

Problem #1: Introduction to Private Law

1. Reading a case (the answers to this question are not in a reading)
 - a. When courts decide a dispute, they often publish their opinion. Why isn't it enough just to tell the parties involved?
 - b. What does the phrase "stare decisis" mean?
 - c. What does the term "plaintiff" mean? What about the term "defendant"?
 - d. What is the difference between a case's "holding" and "reasoning"?
 - e. What does the term "dicta" mean?
 - f. When lawyers talk about "distinguishing" a case, what do they mean?
 - g. What is the "common law"? (At first, contracts and torts law in the U.S. developed through the common law, but the rules were later codified and changed in statutes.)

2. *Grumman v. Rohr*
 - a. Who is the plaintiff here? Who is the defendant?
 - b. What are the facts in the case?
 - c. What is the issue in the case?
 - d. Did the seller mislead the buyer?
 - e. What mistakes (if any) did the buyer make in this transaction?
 - f. Is the court sympathetic to the buyer here? Why or why not?
 - g. Why didn't the seller have a legal duty to disclose the defect in the bus?
 - h. Why is the court letting the seller get away with tricking the buyer?
 - i. Do you agree with the opinion? Or would you have come out the other way?
 - j. What incentive does this opinion create for buyers of a business?
 - k. If the court had come out the other way, what incentive would it have created for the buyer?
 - l. What is an "as is" sale? (This phrase is not used in the reading.) Could the inclusion of an "as is" term affect other terms in the deal?
 - m. If the case had come out the other way, would an "as is" transaction be feasible?
 - n. When judges decide a case, do you think they should worry about the precedent they are setting for other parties and the incentives they are creating? Or do you think they should focus only on finding a just outcome in the case before them?

- a. If Betty was your daughter and she told you the facts described in “4,” would you be proud of her? say, “good thinking”?
 - b. Is it an inherent good to keep promises, so that the law should encourage this behavior and punish people who don’t keep their word?
 - c. Drawing on the article by professor Baird, please offer an efficiency justification for Betty’s behavior. Do you agree with this argument?
 - d. If the rule was that someone in Betty’s position would never be allowed to breach—and a court would force her to go ahead with the deal, instead of allowing her to breach and pay damages—do you think this rule would affect Betty’s willingness to enter into contracts?
 - e. If the goal of contract law is to encourage economic activity and the prosperity it brings, would the rule in “c” be helpful or unhelpful to that goal?
6. True or false: In both contracts and torts, individuals—not the government—usually are the parties to a transaction. These are “private law” subjects, which govern interactions between individual citizens (including businesses), but not the relationship of individuals to the government or the relationship of government institutions to each other.
 7. True or false: The law of contracts governs voluntary transactions. The law of torts governs interactions that aren’t necessarily voluntary, such as accidents and pollution.
 8. Function of Tort Law
 - a. Depending on the circumstances, if Dorothy Driver injures Pam Pedestrian in a car accident, tort law sometimes requires Dorothy to compensate Pam. Why? Please give three reasons.
 - b. What is insurance? If Pam has it, does that reduce the importance of any of these three functions of tort law?
 - c. Imagine that the tort rule for drivers is that whenever a driver makes contact with a pedestrian, the driver must give the pedestrian her car, and that this is true even if the pedestrian was at fault and was not injured. You are in the business of selling cars. Could this tort rule affect your business?
 - d. Can overly strict tort rules discourage socially useful economic activity?
 - e. Imagine that the tort rule for drivers is that drivers are not liable—even when they are reckless—as long as they are on their way to work. Do you think this will affect the costs of health care in the country that has this rule?

- f. True or false: Liability rules can affect the economy.
 - g. Assume that a legal system has a number of rules and regulations on auto safety. Does this reduce the need for one of the functions of tort liability?
 - h. Compared with regulations, why might a tort liability system be a better way to regulate safety? Why might it be worse?
 - i. Richard Posner rejects the third function of tort law. (Hint: This reason has to do with morality.) Why?
9. When is a Tort Liability Rule Efficient?
- a. True or false: An efficient liability rule avoids accidents at all costs.
 - b. Assume that the bumper on Dorothy's car is damaged, so that it has a sharp spike protruding from it. It would cost \$1,000 to fix the spike. If Dorothy bumps into a pedestrian or car, she will cause \$6,000 of damage. There is a 33% chance that she will bump into someone. Is it economically efficient for her to fix her bumper?
 - c. Now assume that the spike is not sharp, and it will cause only \$100 of damage. There is a 10% chance that she will bump into someone. Is it economically efficient to fix it?
 - d. True or false: An economically efficient liability rule motivates people to take precautions if, and only if, the cost of the precautions is less than the cost of the harm these precautions prevent.

10. Negligence

- a. True or false: In the U.S., one of the most important liability rules in tort law is the negligence standard.
- b. True or false: Negligence means "the failure to exercise the care of an ordinarily prudent and careful person."
- c. Does Richard Posner think negligence is an efficient rule? Why or why not?

