

PHIL 30260 Philosophy of Law

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Introduction.

There are many areas of law that raise philosophical issues, and many ways of organising a module with this title. We have chosen to focus on the philosophy of private law. The most familiar example of private law is when you sue someone for compensation. The essential part is that it is a legal relation between two private individuals, where an 'individual' can be a natural person or a 'legal person' (e.g. a company, a university, the police).

Private law is to be distinguished from 'public' law, which is about an individual's legal relationship to the state, e.g. taxation, health & safety regulation, constitutional questions. Counter-intuitively, *criminal law* is also part of public law, because formally, the perpetrator commits the crime against the state (the victim is only a witness), and it is the state (through the criminal justice system) who investigates her, tries her, and punishes her. In this module we will occasionally make comparisons between private law and public law (including criminal law).

Sometimes private law is described as 'corrective justice' – which involves *correcting* a situation that has gone wrong by returning the situation to the 'status quo ante' as far as possible (the situation before the wrong). This is to be contrasted with 'retributive justice', which is what criminal law is about, and with 'distributive justice', which what the taxation system and the welfare state is about.

In our module we will consider three overlapping areas of private law during the following weeks:

- Part A: Tort law (weeks 2-6) is typically about a Defendant (D) who harms a Plaintiff (P) (sometimes called the Complainant, or the Victim). The harm against the Plaintiff can be quantified (a loss), and the Plaintiff is suing the Defendant for compensation for the loss (compensation is also called 'damages').
- Part B:
 - Property law (weeks 7-10) is about what can be owned, and what my ownership means in terms of my relationships with other people. Typically, for example, if I legally own a pen, that means that nobody else is allowed to use it without my consent.
 - Contract law (weeks 11-12) is about two individuals who agree to some exchange (typically money in return for a good or service), and a problem arises when one party misinterprets or breaches the contract.
- There will also be small amounts of medical law, family law and employment law throughout the module.

In law schools, each of these subjects typically has a whole module with a huge textbook, and the legal discussions of statutes, cases and principles get very complicated very quickly. There are also complicated discussions in comparative law, i.e. how tort is understood in Ireland compared to other jurisdictions. Our module only concerns the *philosophical* issues raised in these three contexts – we will take examples from the law for discussion, without any attempt to present the law comprehensively. Typically our examples will come from English and American law, simply because most of the English-language legal scholarship comes from those two jurisdictions. (England and the

US are the main members of the 'common law' tradition, which includes Ireland, and there are a lot of similarities in terminology and procedures.)

But at the end of the day this is a philosophy module, not a law module. We do not expect you to know any law coming into it, and we are not testing you on the law. There are a small number of law students taking the module: they obviously have an advantage in their knowledge of the law, but they have a *dis*advantage in that they will be tempted to write a merely descriptive law essay.

However, you should be warned that this is a Level 3 philosophy module, and we expect you to have completed a minimum of four second-year modules to have a chance of doing well in this module. There will be some difficult philosophy, and there will be a lot of reading; moreover, much of the reading is using unfamiliar terminology and procedures from the legal world, so you will have to look things up.

For the purposes of this module, what does *philosophy* mean? Two things:

- (i) the analysis of relevant concepts, e.g. what exactly is harm, negligence, property, responsibility. When we analyse a concept we start with definitions but we also look at how the concept is used, what such a use assumes, what it entails, and how people disagree in their use of a concept.
- (ii) the ethical criticism of the law: is a law unfair and why? Does the law match up with our ethical intuitions about what a person deserves, about what a person consented to?

