

**SYLLABUS  
TORTS  
Fall, 2009**

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**Required Text:**

- TORTS AND COMPENSATION: PERSONAL ACCOUNTABILITY AND SOCIAL RESPONSIBILITY FOR INJURY (Sixth Edition), by Dobb, Hayden and Bublick. All pages refer to this book.

**Standard Collateral Texts (not required but useful):**

- PROSSER, ET. AL., PROSSER & KEETON ON TORTS (5th ed. 1984)
- RESTATEMENT (SECOND) OF TORTS; RESTATEMENT (THIRD) OF TORTS
- DOBBS, THE LAW OF TORTS (2000)

**I. Introduction**

What is a course in torts all about? The field of torts emerged as a distinct field of law only about 150 years ago, and even today writers have trouble defining what a tort is. In their Hornbook on The Law of Torts (5th ed., 1984) , Prosser and Keeton state that "broadly speaking, a tort is a civil wrong, other than breach of contract, for which the court will provide a remedy in the form of an action for damages" (p. 2) --and then immediately note that this definition doesn't get us very far! Perhaps it is best simply to note that the field of torts has developed historically as a kind of catch-all category for civil wrongs which judges felt were entitled to compensation, but which were not otherwise governed by the laws of contract or property. Most of such wrongs today (and the area on which we will concentrate) involve physical injury to persons or property, sometimes intentional, but more often "accidental." Other torts involve economic or dignitary harm.

Torts today may be categorized in several different ways:

- (1). some torts are defined in terms of the particular interest invaded, such as security of person (assault, battery), security or use of property (trespass, nuisance), reputation (defamation) or emotional security (infliction of emotional distress);
- (2). other torts seem best characterized by the activity producing the harm (ultrahazardous activities, products liability, medical malpractice); and,
- (3). finally, there is the vast area of negligence, which is both a tort in itself and a theory of liability behind other torts.

New torts are being created all the time as judges seek to keep the law abreast of a changing society, technology and culture. Within the last decade or so, legislatures have entered what was once an area almost entirely governed by common (i.e., judge-made) law, especially in such areas as comparative negligence, products liability and malpractice. It will be our task to get a grasp on the historical evolution of tort doctrine, its present state and possible future developments. (Obviously we can only cover selected aspects of this ever-growing field.) You will discover that with a field this volatile, there may be several different positions

on the same issue at one time, and a good lawyer will have to know what they are and what arguments can be made for each.

Three further implications for our study flow from the observation that torts have been developed by common-law judges incrementally over time:

- (1). you will note that many of the sections of the case book have been arranged chronologically, with older cases preceding more recent ones, to give you a sense of the progression of legal doctrine in an area – the theory being that you can't know where you're going until you know where you've been;
- (2). torts is an area where the law has been molded powerfully by social, economic, technological and cultural forces in society at large. Judges may or may not explicitly acknowledge these external considerations in their opinions, but the cases are seldom decided in a vacuum. We will want to identify such social policy considerations in torts cases and see how lawyers can utilize them in argument; and,
- (3). we will want to observe how judges have tried to develop, over time, rules of liability of sufficient generality to allow cases with similar fact patterns to be decided similarly, and thus lend stability and predictability to the law. We will have to see how such rules are deduced from the cases and how they are adjusted over time to deal with new fact patterns that may arise. (For an excellent illustration of this process in the context of products liability, see E. Levi, An Introduction to Legal Reasoning, pp. 1- 27, on library reserve). Tort law involves a constant tension between rule-generality and fact-specificity. Part of the task of learning legal reasoning is to see how rules of law emerge from and are related to specific factual situations and to learn to make arguments that such rules should or should not be applied to new fact patterns (arguing from precedent and "distinguishing" cases) . The use of hypotheticals will enable us to develop these skills and to test the limits of legal rules. (For some guidance on arguing cases in the context of legal rules, see K. Hegland, Introduction to the Study and Practice of Law in a Nutshell (2d ed., 1995) Part 1, on library reserve).

