

Torts II

University of North Dakota School of Law
Spring 2015

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SYLLABUS

1. GOALS AND LEARNING OUTCOMES: My primary goals for the Torts I and Torts II courses are for you to become literate and conversant in the principal doctrines of tort law and to be able to thoroughly analyze torts problems, applying tort law to facts. In addition, you should gain an understanding how tort law works in practice and how rhetoric, strategy, and values affect the law and the outcomes of cases. Finally, you should gain an appreciation of the theory and philosophy behind the common law of torts and learn something of the historical and jurisdictional context of present-day tort law.

The following is a non-exclusive list of particular learning outcomes for this course:

1. Broadly know and be able to apply the principal doctrines of tort law, including, specifically, those listed in the course outline at the end of this syllabus.
2. Have a basic level of literacy with tort law such that, with regard to tort law issues, you could productively and immediately step into a role as the general counsel of a small organization or an attorney supporting the general counsel of an organization of any size.
3. Have the requisite level of knowledge such that you could immediately play the role of a productive and knowledgeable junior associate to an experienced outside counsel who practices primarily in tort law cases.

In making reference to “tort law,” the above learning objectives are meant to refer to the subject matter of the Torts II course. Broadly speaking, that’s tort law minus negligence and the intentional torts.

2. COVERAGE: In the Fall, in Torts I, we covered in-depth negligence and the intentional torts, plus issues of liability arising in the health-care context. This Spring semester, in Torts II, we will proceed at a faster pace, building on the foundations laid in the first semester. Our subjects will include strict liability, products liability, economic torts, worker’s compensation, defamation, remedies, theoretical perspectives on tort law, and more.

3. **CLASS WEBSITE:** The central repository for class materials and information is the class website. It is not password protected. Go to ericejohnson.com and find the link on the upper left. The direct URL is:

http://www.ericejohnson.com/courses/torts_1415/

4. **MATERIALS:** There are required books for this course.

4-1. The following book, or the relevant portions thereof, will be available for free download from the class website:

Torts, Volume Two

by Eric E. Johnson

(Prepublication beta version, forthcoming from eLangdell Press)

Books to be purchased by students, either online, from the UND bookstore, or elsewhere, are:

Understanding Torts, Fifth Edition by John L. Diamond, Lawrence C.

Levine, Anita Bernstein

Published: 2013, LEXISNEXIS

ISBN-10: 0769872344

ISBN-13: 978-0769872346

Four Trials by John Edwards, with John Auchard

Published: 2004, Simon & Schuster

ISBN-10: 0743272048

ISBN-13: 978-0743272049

4-2. **Other:** Additional materials that will be part of the required reading may be made available via links from the course website, handed out in class, or placed on reserve in the library. In addition, I might assign lessons from the CALI website (the Center for Computer-Assisted Legal Instruction) at <http://www.cali.org>, so you should be able to log on to that site. I will also be giving you assignments that will require you to turn in a written product.

4-3. **Study Aids and Unassigned, Additional Reading:** Beyond the required materials, you are encouraged to use any other materials you find helpful or interesting. CALI exercises that you undertake on your own can often be very rewarding. The more you learn about torts, the better.

I have found that commercial outlines and other study aids are a great way of gaining a basic understanding of the blackletter law in a subject. That being said, I think the best time to read such a secondary source is right at the beginning of the semester. That way, you may give yourself a better foundation of knowledge for learning the material presented in the cases and in class. On the other hand, reading a commercial outline *as exam preparation* for this class could be a waste of your time and mental energy. But it's up to you, of course, to judge for yourself.

If you do use study aids or other resources, I would be interested in hearing about your experience with them – whether good or bad. I'm always interested in knowing what is contributing to people's learning.

5. **READING:** Reading assignments will be posted to the chart of assignments, which may be accessed from the class webpage. I take care to craft reading assignments

so that they are not unduly burdensome. In return, I ask that you do the reading conscientiously. How should you tackle the reading? You could, of course, brief the cases, use a highlighter, make margin notes, or do any of a number of other things. And, of course, you should do what works for you. But the most important thing is to read the material with interest. "With interest" means you should be having thoughts going through your head such as, "Mmmm, interesting!" "Ah ha! That makes sense!" or "What is wrong with this judge?!?!?"

