



# *Session 28*

*Tort Law 1*

*Litigation*

## *Tort v Criminal law*

As part of the civil law that regulates the relations between citizens, tort law seeks to regulate civil disputes and compensate victims.

The following table briefly outlines how tort law differs from criminal law.

<i>Tort law</i>	<i>Criminal law</i>
compensate victims	punish offenders
victim takes action	whole of society takes action
claims arising from accidents	claims arising from willful action
burden of proof on the balance of probabilities	burden of proof beyond a reasonable doubt
onus of proof on plaintiff	onus of proof on prosecutor
defendant is liable or not liable	accused is guilty or not guilty

Despite of their different focus, to a large extent, both areas are found to be working in a complementary manner.

Example: in the case of a car accident one may be convicted on grounds of impaired driving (criminal law) and pay compensation for the damages (tort law).

### Case: Home Office v Dorset Yacht Co. Ltd

Several "borstal boys" (young offenders between fifteen and twenty) were under the supervision of three officers when they were working on an island. The officers went to sleep and left them to their work. Seven of the boys escaped, stole a yacht and crashed it into another yacht that was owned by Dorset Yacht. They also boarded the second yacht and caused further damage. The Home Office appealed Dorset's ability to bring a claim to the House of Lords.

## *Litigation in Canada*

Litigation is a civil lawsuit procedure initiated by the plaintiff who makes a claim for the liability of the defendant. It typically involves the following steps:

[http://www.attorneygeneral.jus.gov.on.ca/english/courts/civil/changes\\_to\\_rules\\_of\\_civil\\_procedure\\_flowcharts.pdf](http://www.attorneygeneral.jus.gov.on.ca/english/courts/civil/changes_to_rules_of_civil_procedure_flowcharts.pdf)

In detail:

[http://www.attorneygeneral.jus.gov.on.ca/english/courts/civil/suing\\_and\\_being\\_sued\\_7.asp](http://www.attorneygeneral.jus.gov.on.ca/english/courts/civil/suing_and_being_sued_7.asp)

Source of law:

[http://www.e-laws.gov.on.ca/html/regs/english/elaws\\_regs\\_900194\\_e.htm](http://www.e-laws.gov.on.ca/html/regs/english/elaws_regs_900194_e.htm)

## *Litigation in Switzerland*

Litigation is a civil lawsuit procedure initiated by the plaintiff who makes a claim for the liability of the defendant.

The principle guiding such cause of action is that any person who unlawfully causes loss or damage to another, whether willfully or negligently, is obliged to provide compensation ([CO art 41](#)).

Info: <https://app.zpo-cpc.ch/chapters>

## Litigation in Switzerland (cont.)

Procedurally:

1. The plaintiff determines that there is a cause of action (i.e. a valid reason for suing) ([CO art 42](#))
2. Since the burden of proof lies with the plaintiff, evidence must be made available
3. Then the plaintiff needs to file a claim ([CPC art 62](#))
  - a) with the appropriate court and
  - b) within a certain period
4. The defendant then may seek to negotiate an out-of-court settlement. If not, the claim must be replied

## Litigation in Switzerland (cont.)

Procedurally:

4. When all claims and evidence is collected, a conciliatory hearing is ordered by the court ([CPC art 197 ff](#))
5. If the parties reach an agreement during the hearing the case is dismissed; if not the plaintiff is given authorization to pursue the proceedings
6. Plaintiff and defense are invited to submit further evidence as well as witnesses ([CPC art 150 ff](#))
7. Then comes the trial proper ([CPC art 219 ff](#))

## Damages

Damages for plaintiff's injury or loss include the following types

- General damages that cannot be calculated easily and precisely.
- Examples: loss of income, future earnings, specialized care, pain and suffering, loss of enjoyment of life.
- Special damages to compensate precise expenses already spent before trial.
- Examples: hospital expenses, ambulance service, rehabilitation, lost wages.



## Damages (cont.)

- Aggravated (punitive) damages to punish for bad, insensitive, or uncaring behavior.
- Examples: emotional shocks, intentional tort (assault, battery), outrageous behavior.
- Nominal damages to indicate support for a plaintiff on moral grounds.
- Example: trespassing without damage.
- Injunctions to order the defendant to take particular actions.
- Example: cease polluting waters.

## Enforcement

The plaintiff may seek enforcement of the payment of damages by means of the following options

- Garnishment: debt paid by subjecting bank accounts, unpaid rent, and wages to monthly deductions.
- Seizure: holding assets for a certain period that allows the defendant to redeem the goods; if not the assets are sold on auction.
- Examination: request made by the plaintiff to ascertain the defendant has the available sources to settle the amount due.

## Alternative dispute resolutions

To avoid the risk and costs of litigation the following alternative dispute resolutions may be envisaged:

- Negotiation: an informal and voluntary dispute resolution process between the parties involved without the involvement of a third actor whereby parties communicate with each other and make their own decisions to arrive at an outcome written into a contract that is final and binding.
- Mediation: a formal and voluntary dispute resolution process between the parties involved with the involvement of a third neutral actor who facilitates parties making their own decision to arrive at an outcome written into a contract that is final and binding.

## *Alternative dispute resolutions (cont.)*

- Arbitration: a formal dispute resolution process where a selected third actor receives statements and arguments from both the parties involved and acts as the decision maker whose decision is final and binding.