As the course progresses, you should be acquiring two interrelated skills:

- (1) knowledge of a body of legal rules, principles and doctrines derived from the assigned reading and class discussion; and,
- (2) the ability to recognize legal issues in new fact situations and to apply the doctrine you have learned to the facts to argue for an appropriate outcome. Not incidentally, the examinations in the course test both these skills.

## **II. Assignments**

I have not prepared a day-by-day list of assignments as it is impossible to predict our pace in advance. I will announce assignments for the coming week at each Wednesday's class. (If we end a class discussion in the middle of a case, you should reread that case for the next class, unless I indicate to the contrary, as we will usually pick up with it where we left off.) I have appended a list of assigned readings for the Fall Semester to this Syllabus.

**Please bring to class your casebook, any class handouts and your own briefs and notes. Please do not bring to class commercial outlines or "canned briefs." (see below).**

Do not neglect the notes following the principal cases when they are assigned; they frequently supply important supplementary material. (Some of the notes are rather difficult and some ask questions that depend on later material to answer adequately. Pick your way through them as best you can, and I will try to indicate when notes are particularly important or when they are best ignored).

### **III. Examinations and Grading: Practice Exam Session**

Your final exam will be open book. I expect to hold a practice exam session in the fall semester on a date to be announced later. I will hand out in advance a typical essay exam question and ask you to submit an outline of an answer before the session. Your outlines will serve as a basis for discussion of the problem at the session. While this exercise will not be graded, submission of the outline is mandatory.

### **IV. Class Logistics**

I will call on several people at random during a class period. I may ask you to give a complete brief of the case (facts, issues, holding, rationale) and then ask follow-up questions, or I may do some part of the briefing myself and then ask you questions.

In the course of our discussions, I may press you to clarify your points, to justify your conclusions, to respond to hypotheticals, etc. Please understand that my questions and comments are not designed to embarrass or intimidate you, but rather to encourage you to think in the most creative, careful, lawyer-like way you can. If a question is unclear, ask me to restate it and I will. If you feel that I have somehow not understood what you were trying to say in class (it happens), please let me know after class and we'll talk further. In general, if you have any problems with the course, whether substantive or pedagogical, I'll be more than happy to discuss them with you.

I will try to leave time in class for your questions, but if we don't get to them, feel free to raise them with me after class.

No tape recorders.

### **V. Class Preparation**

Law school education, as you've undoubtedly already been told, is different from your college or graduate school experience. Classroom technique is different, reading material is different, exams are different. I teach in a modified Socratic style, which means I do not do much formal lecturing but rather ask you questions designed to help you develop your powers of legal reasoning and a grasp of doctrine. To benefit from this style of class it is essential that you come to class well-prepared; otherwise you will have difficulty following class discussion and will get little from it.

What do I mean by preparation? Of course you must read and brief the principal cases in the casebook, as well as annotate any other materials assigned, such as statutes and casebook notes. You should read each case at least three times: once, to get an overall view of the facts and issues; twice, to brief it; and three times to review it before class and firm up your understanding of the facts and issues. (***Review before class is vital:*** none of us can remember for long the kind of detail we must deal with in the law without refreshing our memories).

I will expect each of you to come to class with your own briefs of the principal cases in the book (not commercial briefs or mere marginal notes).

Briefs should contain:

- (1). a short statement of the facts of the case, including the tort for which the plaintiff is suing;
- (2). the legal issue(s) involved, in both their procedural and substantive context (if the case is an appeal, what legal error is appellant asserting occurred in the lower court?);
- (3). the holding of the court on the point(s) of law involved as well as any broader statements of legal doctrine on which the court relies; and,
- (4). the reasoning of the court.

It is impossible to say exactly how much time you will need to budget for class preparation since each person's needs are different, but it is likely that at least four hours of preparation will be needed for each class.

You will have to read with greater attention to detail than you ever have before: a single word in an opinion may be the critical element in the court's reasoning. In general, you will find that the law will require you to use language more precisely, with greater attention to shades of meaning, than you are probably used to. The quicker you develop mental habits of thinking and speaking as precisely as possible, the better lawyer you will be.