One way to approach the reading, suggested by Professor Scott Brewer, is to be aware of "the literary drama of the law," that is, to "be alert to the narratives of the hopes, aims, fears, aspirations and frustrations of the litigants ..." Behind every case there is a real story. The more you allow yourself to be absorbed into that story, the more you will get out of the case.

Also, you should attempt to put yourself in the position of the judge. Force yourself to confront the challenge of trying to interpret the law in a way that is fair, unbiased, beneficial for society, as well as true to statute and precedent. Using this kind of viewpoint, you are bound to get something extra out of every case you read.

6. GRADING:

6-1. Your grade will primarily be based on your exam performance. The exam is discussed later in this syllabus.

6-2. Class participation will also count in calculating your final grade: I plan to add or subtract from some students' exam grades on a non-anonymous, discretionary basis, with the result forming the grade for the course. Such adjustment will ordinarily be no more than one step, such as from a B to a B+ or from an A to an A-. In extraordinary cases, which I anticipate to be rare, I may make an adjustment of two steps, such as from a C to a B- or from a B+ to a B-. In making class-participation adjustments, I anticipate that some students' grades will be increased upward and others' may end up being adjusted downward, with most students' grades probably remaining unchanged. Class-participation evaluation is, of course, subjective.

6-3. Reasons for a positive effect of class participation on the overall course grade may include habitual preparedness and engagement, volunteering in discussions, excellence in contributions to discussions, strong performance on the quiz, strong performance on assignments, and various conduct that contributes positively to the educational process.

6-4. Reasons for a negative effect of class participation on the overall course grade may include exhibiting poor performance or visible disengagement in the classroom, being unprepared for class, disruptive behavior (including, but not limited to, a pattern of appearing distracted by a computer or phone), conduct contrary to the Classroom Conduct Rules (listed below) and other conduct that detracts from the educational process. Tardiness and deficient attendance, if substantial enough, may also have a negative effect. (For more on attendance, see §9.)

6-5. Positive and negatives effects may, of course, offset.

6-6. Please keep in mind that, despite the fact that class participation is graded, you should not worry unduly about the quality of your responses in class discussion. Law school, like all other educational environments, is a place to learn, and

that necessarily implies that it is a place to fumble and make mistakes. I do not ask questions or conduct discussion as a way of judging you; I do it as a way of challenging you and helping everyone to learn. So put aside your fears and engage in the conversation. Once you are a full-fledged lawyer, having a confident voice under pressure will be indispensable. Now is the time to find that voice. Be bold.

6-7. Note that I plan to do at least one quiz, using fill-in-the-bubble sheets, near the beginning of the semester, after we have done the blackletter review. Consider the quiz a productive challenge – a chance to solidify your learning of basic doctrine. But don't stress too much about it. While strong performance on the quiz is a positive in terms of class participation grading, poor performance on the quiz will not count as a negative.

7. COMMUNICATIONS AND OFFICE HOURS:

7-1. My e-mail address is eric.e.johnson@law.und.edu. Please note that I do not answer or discuss substantive questions through e-mail. Moreover, perhaps unlike many students, I do not read e-mail on an hour-by-hour basis. I may not respond at all to certain e-mailed questions, including those which ask for information that is clearly answered in this syllabus. If you miss class, please ask other students for information you may have missed, such as reading assignments. Any e-mail communications you do have with me should be prepared in a professional manner, including the use of a meaningful subject line.

7-2. If you have any questions about the exam, please ask them in open class. In the aims of fairness, I do not discuss the exam on an *ex parte* basis.

7-3. My temporary office this year, during the School of Law building project, is Dakota Hall, Room 120. It is located far from the main campus, and I don't recommend you go all the way over there just to drop by, since I might not be there, and then you would find yourself in the middle of nowhere for no reason. I will post open "office" hours – or my website at ericejohnson.com. (I put "office" in quotes, because I will likely hold them somewhere more convenient than my actual office.) Notwithstanding the difficulties caused by the building project, I *do* want to meet with students. In addition to or as an alternative to availing yourself of office hours, please do not hesitate to e-mail me to make an appointment to talk (and when you do, it helps if you include some suggested times that work for you).