Week by week outline

Wk	Date	Topic
1	Mon 11 Sept	<p>Introduction</p> <p>(a) intro to the module, structure, assessment.</p> <p>(b) introduction to over-arching philosophical topics: responsibility (fault), moral luck, harm, consent, causation</p> <p>(c) intro to different areas of law and the legal system in Ireland and the UK.</p> <p>(d) introduction to the private law areas to be discussed in the module:</p> <ul style="list-style-type: none"> • A: Tort • B: Property & Contract • We will also introduce the criminal law for purposes of contrast.
		<p>Part A: Tort</p>
	Tue 12 Sept	<p>Tort 1. The basic schema of a private law action</p> <p>Reading:</p> <ul style="list-style-type: none"> • Weinrib (2002) 'Corrective Justice in a Nutshell' <i>University of Toronto Law Journal</i> vol. 52(4). • <i>Stanford</i>: 'Theories of the common law of torts'
2	18+19 Sept	<p>Tort 2. The tort of negligence</p> <p>Tort lawsuits ('actions') are typically about accidents. The Plaintiff (P) is the victim and has suffered quantifiable harm. He sues the Defendant (D), accusing her of negligence, and he seeks compensation for the harm. In order for P to win, he needs to show the following:</p> <ul style="list-style-type: none"> • D owed P a <i>duty of care</i>; (e.g. D was a doctor, P was her patient at the time) • D was <i>negligent</i>, and thereby <i>breached</i> her duty of care; (she failed to do or notice what she should have done or noticed.) • The breach probably <i>caused</i> the harm to P, harm that would probably not have happened anyway. <p>If the negligence action is successful, then the costs of compensation (and the legal costs of both sides) will be incurred by D. But all the italicised terms raise philosophical issues.</p> <p>Hurd thinks that negligence is a kind of 'strict liability'. We hold D responsible, even if – at the moment of the omission – D could not <i>choose</i> to notice something that she had not already noticed. That's unfair. In his article, Honore shows us that strict liability is much more prevalent and acceptable than we realise.</p> <p>Reading:</p>

		<ul style="list-style-type: none"> • Hurd (2014) 'Finding no fault with negligence' in: Oberdiek (ed.) <i>Philosophical Foundations of the Law of Torts</i>, OUP. • Honoré A (1988) 'Responsibility and luck: the moral basis of strict liability'. <i>Law Quarterly Review</i> vol. 104. • Legal case: <i>Adomako</i> [1993], which a case of negligent manslaughter. It was <i>both</i> a criminal case and a tort case, running in parallel. • Stanford: 'moral luck'
3	25+26 Sept <i>Tutorials begin this week</i>	<p>Tort 3. Understanding Risk</p> <p>Life is full of risks. One kind of negligence is about D's failure to imagine a risk, and/or her failure to take appropriate precautions against a risk. Clearly medicine is full of risks – some of them are reasonable and/or justifiable. Normally a risk can be justified (i) as the best means to a desirable end, <u>and</u> (ii) by the patient's consent to the risk.</p> <p>For the patient's consent to medical treatment be meaningful, she needs to be sufficiently <i>informed</i>, i.e. she needs to understand the risk (in terms of probability and severity), in comparison with the risk of doing nothing. But (i) What if the patient is not medically qualified (i.e. like most of us), how much of the risk can she understand? (ii) Might it sometimes be inappropriate to explain a small risk to a patient because it might unduly alarm her, and she might make a bad decision?</p> <p><i>Montgomery</i> is a UK case where the doctor was found negligent for failing to explain the relevant risks, and the patients (mother and child) were harmed as a result. The case changed the standard for information-giving in the UK. The Macpherson looks at the context of safety risks in engineering works.</p> <p>Reading:</p> <ul style="list-style-type: none"> • Montgomery (2015) 'Montgomery on informed consent'. <i>Journal of Medical Ethics</i> vol. 42.2. [<i>note: this article is written by Montgomery & Montgomery, and is about the Montgomery case – no relation!</i>] • Macpherson J (2008) 'Safety, risk acceptability, and morality'. <i>Scientific Engineering Ethics</i> vol. 14. • Legal case: <i>Montgomery v Lanarkshire Health Board</i> [2015] • Stanford: 'risk'
4	2+3 Oct	<p>Tort 4. Reproductive torts</p> <p>There are a number of different kinds of reproductive torts.</p> <ul style="list-style-type: none"> • A man and a woman decide that they do not want children. One of them arranges to be sterilized. A doctor performs the sterilization negligently. After unprotected sex, the woman becomes pregnant, and gives birth to a healthy child. ("wrongful conception" or "wrongful pregnancy") • A midwife negligently fails to diagnose a severe disability in a foetus, and the child is born with the disability. The parents claim that if they had known about the disability, they would have terminated the pregnancy. ("wrongful life") • A man and woman are unable to conceive naturally, and so they ask for help from an IVF clinic. The clinic plans to collect the husband's sperm and the wife's egg, and implant the resulting embryo into the woman. However, the clinic is negligent and uses a different man's sperm. Only after the birth of a healthy child is the mistake discovered. ("wrongful fertilization")