Important: Please note that adequate class preparation does not mean merely taking notes on the cases in a mechanical way, or even merely spending a lot of hours on your assignments: You must actively think about what you're reading and writing.

Force yourself to ask questions:

- Do I understand what the issues are before the appellate court?
- How were the issues resolved in the trial court and what legal error is appellant asserting occurred there?
- What are the arguments of plaintiff and defendant? (If these aren't spelled out in the opinion, what might they have been?)
- How does the appellate court resolve the issues, i.e., what points of law are decided?
- What is the court's reasoning? Is it persuasive?
- Is the decision wise from the point of view of social policy?
- Should the case have been decided differently? Why? (Is there a dissent? Over what issues?)
- Does the court leave important legal issues unanswered or raise new problems that will need to be adjudicated in the future?

In sum, the more questions you ask yourself about the cases as you read them, the more you'll anticipate and be prepared for the questions we raise in class. ***Above all, force yourself to articulate the legal doctrine, principle or concept for which the case "stands" (i.e., the "law of the case") , whether or not the court does this clearly. From the start of the course, you should be compile your own outline of the principles of law governing the issues we study, to serve as a basis for review later on.***

A further Point: In reading a torts case, you may feel instinctively that one side's position is the "right" one, according to your own values or views of social policy. Nevertheless, you should be able to give arguments not only for a position you think is "right," but for other positions as well, even those you think are "wrong. " If a case goes up on appeal, it is because there are credible legal arguments on both sides. A good lawyer must be able to anticipate his or her opponent's arguments, and that means being able to formulate the best possible arguments for the other side. Please do not be surprised (or offended) if I ask you in class to formulate an argument for a position you initially oppose!

One final Point: Don't be surprised or disillusioned if, despite conscientious preparation, you find that class discussion emphasizes issues other than the ones you thought were important in a case. You may even go out of class more confused than when you came in. ("I thought I understood the case when I came to class, but now....") This is normal. It is not always easy at first to identify the important aspects of a case; reading and understanding cases is a skill that must be learned and that is enhanced by experience, like any other. Judicial opinions are not written with the first-year student in mind, and some cases are unavoidably complex. It is also possible that you have a valid insight that no one else has, including the professor. Or possibly reasonable minds might differ over what a case "means", and your interpretation has not been given sufficient weight in class. If you have conscientiously tried to understand a case and remain confused about it after class, first try to figure out exactly what you're confused about, and then ask. If you've done your homework, no question is "dumb"; if you've got a question, probably others do as well.

## **VI. Suggested Supplemental Reading (all on library reserve)**

If you feel the need for additional information or explanation about a particular topic, I suggest the following treatises: (1) The standard work, frequently cited by the courts, is Prosser & Keeton, Hornbook on the Law of Torts (5th ed., 1984). It is very clearly written, although there are sharp differences of style and even philosophy between the original author (Prosser) and later contributors (Keeton et al.). (2) Harper, James, & Grey, The Law of Torts (2d ed., 1986) is often more complete and intellectually richer than Prosser & Keeton. (3) A new Hornbook on the Law of Torts (2000) by Dan Dobbs (the author of our book) is more up-to-date than the above treatises and has citations to many recent cases and law review articles.

There has been a tremendous amount of writing recently about the overall purposes of the tort law system, from such diverse vantage points as law and economics and moral philosophy; there is also much ongoing controversy about whether the judicial tort law system should be replaced or supplemented by some other system of compensation for accident victims. You can get a flavor of the debate over these and other issues in a volume of essays edited by Robert Rabin, Perspectives on Tort Law (4th ed., 1995).

Throughout the year we will be referring to the American Law Institute's Restatement (Second) of Torts, which is a collection of "black letter" rules culled from court opinions with accompanying commentary. Although it is in no sense binding law, courts cite it regularly as authority. The Restatement has had more influence in some areas (e.g., products liability) than in others. The commentary contains helpful illustrations of the black-letter rules. In 1998, the Institute published a Restatement (Third) of Torts: Products Liability, the drafting of which engendered significant controversy.