7-4. At least once during the year, I hope you will take advantage office hours, an appointment, or some other opportunity just to chat – even if you have no questions and nothing to discuss. That's not a requirement, just a request. But it would be nice to be able spend some informal time with everyone.

8. IN THE CLASSROOM:

8-1. Classroom Conduct Rules:

In general:

(a) Avoid behavior that might disrupt class or distract your fellow students.

Some specifics:

(b) Do not eat in class. Do not chew gum audibly or with your mouth open.

- (c) Refrain from any use of a digital device where such use could reasonably disrupt class or distract fellow students. All digital devices must be operated without audio volume. Screens must not display any distracting content, including, but not limited to, distracting images, indecent content, moving images (video), and animation or flashing graphics.
- (d) You may use digital devices (including, without limitation, computers, phones, and tablets) in class; however, from the time of class's scheduled beginning until class ends: (1) You may not engage in any digitally enabled network communications with anyone else in class, including, but not limited to, e-mail and text messaging. (2) You may not engage in any web publication or any live-updating/realtime digitally enabled network communications with anyone at all, including, but not limited to, live chat, IM, Facebook (including, but not limited to, Facebook groups), Twitter, Ello, Snapchat, Instagram, Google+, and the like. The prohibitions of this subparagraph (d) are not limited by context and apply without regard to whether the activity in question can be characterized as disruptive or distracting. Any violation of the policy in this subparagraph (d) will presumptively result in a lowered course grade and may be referred for disciplinary action. The prohibitions of this subparagraph (d) do not apply if and when you are absent from class and not on campus, nor do they apply to communications with University information-technology staff for technical-support purposes. Bottom line: Keep the discussion in class, where it is productive and beneficial for all.

8-2. Your participation in classroom discussion should be meaningful and appropriate. Raise your hand to have a say in discussion when you have a comment that will contribute to the experience of the class as a whole, or when you have a question, the clarification of which will benefit the entire class. On occasion there are students who raise their hand too often and take up too much of the class's time. And in nearly every class, there are people who sit passively and rarely, if ever, contribute to classroom discussion. Try to not fall into either extreme.

8-3. Even if you don't volunteer, I'll expect you to be ready to participate meaningfully if called on. If you cannot participate fully for a particular class, for whatever reason (and there's no need to tell me why), please tell me before class, in person, so that I can avoid calling on you. Reasonable requests of this sort are entirely understandable and will not adversely affect your grade.

8-4. Be aware that I plan to make an audio recording of each class meeting. These recordings are for my use, and, unfortunately, I will not be making them available during the semester for absent students. No one is permitted to make an audio or video recording of class without my express, written permission.

8-5. Students with Special Needs and Disabilities: If you have medical information to share with me in advance of and in case of any prospective emergency, or if you need special arrangements in case the building must be evacuated, please e-mail me or make an appointment with me to discuss. If you plan to request a disability accommodation, please contact the Dean of Students office, and be aware that you are expected to register with UND's Disability Support Services.

9. ATTENDANCE:

9-1. In General: My view is that punctual attendance in class is an essential component of the educational experience and that superior performance on an examination cannot make up for insufficient attendance. Moreover, the General Rules of the School of Law's Academic Program provide, "Regular and punctual class attendance is required."¹

I expect that students may have occasional, isolated absences. I do not view this as a problem. An infrequent late arrival is forgivable as well. But how does one draw the distinction between the well-meaning student who doesn't make it on time to every class and the student who allows attendance to become a serious problem? It's not easy. Thus, I am providing this detailed attendance policy. I regret that it is so long. Nonetheless, seriously deficient attendance must incur serious consequences and, therefore, it seems prudent to err on the side of particularity.

9-2. Deficient Attendance:

(a) **Late Arrivals and Early Departures:** As the expression goes, better late than never. But bear in mind that tardiness is disruptive. For purposes of determining the appropriateness of penalties discussed below, a late arrival or early departure will count as half of a whole absence. In my discretion, however, a very late arrival or a very early departure may be counted as a whole absence.

(b) **Comings and Goings; Intraclass Absences:** I understand that you may have an urgent need to leave class for a short time. Bear in mind that leaving and re-entering class is disruptive, so please do so only when necessary.

