**Professor Forcese**

Welcome Back to the JD orientation podcast series. In this podcast I discuss the concept of private law with Professor and former Dean Bruce Feldthusen. We focus on the concept of private law and distinguished from public law and then hone in on specific topics in private law including specifically torts and then a conversation about contracts and property law. I begin by asking Professor Feldthusen about his professional background.

**Professor Feldthusen**

Hi I’m Bruce Feldthusen. I graduated from Western Law School in 1976. I did my masters and eventually my doctorate at the University of Michigan in Ann Arbor. So I began as a full time law professor at Western in 1977. My Dean at the time was David Johnson who is now the Governor General of Canada. I guess he was responsible for starting my career although he might wish to deny that. I taught at Western until 2000. In January 2000, I began at the University of Ottawa as the Dean. And that curtailed a lot of my teaching and writing being Dean, but I have always maintained some writing in the Torts field. Which we are going to talk about today. I’ve also taught a large class in torts almost every year I’ve been here.

**Professor Forcese**

Great. So one of the things I want to talk about today is the concept of private law of which torts is a sub-species. What really is the distinction between private law and public law

**Professor Feldthusen**

Well, for me it’s really just a categorization scheme. And arguably it’s a bit suspect. But roughly speaking I would say that law that regulates interactions between private citizens is typically private law. And the law that regulates the government whether with public or private parties is public law. Examples might be helpful so a classic example of public law is constitutional law whether you’re talking about the Canadian Charter of Rights and Freedoms or more traditional Canadian law of division of power between the federal government and the provinces. Both of those are of course mandatory teaching subjects here.

And then there’s administrative law which deals with the judicial control of the regulatory agencies of all sorts. Boards, tribunals, municipal governments. It’s probably the biggest single field of law period. These days it encompasses so much and you’ll have some exposure to that in your legislation course I would think in first year. Criminal law, which is maybe not so evident, is a classic form of public law and also mandatory in first year. In contrast the classic examples of private law would be property, tort, and contract. All of which are mandatory first year courses and have been mandatory courses in North American law schools for 150 years. You might find it interesting that Corporate Law is a classic form of private law. That’s because corporations are in law persons. The same as you and me.

**Professor Forcese**

It’s often said that private law is heavily dominated by the common law. Is that still true.

**Professor Feldthusen**

Yes, I think it is. Certainly relative to most of the examples I gave you about public law. Most of private law developed from English common law that roughly speaking developed from decisions by individual judges across England. That came to be grouped in a hierarchy that was eventually known as precedence. The term common referring to that fact that eventually the judges tried to have the same law of tort, of contract, and of property across. It’s possibly more important that private law is more common because it’s private law that makes capitalism work for better or worse. If there are differences, it is very difficult to trade in other areas. IT would have been of critical importance after the industrial revolution and its colonies develop law that was the same across the country. They didn’t do it by enacting legislation. They did it by agreeing amongst the court that they would respect each other’s decisions.

**Professor Forcese**

You suggested that the distinction between public and private law is somewhat suspect, what did you mean by that.

**Professor Feldthusen**

SO we say public law is about the government, but of course governments own more property than anyone else. Governments contract all the time. When they contract they typically contract as private parties. And they are governed by the same law of contract as anyone else. And governments commit torts. Sometimes the line just isn’t as clear as it may be. Or in my own teaching history. The two subject I’ve taught are torts and administrative law. Which are arguably on different sides of that line. And yet what attracts me to that combination are the similarities. I don’t mean to disparage the categorization, I think it’s useful for a basic understanding of law and I think that’s why we’re talking about it today.

**Professor Forcese**

You’re talking about torts, and of course it’s an area where you’ve spent a significant portion of your career. It’s also an area that may seem the most obscure for most students. Some students have experience with property or some experience with contract, but not any with tort. What is a tort?

**Professor Feldthusen**

Rather than define it, I’ll give an example. I think what you’ll find out that you know more about tort than either property or contract. Although you might not know it by the name tort. When I begin my torts class, I think on the very first day, I begin with this little example about a fellow named Angus. He is an invited public speaker at a public auditorium on the subject of free trade. The local labour union happens to be beginning his talk because they don’t care for free trade. Out of the blue one of the picketers, we’ll call him victor, jumps on the stage and administers a physical beating to Angus.