I will recommend other books and articles from time to time

## **VII. A Word About Commercial "Study Aids"**

A student who reads the casebook diligently, attends class regularly, and follows class discussion attentively should be able to do well in this course. I recognize, however, that some students like to use a commercial outline to increase their "comfort level" with the material and to see how the "tree" of a particular topic fits into the "forest" of the subject as a whole. While I would prefer you use Prosser & Keeton's Hornbook for that purpose, I leave to you whether to use a commercial outline or not.

If you do use a commercial outline, be cautious how you use it:

- (1) Outlines necessarily oversimplify the law and may not deal with issues we raise in class or may deal with them superficially. Be aware that the examinations in this course deal with material as presented by the particular casebook and instructor, not necessarily the abstract law presented in an outline;
- (2) An outline cannot be a substitute for your reading the cases and trying to derive principles of law from them. Law develops in the context of particular fact situations, and you can't learn to apply law by memorizing abstract principles in rote fashion;
- (3) An outline should not take the place of doing your own outline of the course, derived from the cases, other materials in the book and class discussion. You must be actively involved in thinking through the doctrine of the course rather than passively rely on someone else's summary. So if you use a commercial outline, use it as a check on your own work and for review, not in place of your own work.

As to so-called "canned briefs" (Casenotes, Legalines, etc. ) . I respectfully ask you not to buy or use them at all. I believe these shortcuts are harmful to your legal education. If you are ever to be competent lawyers, you simply cannot avoid struggling with the actual cases now, including doing your own briefs. When you are in practice and have to research the law to advise a client, there will be no "canned briefs" to use as a crutch, so you must learn to read and analyze cases now. "Canned briefs" also cause you to miss the intellectual challenge of analyzing and criticizing the courts' opinions, which makes the study of law exciting. Finally, such summaries frequently are either inadequate or wrong, or else simply do not address issues we will deal with in class.

**GOOD LUCK THIS YEAR – I AM LOOKING FORWARD TO WORKING WITH YOU!!**

## **I. INTRODUCTION<sup>1</sup>**

A. Reading Torts Cases and Trial Procedure: pp. 17-24.

## **II. FAULT BASED LIABILITY FOR PHYSICAL HARM TO PERSON AND PROPERTY**

A. Direct Intentional Wrongs:

1. Establishing a Claim For Intentional Tort To Person or Property:

a. Battery: pp. 27-35.  
pp. 35-34.

(i). Requiring fault:

- Van Camp v. McAfoos, p. 27

(i). Elements of Battery:

- Snyder v. Turk, p. 30
- Cohen v. Smith, p. 30
- Fisher v. Carousel Motor Hotel, p. 33-34 (n.6).
- Leichtman v. WLW Jacor Communications, Inc.(handout)
- A.R.B. v. Elkin, p. 34

(iii). Re-focusing on Intent:

- Garratt v. Dailey, p. 35
- White v. Muniz, p. 37
- Walker v. Kelly (handout)
- Palmatier v. Russ (handout)

b. Assault: pp. 44-48

(i). Elements of Assault

- Dickens v. Puryear (handout)
- Alteiri v. Colasso (handout)
- Cullison v. Medly, p. 44

C. False Imprisonment: pp. 48-51

- McCann v. Wal-Mart Stores, Inc., p. 48

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<sup>1</sup>Pages that constitute assignment blocks are in bold/italics. All abstracted cases and all texts and notes within the prescribed pages are included in the assignment unless specifically excluded.

D. Torts to Property: pp. 51-59

(i). Trespass to Land

(ii). Conversion of Chattels

• Kelly v. LaForce, (handout)

(iii). Trespass to Chattels

**III. DEFENSES TO INTENTIONAL TORTS- -PRIVILEGES**

A. Protecting Against the Apparent Misconduct of the Plaintiff: pp. 60-66.

1. Self-Defense.

2. Defense of Third Persons.

3. Arrest and Detention.

Great Atlantic & Pacific Co. v. Paul (Handout).