(c) **Effect on Grade for Deficient Attendance:** Deficient attendance may have a negative effect on the class-participation component of your grade, and thus on your overall course grade. The negative effect may occur either as a drop in your final grade or a decision not to grant a bump up in your grade. The class-participation grading component is discretionary and subjective, and attendance is only one among many factors in determining class-participation grading. In keeping with that, there is no set numerical formula by which absences and partial absences (i.e., late arrivals, early departures, intraclass absences) will be deemed seriously deficient and thus deserving of negative treatment in the class-participation grading component. Factors that will be considered include the number of absences and partial absences, the student's attendance record in comparison with the attendance records of others, courteousness and professionalism in dealing with attendance issues, and extenuating circumstances. As a guideline, however, you can expect that **six** or more absences will constitute deficient attendance such that attendance, by itself, would warrant dropping a student's final grade by one step.

(d) **Administrative Withdrawal or Failing Grade for Profoundly Deficient Attendance:** For a student with a profoundly deficient attendance record, I will presumptively request of the Office of the Dean that the student be administratively withdrawn. Alternatively, I may award a failing grade. For these purposes, I will presumptively regard as profoundly deficient attendance **eight** or more absences. Recall that partial absences (i.e., late arrivals, early departures) will count as half an absence

¹ <http://law.und.edu/students/policy-manual/general-rules.cfm>

and may, in my discretion, be construed to constitute a whole absence. If you are approaching a total of eight instances of whole or partial absences, I encourage you to consult with me to determine whether some or all of your partial absences will count as whole absences. It is your responsibility to keep track of your own absences with regard to the presumptive administrative withdrawal. Do not expect to get independent notice that you are approaching the threshold for administrative withdrawal. This syllabus provision is your notice.

(e) **Extenuating Circumstances:** In consultation with the Dean or Dean of Students, I may take account of special circumstances in deciding whether to request administrative withdrawal, including personal illness, illness of a close family member, or bereavement. Extracurricular activities or job interviews can be considered in this vein as well. Note that there is no need to discuss with me reasons for absences or extenuating circumstances if your attendance is not approaching a seriously deficient level.

9-3. Attendance Record: To avoid being distracted in class by constantly noting things like late arrivals and early departures, I will be requiring students to log their own attendance. Thus, it is of paramount importance that you deal with all attendance issues with utmost honesty, integrity, and care. Inaccuracies in marking the attendance log will presumptively be referred to the Honor Board and/or may result in a lowered grade.

(a) **Means of Taking Attendance:** Attendance will usually be taken by means of an “attendance log,” a sheet comprising a grid with boxes to initial for individual days. On any given day, attendance may alternatively be taken by roll call, by reference to the seating chart, or by some other method.

(b) **Initialing to Indicate Attendance:** When the attendance log comes around to you, initial in the box at the intersection of your row and the column for the instant date. (“Instant date” means the current date as you are looking at the log.) Indicating your attendance this way is your responsibility. If the attendance log does not come around to you, then it is your responsibility to make sure you are marked as having attended – simply come up to me immediately after class ask to initial the log. If you omit to initial the log during class or immediately afterward and before I leave the room, you will be counted as absent.

This is very important: You may only initial your box for the instant date. You may not mark the sheet on behalf of another person, even if that person is in attendance, and you may not permit another person to mark the sheet on your behalf. You may not make any mark indicating your attendance for any other date other than the instant date, even if you were or will be in attendance on that date.

(c) **Self-Reporting of On-Time Arrivals on Log:** If you arrived to class on time, then completely fill-in the circle in the right-hand side of the box for the instant date. If you arrive late to class yet early enough to sign the attendance log when it comes around to you, then you must not indicate on-time attendance by filling in the circle.

(d) Initialing the log to indicate your attendance signifies that you will be in attendance during the entire duration of the class session for the day. If you need to depart class early and not return, then you must either make a note of that on the attendance log, or you must inform me by e-mail, either before class or as soon as

possible afterward. If you know ahead of time that you will be arriving late or departing early, I recommend that you let me know with an e-mail to eric.e.johnson@law.und.edu. Please use the subject line "Torts late arrival" or "Torts early departure."

10. EXAMINATION:

10-1. Communications and Anonymity:

(a) **Ex Parte Communications:** I will not discuss the exam on an *ex parte* basis. (See §7-2.)