11. *Conway v. O'Brien*

- a. What kind of accident was the subject of this case? Who brought the law suit? Who was the defendant?
- b. What was the issue in the case? (Hint: Vermont had a rule about when passenger's could sue drivers. What was the rule?)
- c. Who won the case? How did the court explain its decision?
- d. This case is famous because it outlines a test for negligence, which is named for Learned Hand, the prominent U.S. judge who authored the opinion. This "Learned Hand" test balances three factors to decide

whether a defendant should be considered “at fault” for an accident. What are the factors?

- e. True or false: Judge Hand proposes a strict liability rule. In other words, Judge Hand says that defendants should pay if the cause an injury, even if they were being careful and acting reasonably.
- f. True or false: Judge Hand applies cost-benefit analysis to decide whether a defendant should have to pay the cost of an accident.
- g. True or false: Judge Hand says defendants should cover the costs of an accident if the risk-adjusted harm exceeds the cost of taking precautions, but not if the cost of precautions are greater than the risk-adjusted harm.
- h. According to Richard Posner, is the “Learned Hand” test an efficient liability rule?

12. Punitive Damages

- a. Compensatory damages are meant to put the plaintiff in the same position she would have been in if not for the accident. For example, assume that Pam Pedestrian is hit by a car. She misses a week of work (and does not collect her weekly salary of \$2,000). She spends \$5,000 on medical bills. She also is very uncomfortable for a week. What should her compensatory damages be?
- b. Assume that drivers often flee the scene of accidents are not caught, so that only $\frac{1}{2}$ of these drivers actually ever pay compensatory damages. As a response to this imperfect enforcement, would it make sense to add additional damages in the circumstances in which drivers actually are caught?
- c. What are punitive damages? If they are awarded in part “b,” how much should they be?
- d. In 1992, 79-year-old Stella Liebeck bought a cup of takeout coffee at a McDonald’s drive-thru in Albuquerque and spilled it on her lap. She sued McDonald’s and a jury awarded her nearly \$3 million in punitive damages for the burns she suffered. Does this seem right to you?
- e. Does your analysis change if Ms. Liebeck suffered severe burns that required hospitalization?
- f. Mrs. Liebeck offered to settle the case for \$20,000 to cover her medical expenses and lost income. But McDonald’s never offered more than \$800. Does this affect what you think of the jury’s \$3 million award?
- g. What if McDonald’s corporate policy was to serve the coffee at a dangerously hot temperature—180 degrees Fahrenheit (82 degrees celsius)? What if a number of people have been seriously injured, but McDonald’s still refused to change their policy?

- h. McDonald's admitted it did not warn customers of the nature and extent of this risk and could offer no explanation as to why it did not. Should this affect the size of the punitive damages award?
- i. At least one juror later told the Wall Street Journal she thought the company wasn't taking the injuries seriously. To the corporate restaurant giant those 700 injury cases caused by hot coffee seemed relatively rare compared to the millions of cups of coffee served. But, the juror noted, "there was a person behind every number and I don't think the corporation was attaching enough importance to that." Does this justify a \$3 million award?
- j. Would you be surprised to learn that the judge reduced this jury award by 80% (so the punitive damages were \$600,000)?

13. Preview for Next Session: The U.S. legal system has two important features:
Federalism & Separation of Powers

- a. What is a constitution? (This isn't in the reading.)
- b. Do all democracies have written constitutions? For example, what about England? And Israel? (This isn't in the reading.)
- c. What is separation of powers? Do all countries have it?
- d. Speaking of the U.K. and Israel. The U.K. and Israel (and many other nations) have parliamentary systems. How are they different from the U.S. system?
- e. In Israel, members of the ruling coalition have defected, so it no longer has a majority in the legislature. Can the prime minister stay in power? (This isn't in the reading.)
- f. In the U.S., a number of legislators will run for reelection (but the president won't run for reelection until 2024). In these "midterm elections, if President Biden's party loses its majority in the legislature, must he step down? (This isn't in the reading.)
- g. What is federalism? Do all countries have it? (By the way, do you know the term "subsidiarity"?)
- h. In the U.S., each state has its own criminal law, while the federal government also has criminal laws on specific issues, such as terrorism, securities fraud, and illegal drugs. Is this an example of federalism or of separation of powers?
- i. Assume that the President believes the U.S. is too tough on tax fraud. Can the President declare that it is no longer illegal to underreport taxable income? Or does another branch of government have to do that? Is this an example of federalism or separation of powers?

14. Origins of the U.S. Constitution: the American Revolution

- a. July 4 is known as “independence day” in the U.S. What happened on July 4, 1776? Before then, how was the U.S. governed? Or perhaps more importantly, by whom? (This isn’t in the reading.)
- b. The Continental Congress was the government of the U.S. during most of the American Revolution. Thomas Jefferson was a member of the Congress, representing Virginia, who drafted the declaration (and eventually served as the nation’s third president). In 1776, do you think Jefferson thought of himself as a “Virginian” or as an “American”? What does this tell you about the evolution of federalism in the U.S.? (This isn’t in the reading.)
- c. Under the command of General George Washington, the U.S. won a decisive victory in the battle of Yorktown in 1781, and earned its independence formally in a treaty in 1783. What did Washington do after the U.S. won the American Revolution? Was that a typical choice? (This isn’t in the reading.)