I ask the class, what’s the likely first step of the law in this scenario? We play around for 15-20 minutes. Some jump right into the courts, but I bring them back to the fact that someone has to call the police before anything happens. The police will have to investigate. Arrest victor and question the visitors. Just to illustrate a bit about the procedure, which everyone in North America is familiar with because of TV. So eventually get to a criminal trial. And I ask the students what the qualities are of this criminal trial. Because they are familiar with. One of the things I say is what is this case going to be called. We arrive at the answer that it’s going to be called R against Victor. And who is R, but Regina. And who was Regina, but a Queen. And we then get into the question about why is the Queen meddling in this at all. And I run through the public aspects of Criminal law, which may not have occurred to everyone in the class beforehand. And so, what’s revealed in this discussion is that Angus really has little or nothing to do with this process. Although, Angus may have been the person who was beaten, it’s the government that controls the trial and the government who decides who the witnesses are going to be and not and what the questions are going to be. And it’s the government who pays for the trial and all the trappings including the Crown attorney who prosecutes it and so on. We then get to the question when this is all over: what did Angus get out of it. Often the answer is: Angus not only didn’t get anything out of it. But actually may feel wounded by it. Having been excluded. At this point, I bring it to their attention that Angus is quite likely to bring a tort case based on exactly the same facts. This will be a case, and here you see the private-public dimension. The case will be called Angus against Victor. Angus will have a lawyer who is running that case. Angus’ lawyer will decide what witnesses will and won’t be called. At the end of the day, if Angus succeeds, the remedy in torts will be an award of damages. A sum of money. The purpose of which is to put Angus in the position he was in before the accident. It will compensate him for medical expenses, for lost work, for pain and suffering.

We juxtapose the systems that way so that precisely the same facts lead to two very different proceedings. The private law, tort system being far more geared to the control and benefit of the victim. At this point, I actually tell them about research I’ve done on tort suits that come out of sexual assaults. We typically of a sexual assault as a crime. Which of course it is. It’s a hideous crime and prosecuted vigorously. But many survivors bring tort suits afterwards. Many of them bring tort suits even though the perpetrator has been convicted in criminal law and often when the perpetrator isn’t going to have any money. All of this suggests to me that the public system does things for the public presumably but leaves a lot of gaps to be filled, financial and otherwise, for the private law tort.

**Professor Forcese**

And so tort is about compensation

**Professor Feldthusen**

I wouldn’t say it’s about compensation, because it’s a terrible compensation scheme. It’s slow and expensive. But the remedy is compensatory. I think a purist would say the remedy is as much an inducement for the private enforcement of law as it is a compensation scheme. If we just wanted efficient social compensation, everybody would be insured and that would be the end of that. There’s more to it than that. Some people speak about the purpose of tort as corrective justice. Righting wrongs between to private parties.

**Professor Forcese**

You’ve used the example of a person being beaten. That would be the tort of battery presumably.

**Professor Feldthusen**

That’s right.

**Professor Forcese**

What other torts are there?

**Professor Feldthusen**

You have a slew of torts that are based on intentional wrong doing. They’re the hitting and beating if you like. So you have battery, which is striking a person without their consent. You have assault, which making someone fear they’re going to be struck without their consent. You can see the common history between crime and tort with the somewhat common terminology. You have torts of various names, which deal with people taking your property. Damaging your property. These kinds of things. These are the intentional wrong doings.

The most common form would be an action in negligence, which is basically seeking a remedy for people have injured someone carelessly. This would take into account products liability cases. People will know medical malpractice cases. Interestingly, certainly at one time would have included automobile accidents, but most automobile accidents have been removed from tort liability by legislation and dealt with by insurance. Workplace legislation that takes workplace injuries out of the system. We’re left with sports injuries is another category. They vary in importance. There are lawsuits against the government. And law suits against people who sell and otherwise provide liquor. Things like that.

**Professor Forcese**

So these kinds of law suits, this is what we would mean by a civil action?

**Professor Feldthusen**

It would be called a civil action for damages. That’s right

**Professor Forcese**

But what about the term cause of action? What does that mean?

**Professor Feldthusen**

Cause of action is a famous name for a tort. If you want to sue someone in tort. There has to exist something which is called a cause of action. An existing tort if you like. Courts can make new torts but usually there has to be a pre-exiting cause of action. Battery is a cause of action. Negligence is a cause of action. Nuisance is another cause of action. Defamation where one damages another person’s reputation by publication is another cause of action in tort. Also, some of the students may be familiar with the term class action which is a very important vehicle for social change right now. A class action is when you have a group of people who suffer substantially the same wrong, from substantially the same defendant. When the judge agrees there’s a common issue there, it’s tried all at once. It dramatically reduces the cost of each individual doing it. A few years ago an American news magazine had a cover of a famous trial lawyer in the United States. In it, it put the hypothesis forward that no other form of law had created more social change than tort law. They looked at the toxic tort suits against the makers of agent orange, the tobacco litigation, the products liability legislation. All these kinds of behavioural changes that have been affected by tort law. That’s why I said students know more about tort law than they think.