(b) **Anonymity:** Each exam will be "blind graded," so that I will not know the identity of the student as I am grading her or his exam. You may not waive anonymity. Self-identification on the exam or otherwise culpably compromising anonymity will presumptively result in a deduction from your exam grade and a referral for disciplinary action.

10-2. The examination will be administered in two parts.

(a) **Part I: Multiple Choice Questions**

(1) Part I of the exam, worth approximately one-third of the total exam grade, will consist of multiple-choice questions administered on a closed-book basis. The questions will include, but may not be limited to, bar-exam-style hypotheticals testing the application of law to facts, as well as questions that test literacy of pure law (e.g., legal doctrines and statutes) and understanding of relevant concepts of legal theory and scholarship.

(2) Part I will be one hour in duration.

(3) All multiple-choice questions are written by me. None of the questions used on the exam will be questions that have been previously released.

(4) At least some of the multiple-choice questions will be new for this semester.

(5) Some of the multiple-choice questions may be questions that have been used by me in a previous semester, but which have remained unreleased.

(6) A word about the re-use of multiple-choice questions: Re-use of multiple-choice questions is standard in higher education, and the practice permits better exam quality and better calibration of the results. There is a downside, of course, which is the possibility that questions will be leaked to some students. I take appropriate steps to prevent the dissemination of unreleased questions. But bear in mind that the security of multiple-choice questions is not just a matter of faculty and staff responsibility; it is a matter of student responsibility as well. If you are aware that detailed information about or copies of unreleased questions are circulating, please let me know. Informing me will allow me to (1) refrain from using the compromised questions on the exam, and (2) release those questions to the public exam archive so that everyone can study from them.

(7) Be aware that the use of unreleased exam materials – whether photocopied, roughly transcribed, or otherwise – as part of your preparation for the exam constitutes academic dishonesty. Moreover (not to put too fine a point on it) reproducing or trafficking in unreleased questions is civilly actionable. If you find,

receive, or are offered unreleased questions, be responsible and act promptly to ameliorate academic unfairness by letting me know; I will pursue no action against you in this regard if you make timely notice to me, which may be made anonymously, specifically identifying the materials, preferably by submission of a copy. The notice is timely if (i) it is near the beginning of the semester, (ii) it is reasonably soon after you come into possession of the materials and there is enough time to prevent such questions from being used on the exam and to release them to the class for their meaningful use in studying, or (iii) it is immediately upon coming into possession of the materials.

(b) **Part II: Essay Response**

(1) Part II of the exam, worth approximately two-thirds of the total exam grade, will require written answers. This part of the exam will consist of one or more open-ended questions calling for written essay responses to one or more hypothetical fact patterns. In addition, the exam may include directed response or “short answer” questions.

(2) I will write Part II such that it should be answerable in less than two hours. Nonetheless, you will have three hours in which to answer Part II.

(3) You will have the choice of typing or handwriting your response to Part II. The typing of exams will be in accordance with the School’s policy for the use of computers to write exams.

(4) Part II will be administered on an open-book basis. You may bring with you any notes and books you like. No electronic or interactive resources (such as a tablet computer, smart phone, etc.) may be used or referenced. You may, of course, use a laptop to write your exam, but you may not reference files stored thereon during the examination session.

(5) Be assured that I will not use any questions for Part II that have been used on any prior exam.

10-3. My old exams in Torts should be quite useful to you in studying for and thinking about this semester’s exam. You will find them in my Exam Archive, which is publicly accessible online. You will find a link on ericejohnson.com (or use the direct URL: http://ericejohnson.com/exam_archive/). Later in the semester I will have more to say about the exam and how I recommend preparing.

11. NON-DISCRIMINATION, REPORTING SEXUAL VIOLENCE OR GENDER-BASED MISCONDUCT, AND STUDENTS IN DISTRESS: The following information is provided by the University of North Dakota’s Office of the Provost and Vice President for Academic Affairs, Dean of Students Office, and the Office of Equal Employment Opportunity/Affirmative Action.

