

# CLATAPULT

## LAW OF TORTS



# UNDERSTANDING APTITUDE

CLAT tests law aspirants on Legal Aptitude. Traditionally, the section has contained components of Legal Reasoning and Legal Knowledge.

A good CLAT paper will invent newer and tougher forms of legal reasoning questions. For example, you might be given a new principle (say on Intellectual Property Law) and be tested on that.

A good legal aptitude module will thus not try to cover as many topics as many possible or put thousands of questions. That is an impossible task. There are a plethora of laws and unlimited number of questions. You are not expected to know all that. We cannot be expected to spoon feed all that.

What you should instead strive to do is further your ‘aptitude’. Wikipedia’s definition of aptitude as a component of a competency to do a certain kind of work at a certain level provides a vital insight for us all in this task.

The competency to think like a lawyer is what CLAT should test you on. And a good legal aptitude module will guide you, slowly but surely, into thinking like a lawyer. That is the aim with which we’ve curated this study material. That is the aim with which you should study this.

Yes, we do provide you with comprehensive knowledge of topics which have been, can be and will be tested. Yes, we do provide you with an ample number of questions (we have a separate module full of questions). But mainly, we’ve tried to make you think like a lawyer.

Don your black robes and that wig with the judges wear as you begin your journey towards thinking like a lawyer.

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## HOW LAWYERS THINK

*"The competency to think like a lawyer is what CLAT should test you on"*, we said earlier. So how do lawyers think? Do lawyers thinking differently than a common man?

## THE SOCRATIC METHOD

Ah! A new term!

Now, the real ‘learning to think like a lawyer’ training begins, of course, in the law school. A famous way in which law professors teach you is called ‘the Socratic Method’.

Here is how Wikipedia defines Socratic Method: a form of inquiry and debate between individuals with opposing viewpoints based on asking and answering questions to stimulate critical thinking, illuminate ideas. (Exciting?)

**Key takeaway:** asking and answering questions.

Here is another useful postulation: *The purpose of the Socratic Method is to ask students the legally relevant questions (and in some cases, to show why the legally irrelevant questions are legally irrelevant) in order to train them to ask themselves those questions when they read cases and legal materials on their own.*

*Put another way, the method pushes students to internalize a way of thinking: The repeated raising of a specific type of questions in class trains students to ask themselves those questions out of class<sup>1</sup>.*

**Key take away:** ask legally relevant questions

So whenever you read up on a concept in this module, ask yourself, ‘why this?’ and ‘why not that?’ Whenever you solve a legal reasoning question, ask yourself ‘why this?’ and ‘why not that’.

Asking questions is the first step. Asking legally relevant questions, the second.



<sup>1</sup>Taken from here <http://www.volokh.com/posts/1219420711.shtml>

## THE REASONABLE MAN

Lets try to simulate a classroom discussion using the Socratic Method, shall we?

**Question:** Why should CLAT have legal reasoning? (We've already answered that).

**Answer:** To test whether you can think like a lawyer.

**Question:** How do lawyers have to think?

**Answer:** Lawyers have to think like a reasonable man.

**Question:** Reasonable Man?

**Answer:** Well, let us give you a definition. "He has not the courage of Achilles, the wisdom of Ulysses or the strength of Hercules, nor has he the prophetic vision of a clairvoyant. He will not anticipate folly in all its forms. However, he also never puts out of consideration the teachings of experience. So he will guard against negligence of others when experience shows such negligence to be common. He is a reasonable man but not a perfect citizen, nor a paragon of circumspection" - **Percy Henry Winfield**

Read that again. Absorb slowly, the beauty of the words and also the other useful bits!

**Question:** How is reasonable different from intelligent?

**Answer:** A reasonable man is intelligent; but not more intelligent than what is typical.

He doesn't overlook things (he considers the teachings of experience and guards against the negligence of others).

He also doesn't ruminate deeply on every decision he takes (he is not a paragon of circumspection).

So that's your challenge. Whatever the problem question might be, you have to think like a reasonable man and then begin to answer it.

We'll make a reasonable man out of you. Slowly and steadily.



## THE LAW OF TORT OR THE LAW OF TORTS (S)

Now you know about 'aptitude' and 'Socratic Method' and the concept of 'Reasonable Man'.

Lets now touch base with something legal.