**Professor Forcese**

One of the classic images on has of law school is of the so-called “Socratic method” which is most common in the private law subjects like tort and contracts. Could you describe a bit, because you use Socratic in your teaching? What is the Socratic method of teaching?

**Professor Feldthusen**

I don’t use a pure Socratic method. I’m not sure anyone does anymore. In the pure form, the instructor asks a question, the student answers. The instructor asks another question and another question and another question either of that same student or of other students. But there are no answers given by the instructor. That’s based on the manner in which Socrates is purported to have taught. The best example in law school can be found in a movie called The Paper Chase, which is still shown at many law school orientation weeks.

**Professor Forcese**

In fact, it is on Netflix

**Professor Feldthusen**

Well I recommend everybody get it and watch that. I certainly had a lot of Socratic professors. I liked it. My feeling is some students love it and some students hate it. But very few have not opinion about it. The advantages of it I think, and I don’t do it purely. I give some guidance. I’m pluralist about teaching. There’s no one way I think I better than another. Students should be exposed to a range of them. My way is not to come in and think good teaching is point 1, point 1a, point 1b and the students transcribing and fooling herself that she learned something or that I taught something. That’s what books are for. I like to play around with the material, what if. What it means that everybody in class. They don’t know if they’re going to be called upon. So they’re listening and thinking through that time. It’s exhausting for me and them. And I wouldn’t wish it upon everybody. But I hope that everybody gets some.

**Professor Forcese**

Anything else that you’d like to discuss about private law in the University of Ottawa Law program.

**Professor Feldthusen**

First of all, I didn’t say anything about the other two ones and I should just say briefly that if I go back to my Angus example. I say to the class, supposing he had been threatened and hired a body guard and watched him get beaten. His law suit there would likely be a suit of breach of contract against the body guard.

And the difference between a contract and a tort if you like is tort battery courts have defined. They told you it’s the touching of another person without consent. That’s a social definition of the wrong. A breach of contract is the parties decide what the obligations they own one another. The law enforces them. The reason the law enforces them is that that’s the way we have trade and exchange and without that we don’t have capitalism. But the content of the bargain subject is some limitation is set by the parties. And that’s the law of contract.

Property law, I don’t know about you, but I’ve never been able to understand properly. But the most interesting thing in property law is that property is not a thing. Property is a bundle of legal rights and obligations that are associated with a thing. Not even always with a thing. You have what’s called real property. That is land. That has a very distinct set of laws. If you’re the owner, you have certain right. But you might be a mortgage lender, secured creditor or a tenant. All of you have different rights and obligations in that property. There’s a similar regime for personal property. And now the most interesting kind of property is a complete extraction. Intellectual property. There is now thing, it is a total creation of the law. That is the thing that protects ideas and expressions of ideas and again allows them to be marketed in a capitalist society. The irony is that China for example, doesn’t have much intellectual property or much respect for western intellectual property. It’s only because it’s trying to enter into a capitalist phase in its economy that it has to develop an intellectual property regime. So all of those are taught here. One of the things we have here at Ottawa is one of the leading intellectual property programs in the world. We have a good balance between public and private. In part, because we have so much choice. But even in our mandatory courses we’re split pretty equally between public and private.

**Professor Forcese**

Perhaps as a final question in your capacity as the outgoing Dean. What recommendations would you make to students in the way they approach their legal education and what they should hope to get out of it while students are at the University of Ottawa.

**Professor Feldthusen**

First of all, it’s a means to an end. For sure it leads to various ends. No one should spend 3 years of their life in a means to anything. It should be an end in itself. They shouldn’t be wasting time here, hating it, goofing off. They should embrace it. There are so many different ways to embrace it here. They could be volunteers. They could meet private lawyers, public lawyers whatever. But they really should engage. They’re reaching an age and a stage where 3 years is too long to write off. They should engage and I think I would always look for stars. Even if they’re teaching in areas where you might have no interest. You really will never no. Go to the people who have fabulous reputations at least once. You never know what you’re going to find. Along with that have an open mind. The world is changing fast. The nimble will survive the best.

**Professor Forcese**

Thank you very much

**Professor Feldthusen**

My pleasure.