Non-discrimination statement: As part of its commitment to providing an educational environment free from discrimination, UND complies with Title IX of the Education Amendments, which prohibits discrimination and harassment based upon sex in an institution’s education programs and activities. Title IX prohibits sexual harassment, including sexual violence, of students at UND-sponsored activities and programs whether occurring on-campus or off-campus. Title IX also protects third-parties, such as visiting student athletes, from sexual harassment or violence in UND’s

programs and activities and protects employees from sexual harassment and discrimination. Prohibited harassment includes acts of verbal, nonverbal or physical aggression, intimidation or hostility based on sex, even if those acts do not involve conduct of a sexual nature; sex-based harassment by those of the same sex; and discriminatory sex stereotyping. UND will take prompt action to investigate and resolve reports of sexual harassment or sexual violence in accordance with Title IX. UND's Title IX coordinator is Donna Smith, Director of Equal Employment Opportunity/Affirmative Action, 401 Twamley Hall, 264 Centennial Drive Stop 7097, Grand Forks, ND 58202-7097, 701-777-4171, donna.smith@und.edu. Retaliation against any person who initiates an inquiry or complaint or participates in the investigation of a complaint is prohibited. Such conduct will be further cause for disciplinary action.

Brief Information about reporting: Any student who has been impacted by sexual violence (sexual assault, domestic violence, dating violence, stalking) or gender-based misconduct is encouraged to report and seek appropriate resources on campus. Please contact the Title IX Coordinator (Donna Smith, donna.smith@und.edu or 701-777-4171) to discuss your options. To view the policy and additional resources, please visit: <http://und.edu/finance-operations/university-police/sexual-violence-programs.pdf>.

How to seek help when in distress: We know that while college is a wonderful time for most students, some students may struggle. You may experience students in distress on campus, in your classroom, in your home, and within residence halls. Distressed students may initially seek assistance from faculty, staff members, their parents, and other students. In addition to the support we can provide to each other, there are also professional support services available to students on campus through the Dean of Students and University Counseling Center. Both staffs are available to consult with you about getting help or providing a friend with the help that he or she may need. For more additional information, please go to <http://und.edu/und-cares/>.

12. REVISIONS TO THIS SYLLABUS: This syllabus may be amended or revised, and if it is, the most recent syllabus will be posted to the class website.

13. COURSE ORGANIZATION: The planned organization of the Torts II course is below. The structure is subject to minor adjustment. Please be aware that some of the topics below will be covered very briefly with short lecture presentations and without assigned reading. To make the most efficient use of classroom time, I anticipate that I may take certain topics found later in the outline – especially ones requiring less than a full class session to cover – and plug them in earlier in the semester when time permits.

PART I: Preliminaries

Module 1: Blackletter Overview

PART II: Dealing with Accidents Outside of Negligence

Module 2: Strict Liability

Module 3: Products Liability

Module 4: Safety and Health Regulation

Module 5: Worker's Compensation

Module 6: Insurance

PART III: Remedies

Module 7: General Issues in Remedies

Module 8: Compensatory Damages

Module 9: Punitive Damages

Module 10: Multiple Tortfeasors

Module 11: Enforcing Judgments

Special Module A: Writing Assignment: Adversarial Correspondence

PART IV: Special Issues With Parties and Actions

Module 12: Statutes of Limitation and Repose

Module 13: Immunities and the FTCA

Module 14: Constitutional Torts

Module 15: Implied Rights of Action

Module 16: Loss of Consortium, Wrongful Death, and Survival

Special Module B: Indian Law and Tribal Jurisdiction

Module 17: Wrongful Conception, Birth, and Life; Unborn Plaintiffs

Special Module C: Canadian Law and Courts

PART V: Oblique Torts

Module 18: Transactional Torts

Module 19: Defamation

Module 20: Invasion of Privacy

Module 21: Right of Publicity

Special Module D: Ethics/Professionalism Assignment: Bluff and Bluster

Module 22: Some Other Oblique Torts

PART VI: Theoretical and Policy Perspectives

Module 23: Basic Theoretical Concepts of Jurisprudence

Module 24: Theoretical Perspectives on Torts

Module 25: Tort Reform

14. FEEDBACK: If you have feedback for me – suggestions, ideas, commendations, or criticisms – please do not hesitate to tell me in person or by e-mail. If sending something to me anonymously would make you feel more comfortable, then I invite you to do just that.

I hope you enjoy the course!

– EEJ

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