You must have heard about Law of Torts by now. We'll go into the nitty-gritty later; before that, a seemingly useless digression: is the Law of Tort or the Law of Torts?

How does an "S" matter? How does it matter if it's the Law of Tort or the Law of Torts? For lawyers, it matters. **Sometimes.**

An S matters, because the eyes of the specie that a lawyer is, are sharp; the mind is sharper; and when such a specie finds something as harmless as an extra S hovering on a word, it's hackles rise.

It pounces on the "S" like a pack of Bloodhounds on the game, and it argues and harps on the "S" till it no longer remains the harmless alphabet, but becomes a question of fundamental rights of some exploited people or a question of lots of money, perhaps even a country's economy.

And because it matters for the specie that is a lawyer, it should matter for a law aspirant too! Your future life will revolve around the S! Putting an S or omitting an S in a legal document (and such little things) often become a battle ground for the legal people<sup>2</sup>.

So sometimes, the extra S matters. **Sometimes it does not.** Sometimes unnecessary S's, commas or words in legislations and judicial decisions lead to unnecessary litigation, unnecessary commentaries and unnecessary debates.

These un-necessities<sup>3</sup> often cause verbal diarrhea<sup>4</sup> in both judges and lawyers. In CLAT



<sup>3</sup> Hey! That's not a word

<sup>4</sup> The Kesavananda judgment was more than 700 pages long! In case you don't know about this case, do a Google search on it.

coaching classrooms too, over-eager students often indulge in time-consuming and mildly funny debates.

You should know when an S matters and when it does not. That's where your skills about separating the relevant from the irrelevant come into play. Do you recall that 'ask legally relevant questions' bit?

So hunt for that S.

**Takeaway:** read the principle and the facts carefully. Know when the S doesn't matter.

**Takeaway:** learn to distinguish important facts from the not-so-important ones.

So start dotting your I's and crossing your T's and curving your S's well. For the uninitiated, it's called **due diligence**.

## CREATING GODS, CREATING LAW: HOW LAW OF TORTS IS DIFFERENT FROM USUAL LEGISLATIONS

We'll get seriously legal from here on. Law of Torts is a strange creature. Let us tell you why. Man created the idea of God to put responsibility on someone; responsibility of things he couldn't control. For things he could control, he wanted to control better. And for such things he created law.

Law came into being because of this need to control and regulate. Initially laws were not written down in Statutes but emerged due to a fantastic concept of **Spontaneous Order**<sup>5</sup>.

Law of torts/tort is the best example of how laws came about in this manner. Let's see why (or maybe why not).

In India, the first *firang* courts were established in the 18th Century<sup>6</sup> in the three presidency towns of Calcutta, Madras and Bombay. These were 'Mayor's Courts' and the charter<sup>7</sup> which established them required these courts to give judgments '**according to justice and right**'.

<sup>5</sup> Spontaneous Order is typically used to describe the emergence of various kinds of social orders from a combination of self-interested individuals who are not intentionally trying to create order through planning. - Wikipedia

<sup>6</sup> Important for the legal knowledge section.

<sup>7</sup> Charter is derived from the Latin word 'charte' meaning paper. Now it means any document that lays out the granting of rights or privileges.

The English judges in these courts used some of the statute law of England and some of the **common law**<sup>8</sup> and tried to fit those laws into the Indian circumstances; that in accordance to justice, equity and good conscience, of course.

So that is how Law of Torts came into being in India. Through judgments made in accordance to **justice, equity and good conscience**.

Law of Torts, in itself, emerges out of a Spontaneous Order. A case comes before a court and is decided upon. The decision then becomes the law. The laws keep evolving with newer cases. No one plans it, like legislators plan what goes into a statute.

Actually, common law (hope you didn't skip the definition) itself has the flexibility to adapt itself to new situations, to extend a principle or even create a new law when the pursuit of justice requires that.

Core legal stuff starts now!



## — LAW OF TORT: AN INTRODUCTION —

A **tort**, in common law, is a civil wrong<sup>9</sup>. Now, let's go slow here. Read the footnoted explanation of a 'civil wrong' carefully before proceeding.

Tort law deals with situations where a person's behavior has unfairly caused someone else to suffer loss or harm.