		<p>In all three cases the man and woman sue the doctor/midwife/clinic for some of the consequential costs. But there are plenty of paradoxes here.</p> <p>Reading:</p> <ul style="list-style-type: none"> • Ramsay, M. (2015). Wrongful Pregnancy and the Offset/Benefits Approach. <i>Canadian Journal of Law & Jurisprudence</i>, 28(1), 129-154 • Todd, S. (2005). 'Wrongful conception, wrongful birth and wrongful life'. <i>Sydney Law Review</i>, 27(3). • Legal case: <i>McFarlane v Tayside Health Board</i> [2000]
5	9+10 Oct	<p>Tort 5. Mass torts</p> <p>The two lectures this week will each focus on a particular example.</p> <p><i>Note: the first example, and the first article, have been changed.</i></p> <p>(i) Like other countries, Ireland has had a series of scandals about sexual and other abuse of children in institutions. This presents a special legal problem, since it might be difficult to prove abuse by one particular individual. The doctrine of 'vicarious liability' is a form of strict liability where the institution can be sued for compensation.</p> <p>(ii) The drug thalidomide was introduced to the German market in 1953 to help pregnant women with anxiety, sleeping disorders, and morning sickness. It was later used in many countries, with different manufacturers. By 1961 the drug was found to have caused a huge number of miscarriages and severe foetal deformities. There is a question for tort law on how to organise a mass tort, especially when it can raise problems with proving causation.</p> <p>Reading:</p> <ul style="list-style-type: none"> • Giliker P (2018) 'Analysing institutional liability for child sexual abuse in England and Wales and Australia'. <i>Cambridge Law Journal</i>, 77(3). • Schuck P (1994) 'Mass Torts: An Institutional Evolutionist Perspective'. <i>Cornell Law Review</i>, vol. 80. • Stanford: 'causation in the law'
6	16+17 Oct	<p>Tort 6. Historical torts</p> <p>So far we have been discussing cases where the Defendant and Plaintiff are still alive, and the harm is recent. But what about harms committed a century ago? The original perpetrators and victims are long dead.</p> <p>One approach is to say that a <i>victim group</i> of people was harmed, that <i>victim group</i> is still 'alive' today (albeit with new members), and is still suffering the effects of the long-distant harm. In parallel, the <i>perpetrator group</i> is also still around today, and still living off the benefits inherited from the original harm. This would be the approach for present-day African Americans claiming compensation from the American government for the harm of slavery.</p> <p>But this is controversial: surely <i>middle-class</i> African-Americans have not suffered too much, and therefore do not deserve compensation? Far better would be to address</p>

		<p>present distributive injustice: the US government should provide support for <i>all</i> citizens who are badly off, whatever their race, and regardless of how they became badly off.</p> <p>Reading:</p> <ul style="list-style-type: none"> • Stark S (2023) 'A path to repair of the past' <i>Journal of Social Philosophy</i>. • Thompson J (2022) 'Groups as intergenerational agents: Responsibility through time and change'. <i>Journal of Social Philosophy</i> vol. 53(1). • Stanford: 'intergenerational justice', 'transitional justice', 'Black reparations'
		Part B: property and contracts
7	23 Oct	<p>Property 1. Restitution</p> <p>The first question about property is: what does it mean to <i>own</i> something, e.g. this pen? What exactly about the pen makes it <i>mine</i>? In typical cases, it means that I can use or modify or destroy the pen (albeit without harming others), and others are not allowed to use the pen without my consent. (There are exceptions: taxation involves state confiscation of some of my property, but this is justifiable through democratic legislation, and my presumed consent.) Normally, if someone steals my pen without justification, then they have to give it back – retribute it – and the state can enforce this. But sometimes restitution will depend on the grounds of my original ownership claim. The Butt article looks at some of the problems with restituting land and buildings after the state's confiscation e.g. during wartime. Part of the problem here has to do with the special status that e.g. the family home can have in our lives – compared to other 'movable' property. (There is some overlap with the topic of 'historical torts' the week before.)</p> <p>Reading:</p> <ul style="list-style-type: none"> • Butt N (2019) 'Restitution Post Bellum: Property, Inheritance, and Corrective Justice'. <i>Journal of Applied Philosophy</i>, Vol. 36(3). <p>For background:</p> <ul style="list-style-type: none"> • Katz L. (2020) 'Property law' in: Tasioulas (ed) <i>Cambridge Companion to the Philosophy of Law</i>, CUP 2020 • Stanford: 'property and ownership'
	24 Oct	<p>Property 2. Inheritance and inheritance tax</p> <p>Imagine a widow who lawfully owns money. What will happen to that money on her death, given that she has no living spouse to give it to? Two scenarios: (i) she can write a will; (ii) if she has not written a will, she dies 'intestate', and the state will redistribute her money according to certain principles.</p> <p>The first question is: why should her ante mortem preferences have any relevance to what happens post mortem? She cannot own her money after she dies. (This question is parallel to the debate about posthumous organ use.) Second: with or without a will, should the state be able to <i>tax</i> the inheritance, and if so, by how much? Some people would claim this money is just like any other antemortem gift, and should therefore be exempt from taxation. Others point to the reproduction of massive wealth inequalities across generations. Besides, maybe Mark Zuckerberg deserves his wealth because he worked hard and took risks for it – but do Zuckerberg's <i>kids</i> deserve all of his wealth when they have done nothing to generate it?</p>

