not have a “stand your ground” protection. We will consider “stand your ground” defenses when we discuss self-defense in the Torts context.

<sup>8</sup> <http://law.emory.edu/elj/content/volume-61/issue-4/thrower-symposium-articles/balls-and-strikes.html>

<sup>9</sup> Define.

<sup>10</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 and 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/)

to bring charges, who to charge, what crimes 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 Tort 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 (State v. Smith or United States v. Jones), the parties in Torts cases are generally private parties (although, as we will see, there are important pockets of the law 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”) compensation in the form of compensatory 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>11</sup>
5. Lawyers who represent injured people generally charge their clients a “**contingent fee**” for their services.<sup>12</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. This is pretty rare (not many bad drivers have Elon Musk’s bank account!). On the other hand, most drivers have “liability insurance” to provide a payout if liability is found. Stated differently, most lawyers for injured people need to identify and then be able to file a lawsuit<sup>13</sup> against a “deep pocket” defendant to justify the cost and effort of litigation.<sup>14</sup>

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<sup>11</sup> Define both terms. How are they different? Why have different proof requirements in the two systems?

<sup>12</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>13</sup> You will learn how to initiate and then prosecute a civil action in your year-long course in Civil Procedure.

<sup>14</sup> How is this “search for the deep pocket” related to the practice of lawyers for Plaintiffs in Tort actions charging a contingent fee?

7. Torts cases are primarily litigated in state courts and the law applied is primarily state law, made by state judges; as a result, we will read relatively few decisions from federal courts.<sup>15</sup>
8. The institution of the civil jury--typically made up of 6 people<sup>16</sup> “randomly selected” to adjudicate a single trial<sup>17</sup>—is central to our civil justice system in general, and Tort cases in particular.<sup>18</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>19</sup>
9. The United States Constitution protects the right to a jury trial in both the criminal and civil contexts,<sup>20</sup> on the libertarian view that citizens need protection from the abuses of government and other powerful institutions.<sup>21</sup>
10. Beyond the democracy-based arguments, what are the advantages of having important legal matters decided by a constantly-changing group of laypeople? What are the disadvantages of such a system?<sup>22</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” unless the D makes contact with P’s body); then, if the conduct constitutes a Tort, the jury identifies the amount of damages that the D (the “**tortfeasor**”) must pay the P in compensation. As the semester progresses, we will see that this simple demarcation of institutional responsibilities between juries and judges, and the distinction between “**issues**

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<sup>15</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>16</sup> Criminal juries generally have 12 members. Why the difference?

<sup>17</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>18</sup> We will discuss them the mechanics of the jury selection, aka “Voir Dire,” soon.

<sup>19</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>20</sup> <https://www.annenbergclassroom.org/resource/our-constitution/constitution-amendments-7-8/>

<sup>21</sup> <https://www.acslaw.org/expertforum/could-a-new-supreme-court-justice-help-restore-fundamental-civil-liberties/>

<sup>22</sup> <https://civiljuryproject.law.nyu.edu/>

**of fact**” for the jury and **“issues of law”** for the judge, is both central to understanding Torts and also quite complicated.

12. While juries play a crucial role in the civil justice system, the number of jury trials has dramatically decreased in recent decades. That is, the vast majority of Tort claims (more than 95%) are terminated by “settlement” (the parties agree to resolve the case before a final determination by a jury) or are terminated when the judge dismisses the case by granting a “dispositive motion” made by the D.<sup>23</sup>
13. It turns out that you can’t understand Torts without a basic understanding 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 under the heading of “BASIC TORTS PROCEDURE”. These concepts will be the focus of our first class session and part of our second.

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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

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<sup>23</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); Judgment Notwithstanding the Verdict “JNOV”;** and **Motion for a New Trial.** These are detailed below.

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”!