*A tort is not necessarily an illegal act but an act which causes harm.*

The word **TORT** has been derived from Latin **term tortum which means twisted**. It is

<sup>8</sup> Common law does not come via any statute or act. It is derived by the decisions of courts and tribunals. It is derived from 'cases' which come before the court for decision making. Thus it is also known as case law or precedent.

So while statutes and acts, like say the Indian Contract Act (1872) or the Indian Copyright Act (1957) come after a legislative process, common law is essentially a judge made law.

We must also distinguish Common Law from Civil Law. Civil law (or civilian law) holds case law to be lesser to statutory law. The Statute or the Act is the superior law and the judges in Civil Law countries have a limited authority to interpret law.

India, of course, is a common law country.

<sup>9</sup> A civil wrong is different from a crime. A crime is considered a "public wrong" while a civil wrong is "a private suit between individuals".

Why is crime a public wrong? Because a crime is considered to be an offence against the State.

believed that “tort” is the French equivalent of English word “wrong”. So tort implies a conduct which is ‘twisted’ or ‘wrong’.

### Consider this:

Boya is walking merrily on the road, swinging his arms. That's perfectly normal. But what if he is swinging his arms in a way that his hand hits someone? That's a 'wrong'. And Boya can be sued for committing a Tort<sup>10</sup>!

*“The right to swing my fist ends where the other man’s nose begins”.* This is such a famous statement, that you should learn it by heart<sup>11</sup>.

Let us also understand the difference between duty imposed under the law of torts and the breach of contracts (You will study the law of contracts in detail later).

A contract is basically an agreement between two parties to do or refrain from doing a certain thing.

For example, Mrs. L, a baker enters into an agreement to bake and sell 250 cupcakes for Mollu's eighteenth birthday party. The agreement between Mrs. L and Mollu is a 'contract'.

Now, if Mrs. L doesn't deliver the 250 cupcakes to Mollu on her birthday, such an act will be considered as a 'breach of contract'.

Compare this to the law of torts. As per the law of torts, citizens do not enter into any written agreements with each other but are provided with certain

rights by law against the community as a whole.

For example, Bhavana has the bad habit of talking on her phone while driving her scooter. One day, while she was talking on the phone, her scooter rammed into a parked vehicle belonging to Mr.X. Now, Bhavana will be liable under the law of Tort for damaging Mr. X's property



under the law of Torts.

Notice here that there is no contract or agreement entered into between Bhavana and Mr. X (They are complete strangers!) but since there exists a duty under law to not harm another person's property, Bhavana will be held responsible under the law of Torts.

Before reading any further, please read the above carefully once more.

## CONSTITUENTS OF A TORT

To constitute a Tort:

1. there must be a **wrongful act** committed by a person
2. the wrongful act must give rise to **legal damage/ harm or actual damage** (yes, legal damage and actual damage are two different things)
3. the wrongful act must give rise to a legal remedy in the form of an **action for compensation**<sup>12</sup>



### 1. WRONGFUL ACT

What is a wrongful Act? Any act or omission which has a *detrimental effect* on the legal right of another is a wrongful act.

Also, a wrongful act can be an 'act' or an 'omission':

- the wrongdoer has either done something which he should NOT have (ACT)
- or he has not done something that he should have (OMISSION<sup>13</sup>)

An example of such an ACT could be driving rashly/ negligently and an example of OMISSION could be not repairing a live electric wire (pretty dangerous, that thing) suspended from a tree in your property.

Do social and moral wrongs fall within the purview of a wrongful act?

<sup>10</sup>Tort of Battery, actually. You'll slowly be lead there. Breathe!

<sup>11</sup>Passion, dear child, passion!

<sup>12</sup> Such a compensation is called 'damages'. In law of Torts, the damages paid are usually unliquidated (not ascertained beforehand).

<sup>13</sup> You can think of an omission as a negative act

It must be remembered that the wrongful act must be an act which is recognized by law. An act which is only socially or morally wrong will not fall within the ambit of a wrongful act.

For example, Mr. A is from small village in Andhra Pradesh. He did all his schooling in Andhra Pradesh. His relatives worked very hard to pay for his education. They also helped him to go abroad. Today, Mr. A is a well settled

software engineer in the United States. Recently, there was an earthquake in Andhra Pradesh. Mr. A's town was badly affected and the whole town is in ruins.