		<p>Reading:</p> <ul style="list-style-type: none"> • Pedersen and Boyum (2019) 'Inheritance and the family'. <i>Journal of Applied Philosophy</i> vol. 37.2.
8	Mon 30 Oct	Reading week: no lectures, no tutorials
9	Mon 6 Nov	<p>Property 3. Human bodies</p> <p>Most discussions of property are about movables (my pen) or immovables (my house). But human bodies are a special category. The default might seem to be a principle of self-ownership: if I'm a competent adult, surely nobody else owns me or my body. But self-ownership runs up against a number of problems for the following situations:</p> <ul style="list-style-type: none"> • Renewable human products (blood, gametes, hair). It does not seem controversial to sell my hair to a wigmaker, but then why can I not sell my blood (in the UK and Ireland)? • Non-renewable live-donated body parts (my kidney). Selling one's kidney is prohibited throughout the Western world. Why exactly? • Bodily tissues removed during surgery. John Moore's cancerous spleen was successfully removed by surgeons. The cancerous tissue turned out to have enormous therapeutic potential, earning the hospital millions. Should Moore have a right to some of those millions? • The posthumous use of a body or body parts. Should I be able to determine what happens to my organs after I die – in a similar way that I can determine what happens to my money after I die? <p>Reading:</p> <ul style="list-style-type: none"> • Richards J (2009), "Consent with Inducements: the case of body parts and services" in: Miller, F. and A. Wertheimer (eds.) <i>The Ethics of Consent: Theory and Practice</i>, Oxford University Press. • Legal case: <i>Moore v. Regents of the University of California</i> [1990] • Stanford: 'the sale of human organs', 'the donation of human organs'
	Tue 7 Nov	<p>Property 4. Property and Personhood</p> <p>It is tempting to think of property in terms of objects to be bought and sold, and then we can develop rules of fair acquisition, consent, and responsible management. This conception assumes that when property is damaged, it can be repaired, replaced, or compensated under a tort action. But what about an heirloom? What about the family home? In one sense such objects are irreplaceable precisely because the owner has invested something of her <i>self</i> into them. This does not need to sound mysterious or metaphysical: think of the way that we judge people's characters by their clothes, their car, their home décor. As Radin explains, the law already recognises this self-investment <i>implicitly</i> in a variety of contexts; she argues that it should be recognised <i>explicitly</i> as a way to solve some key problems in property law disputes.</p> <p>Reading:</p> <ul style="list-style-type: none"> • Radin M (1982) 'Property and personhood'. <i>Stanford Law Review</i>, 957. • Note: this article is 60 pages long. However, there is a lot of theoretical and historical material that you do not need, and there are long footnotes you can ignore. So read the following:

		<ul style="list-style-type: none"> ○ Introduction, Sections I and II: 957-970 ○ <u>Omit</u> Section III and IV, on Hegel and Marx: 971-990 ○ And the important bit to read is Section V to the end (990-1015), which focuses on specific legal examples.
10	Mon 13 Nov	<p>Property 5. Intellectual Property</p> <p>Imagine I am a solo performer: I write a song, I book a venue, and people pay money to watch me perform it. It would seem that the <i>song</i> (the words and the melody) is mine. It would also seem that the <i>performance</i> is mine. And therefore I should have the right to all the money that the spectators are willing to pay to hear me (although I still have to pay the owners of the venue etc.). What does it mean to sell a song to another person? What sorts of conditions can I impose on the sale?</p> <p>This lecture overlaps with the lecture on personhood, since obviously the artist sees her artistic creations as self-expression.</p> <p>Reading:</p> <ul style="list-style-type: none"> • Waldron J (1992) From Authors to Copiers: Individual Rights and Social Values in Intellectual Property, <i>Chi.-Kent L. Rev.</i> vol. 68. • Stanford: 'Intellectual property'
	Tue 14 Nov	<p>Property 6. Homelessness</p> <p>We have mentioned the special category of property before – the home – and there is more to say about it via the special wrong of homelessness. Homelessness is more than mere poverty. It also means not having a place to call mine, where I can take refuge, where I can 'be myself', where I leave the rest of my property when I am away, a place where I can organise the rest of my life. It is arguable that the right to a home should be even more fundamental than the basic democratic rights (to free speech, to free assembly etc.).</p> <p>Reading:</p> <ul style="list-style-type: none"> • Jenkins D, Brownlee K (2022) 'What a home does'. <i>Law and Philosophy</i> (2022) vol. 41.
11	20+21 Nov	<p>Contract 1: Consent</p> <p>A contract can be described as an agreement to exchange things: typically a good or service in exchange for money. But for a contract to be fair, it requires the informed consent of both parties: they have to know what they are getting in exchange, and they have to be free to refuse. In some cases, the parties might not quite know what they are consenting to until the contractual duties start to be carried out: might that be a good reason to breach the contract? More generally, since contracts are about the future, how informed can <i>any</i> party be about the future? Maybe we should not be too hung up on 'full' consent.</p> <p>Part of the discussion surrounds the principle <i>Volenti non fit injuria</i>, also called the 'Volenti principle': a person who consents cannot be legally harmed.</p> <p>Reading:</p>

		<ul style="list-style-type: none"> • Brownsword R (2004) 'The Cult of Consent: Fixation and Fallacy', <i>King's Law Journal</i>, 15:2. • Goodin R (2006) 'Volenti goes to the market' in: <i>Journal of Ethics: An International Philosophical Review</i> Vol. 10, Iss. 1-2 <p>Background reading:</p> <ul style="list-style-type: none"> • Bix B. (2010) 'Contracts' in: Miller and Wertheimer (eds.) <i>The Ethics of Consent; Theory and Practice</i>, OUP • Stanford: 'informed consent', 'philosophy of contract law'
12	27+28 Nov	<p>Contract 2: Fairness</p> <p>One view of contractual fairness would be from liberalism: as long as both parties were sufficiently informed and free (i.e. free to walk away) during contractual negotiations, then <i>whatever</i> contract results will be fair. One version of this liberal principle is the Latin expression <i>caveat emptor</i>, "Let the buyer beware." When a contract involves impenetrable deception, then it will be clearly unfair. But sometimes it involves not deception but semi-obvious manipulation. Think about the way the beauty industry functions. Current legal rules focus on power and information imbalances in complicated market transactions. The significant disparities in information, skill, resources, and bargaining power between buyers and sellers are reflected in new theories of consumer law, such as strict liability, which seek to allocate risk more fairly between businesses and consumers.</p> <p>Reading:</p> <ul style="list-style-type: none"> • Threedy D (2010) 'Dancing around gender; lessons from Arthur Murray on gender and contracts'. <i>Wake Forest Law Review</i> vol. 45. • Koltonski D. (2018) 'Vocations, Exploitation, and Professions in a Market Economy'. <i>Social Theory and Practice</i> Vol. 44, No. 3
	December exam period	<p>*** Final 'property & contract' exam ***</p> <p>In the RDS. Two hours. Precise date and time will be published at the end of October.</p>