4. Defense of Property and Recapture of Chattels.

Katko v. Briney, p. 62

Brown v. Martinez, p. 64

B. The Special Case of Consent, p. 66-73

Reavis v. Slominski, p. 92 (Handout)

Ashcroft v. King, p. 69

Kennedy v. Parrott, p. 70

Doe v. Johnson, p. 71

C. Privileges Not Based on the Plaintiff's Conduct, p. 73-81

1. Public and Private Necessity

Surrocco v. Creary, p. 74

Wegner v. Milwaukee Ins. Co., p. 75

Ploof v. Putnam, p. 77

Vincent v. Lake Erie, p. 78

## VI. THE SCHEME OF NEGLIGENT WRONGS

### A. The Fault Basis of Liability

### B. Duty

#### 1. The General Duty of Care: The Due Care or Prudent Person Standard, pp. 83-100

##### a. Circumstances External to the Actor

###### (i). Special Danger:

Stewart v. Mott, p. 85

###### (ii). Emergency:

Lyons v. Midnight Express (Handout)

##### b. “Circumstances” in the Actor’s own Characteristics

###### (i). Physical limitations of the actor

Shepard v. Gardner, p. 91

Roberts v. State of Louisiana (Handout)

###### (ii). Special Ability, Knowledge, Experience

Hill v. Sparks, p. 95

###### (iii). Infancy

Robinson v. Lindsay, p. 97

Hudson-Conner v. Putney, p. 98

#### 2. The General Duty of Care: Specification of Duties – Negligence as a Matter of Law, pp. 100-111

##### a. Judicial Treatment of Specific Duties

###### (i). General duty is specified to a particular requirement of action

Marshall v. Southern Ry. Co., p. 100

###### (ii). Specification of general duty rejected and jury role restored

Chaffin v. Brame, p. 100

##### b. Legislative treatment of Specific Duties

###### (i). Legislative specification accepted as tort standard

Martin v. Herzog, p. 102

###### (ii). Legislative specification rejected

###### (a). By excused violation doctrine

Impson v. Structural Metals, p. 109

###### (b). By judicial refusal to accept legislative standard

Rudes v. Gottschalk (handout)

##### c. Scope of the Per se rule – classes of persons and harms

Wright v. Brown (Handout)

## C. Breach:

### 1. Assessing Reasonable Care by Assessing Risks and Costs, pp. 112-131

#### a. Risk/ utility introduced

Pipher v. Parcell, p.114  
Indiana Consol. Ins. Co. v. Mathew, p. 117  
Stinnett v. Buchele, p. 119  
Bernier v. Boston Edison Co., p. 122

#### b. Risk/Utility Balancing

United States v. Carroll Towing, p. 127

### 2. Proving and Evaluating Conduct

#### a. Proving Conduct

##### i. Direct Proof

- (a). Sufficiency of Proof – the requirement of specific conduct  
Santiago v. First Student, Inc., p. 135  
Gift v. Palmer (handout)
- (b). Conflicting Evidence – credibility, experts and the process of determining facts  
Upchurch v. Rotenberry (handout)

##### ii. Circumstantial Evidence

- (a). Permissible inferences of fact  
Forsyth v. Joseph, p. 137
- (b). Opinion evidence bearing on factual inferences  
Note: Witnesses' opinions as to facts and factual inferences, p.138

#### b. Evaluating conduct, pp. 139-147

##### i. Evaluation of known conduct

Problem: Kibler v. Maddux, p. 139  
Thoma v. Cracker Barrel, Inc., p. 140  
Wal-Mart Stores v. Wright, p. 143

##### ii. Evidence to assist evaluation: custom

Duncan v. Corbetta, p. 144  
McComish v. Desoi (Handout)  
The T.J. Hooper, p. 145

3. Res Ipsa Loquitur, pp 147-

a. Origins and Basic Features of the Doctrine

Byrne v. Boadle, p. 147

Valley Properties Limited Partnership v. Steadman's Hardware, Inc.  
(Handout)

Eaton v. Eaton (Handout)

b Is negligence more probable than not

Warren v. Jefferies, p. 153

c. Attributing fault to the Defendant rather than others

Giles v. City of New Haven, p. 156

Collins v. Superior Air-Ground Ambulance Service, p. 160