Mr. A's relatives have made frantic phone calls to him requesting him to help them financially. His relatives had informed him over the phone that all their property was destroyed. Now, Mr. A doesn't contribute a single penny to help his relatives. Do you think he should be held liable to pay?

No, Mr. A will not be held liable in this case. As explained above, this act of Mr. A is only socially or morally wrong but does not constitute a wrongful act under the law as there is not legal duty imposed on him.

Note: An omission will invite liability under Tort Law when there is a duty to act<sup>14</sup>.

Now an act, which appears to be innocent can become 'wrongful' and 'tortious', if it invades the legal right of another person. Let us look at an example:

*You own a house. A nice house. You call it home.*

*You want to turn it into a better home. A home which generates revenue? And with big plans and some small second hand computers, you decide to launch a little cyber café. You stick a huge advertisement board on your roof top.*



<sup>14</sup> Do revisit this sentence after a while. It will make more sense.

*The cyber café is a success. However, your neighbor is angry. The advertisement board is preventing any light from entering his house.*

Your act was innocent. But it became tortious because it encroached upon the legal right of your neighbor (the legal right to enjoy his property).

## MENTAL ELEMENTS

In situations wherein a voluntary act or omission has been committed, in order to fasten liability it is essential that the act or omission is accompanied by the requisite "mental element"<sup>15</sup>.

What do we mean by "mental element"?

Mental elements include:

### 1) Malice:

We all know that malice means ill-will or spite for others. For example: Draco Malfoy in the Harry Potters series had ill will or spite towards the more popular Harry. However, in law, malice includes not only ill will or spite but any motive that the law disapproves. Let us try and understand this concept. As per the law of torts, any wrongful act done *intentionally* without *any reason* or just cause will constitute a malicious act.



For example: A goes for a jog to BPR National Park every day. One day, B, a complete stranger runs up to A and punches him in the face for no reason. A faints as a result of this deathly blow.

Now, this act of punching A (Voluntary Act) for no just cause or reason (malice) will constitute a wrongful act under the law.

Did you notice that in the above case A and B were complete strangers. Thus, unlike in

<sup>15</sup> This requirement of mental element is not necessary in cases of Strict liability

common parlance, the law doesn't require the wrongful party to know the other party in order to prove the presence of an element of malice.

Let us take another example to understand this concept better.

Ms. Chang runs a very successful animal shelter in Bangalore. Many people visit her animal shelter to play with the animals. Some kind souls also bring treats for the animals. One day, Mr. Tatahos visited the animal shelter. He knowingly gave all the dogs in the animal shelter some poisonous biscuits. The next day all the dogs fell sick.

Do you think Mr. Tatahos will be liable for his wrongful act?

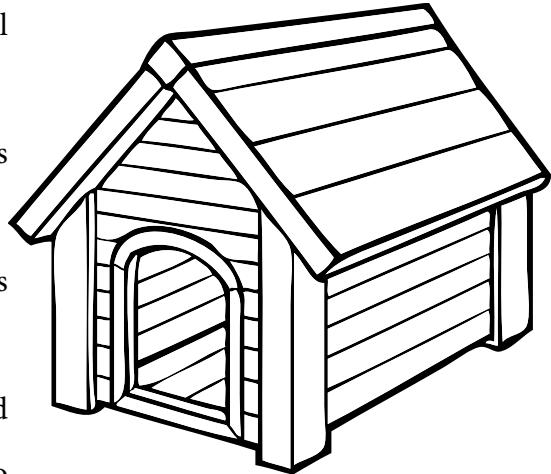
Yes, he will be! The presence of a malicious intent can be proven by the fact that:

- a) Mr. Tatahos has voluntarily and knowingly given the poisonous biscuits to the dogs
- b) Mr. Tatahos has no justified reason or cause to harm Ms. Chang's animals.

## 2) Intention, Negligence and Recklessness

Intention is an element which passes in the mind and direct evidence to prove the same doesn't exist. It is an internal fact. We say that we cannot find direct evidence to prove it because no one can be sure of what is going on in somebody else's mind. We can only deduce the same from their actions and conduct. An act will be considered intentional if a person has knowledge about his conduct and is also very well aware of the consequences of his conduct.

Now, these intentional conducts will constitute negligence when adequate attention is not paid to the consequences. The level of attention required to be paid will be that equivalent



to what a reasonable man in a similar situation would have paid attention to those grave consequences.

Recklessness can be termed as 'gross negligence'. The only difference being that the consequences of the act are well known. However, there exists indifference towards them or the party is willing to run the risk of the same.

## MOTIVE

Simply put, motive is the reason or purpose for doing a particular act.

Now, you probably are wondering what the difference between motive and intention is.

The difference is simple – Intention is to do with the immediate objective of the Act whereas motive is to do with the ulterior objective of the act.

For instance, if Cathy poisons Randal's food, the immediate objective (Intention) is to kill Randal. The ulterior object of Cathy may be to secure Randal's property by inheritance. This ulterior objective will be the motive behind Cathy's murderous act.

Note: An act which does not amount to a legal injury (*Damno sine injuria*<sup>16</sup>) cannot be actionable even if the act is accompanied by a bad motive.

For instance, A and B are neighbours. They have always disliked each other. One day, A sank a deep borewell on his land. As a result of this, the water supply to B his neighbor was cut short.

Now, there is nothing in law to prevent A from intercepting the underground water on his land. So, in this situation although A's act is lawful, A's motive behind the same was improper. However, as explained above there can be no claim without legal injury.

Motive is relevant in the torts of defamation, nuisance and conspiracy. (You will study these concepts later on)



<sup>16</sup> You will study this in Damages

## 2. DAMAGE

Damage means harm or loss suffered as a result of some wrongful act. (It is different from damages, which means compensation awarded by the court. More later).

However, a damage caused does NOT always mean that a legal right has been infringed.

Two foreign phrases for your consideration kids:

### INJURIA SINE DAMNO (INJURY WITHOUT DAMAGE).

Violation of a legal right without any actual damage being caused.

In such a scenario you do not suffer any tangible harm (no actual damage) but your legal right does get infringed.

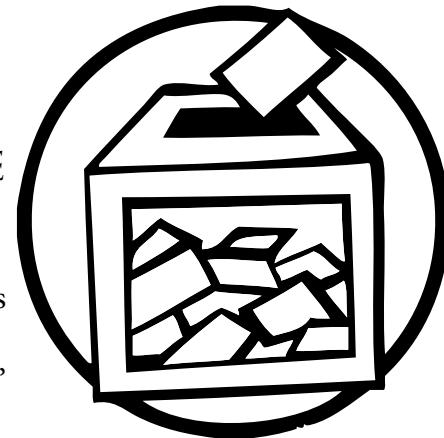
A very famous example<sup>17</sup> : a voter was denied to cast his vote for no valid reason. However, the party he wanted to vote for won and he did not have to face any actual damage. But his legal right to vote was infringed! It caused him a legal injury but caused no actual damage.

Let's take another example. A banker refused to honour Mr. Z's cheque although he has sufficient funds in his account. In this situation although Mr. Z did not suffer any tangible loss or harm, his legal right has been infringed.

In cases of *injuria sine damno*, the legal injury itself is taken to imply damage. Violation of your legal rights *per se*<sup>18</sup> is a serious enough harm. You might even get a human rights commission to intervene!

### DAMNO SINE INJURIA (DAMAGE WITHOUT INJURY)

In such cases, there is an actual and substantial loss without the infringement of any legal right. And well,



<sup>17</sup> Based on the leading case of *Ashby v. White*

<sup>18</sup> A Latin phrase meaning "in itself". Used often in law school!

you can't go to a court in such cases.

**Consider this example:**

*I run a school in my locality. It's called 'St. GCS: Good, Cheap School'. I charge rupees 100 per student. I get good teachers for them. A nice playground. And a computer room!*

*A competitor school opens up very near to my school. It's called 'Better, Cheaper'. The fees is rupees 50 per student. Better teachers. A bigger playground. A well, they have Apple<sup>19</sup> products in the computer room!*

*I suffer damage. Economic Loss. But my legal rights were NOT infringed. And I have no cause of action to take this case to a court of law.*

Let us consider another example, Mr. Halim runs a highly profitable mill in a small town. Mr. Zouk is his neighbor. They do not like each other at all. Now, Mr. Zouk starts a rival mill in the same locality. As a result of this, Mr. Halim's profits decrease.

In this situation, although Mr. Halim suffered damage, he cannot bring a suit against Mr. Zouk has no legal right of him is infringed.

Let us tweak this problem and make it more interesting. Suppose Mr. Zouk hinders the water flowing to Mr. Halim's mill. In this situation, Mr. Halim can bring an action against Mr. Zouk.

So there has been a 'wrongful act' which has 'resulted in damage'. What is my 'remedy' in the court of law?



<sup>19</sup> Trust that you are an Apple' fan!

### 3. REMEDY

Law of Torts is essentially a development of the maxim ‘ubi jus ibi remedium’ which means ‘where there is a right, there is a remedy’.

A tort is a civil wrong. But only those civil wrongs for which the remedy is a civil action for damages are Torts. “Damages” basically means compensation<sup>20</sup>. Damages do NOT mean damage, as used colloquially.

There could be other remedies too, like an injunction order<sup>21</sup> passed by court.

Now let's look at a few new (and basic) terms here:

- Plaintiff and Defendant
- Damage and Damages
- Injunction
- Tortfeasor



#### PLAINTIFF AND DEFENDANT

The person whose rights have been infringed is called PLAINTIFF and the one who is accused of infringing the rights is called the DEFENDANT.

Question:

Bade mian (BM) slaps Chhote mian (CM). CM takes BM to court.

Who is the plaintiff<sup>22</sup>? And who is the defendant<sup>23</sup>?

A plaintiff initiates a law suit against the defendant in a Court. A plaintiff is also known as a CLAIMANT or a COMPLAINANT.

A defendant is also called a RESPONDENT.

<sup>20</sup>Surely worth repeating (and remembering)

<sup>21</sup>An injunction is a remedy in the form of a court order that requires a party to do or refrain from doing specific acts. So the court basically says: “You can NOT do this” or “You HAVE to do this” etc.

<sup>22</sup>CM

<sup>23</sup>BM

### DAMAGE AND DAMAGES

Ah! There is an S again. And this time the S has more life changing consequences. We've already explained the difference, but here you go again, for one last time:

In a Tort case, the plaintiff sues the defendant and asks for **DAMAGES**. Damages is the legal term for compensation.

So you get damages for the damage you have suffered (2).

**Unliquidated damages** (remember the term?) mean that what damages will be paid hasn't been previously decided. This is a unique thing about Tort cases; that what damages will be awarded isn't pre-decided!

In criminal law, for example, the punishment for crimes has already been laid out in the statute. For example, Section 420 of the Indian Penal Code provides a punishment upto seven years jail time and/or fine for offences relating to cheating. And in cases involving contracts, parties decide in advance (through a contract) about the compensation to be paid in case there is a breach of Contract.

#### TYPES OF DAMAGES

There are four types of damages:



**1) Contemptuous damages:** Contemptuous damages are awarded when the court believes that an action should not have been brought by the plaintiff against the defendant.

**2) Nominal damages:** Nominal damages are those damages which are awarded in cases where no substantial harm or loss has been suffered by the plaintiff. This kind of damages is generally given in cases where a right of the plaintiff with no substantial loss or harm has been infringed. For example: when the defendant trespasses over the plaintiff's property. Such damages are called nominal damages as they do not cover the cost of litigation.

**3) Ordinary damages:** These damages are awarded when it is essential to compensate the plaintiff for the injury suffered. Ordinary damages are also known as Compensatory damages. Ordinary damages are those damages which are paid to the injured party to restitute or put him back in the same position as he would have been if the damage or injury was not sustained.

**4) Exemplary Damages:** Exemplary damages are those damages which are awarded not to compensate the injured party but to punish the wrongdoer for his unlawful act. Essentially, these damages are awarded to deter a party from exercising unlawful conduct in the future.

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## INJUNCTION

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Courts generally award compensation to the plaintiff (in case he wins the case).

In certain cases an INJUNCTION can be granted by the court too. An injunction is an order by the court wherein the court directs the defendant to do or not to do something.

Example: In case your neighbour drags you to court because the loud music you play disturbs him, the court will not only award your neighbour damages but will also direct you to stop playing the music so loud.



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## TORTFEASOR

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Let's get a bit more legal: whenever a tort is committed, the term used for that person is 'TORTFEASOR' (yes, when a case is filed in court this very person becomes the defendant). When two different people act separately but their act results in the same damage they are called 'INDEPENDENT TORTFEASORS'. However, if two people commit a tort together they are termed as 'JOINT TORTFEASORS' and they can be sued either individually or jointly.