

## Torts I

University of North Dakota School of Law  
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### SYLLABUS

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- 1. GOALS:** 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.
- 2. COVERAGE:** This course, Torts I, will cover in-depth only the tort of negligence, the intentional torts, and issues of liability arising in the health-care context. Torts II, in the Spring semester, will proceed at a faster pace, building on the foundations laid in the first semester, and will cover strict liability, products liability, economic torts, worker's compensation, defamation, remedies, theoretical perspectives on tort law, and more.
- 3. CLASS WEBSITE:** Various materials and links are on the class website. Go to [ericjohnson.com](http://www.ericjohnson.com) and find the link on the upper left. The direct URL is: [http://www.ericjohnson.com/courses/torts\\_1415/](http://www.ericjohnson.com/courses/torts_1415/)
- 4. MATERIALS:** There are required books for this course.
  - 4-1.** The following books, or the relevant portions thereof, will be available for free download from the class website:

*Torts, Volume One*  
by Eric E. Johnson  
(Prepublication beta version, forthcoming from eLangdell Press)

*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 may 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 as well. The more you learn about torts, the better. 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, 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, I am always interested in hearing about people's experience with them – whether good or bad.

**5. ASSIGNED 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, "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 render decisions on the law in a way that

is fair, unbiased, beneficial for society, and 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.** 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. Take note: You may not waive anonymity. Self-identification on the exam or otherwise acting to destroy anonymity during the exam or afterwards will, at a minimum, result in a lower exam grade, and may result in disciplinary action.

**6-3.** Class participation will also count in calculating your 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.

**6-4.** 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 other conduct that contributes positively to the educational process. An “extraordinary case” for an upward adjustment would entail a marked and surprising difference between one’s classroom performance and one’s exam performance, such as where a student whose classroom performance was among the very best receives an exam score in the bottom third of the class.

**6-5.** Reasons for a negative effect of class participation on the overall course grade may include exhibiting poor performance in the classroom, notably deficient attendance (including tardiness), being unprepared for class, disruptive behavior (including, but not limited to, a pattern of appearing distracted by a computer or phone), and other conduct that detracts from the educational process. An “extraordinary case” for a downward adjustment would include, at a minimum, a seriously deficient attendance record, a repeated pattern of unpreparedness evidencing a lack of honest effort, or markedly disruptive behavior in class.

**6-6.** Positive and negatives effects may, of course, offset. A student who evinces superlative performance in classroom discussion, for instance, might not receive an upward adjustment if that student has a mediocre record of attendance.

**6-7.** Please keep in mind that, despite the fact that class participation is graded, you should not worry unduly about the quality of your verbal 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.

**6-8.** 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. Students' quiz performance will figure into class-participation grading and will, therefore, be only a minor factor in any student's overall grade.

## **7. COMMUNICATIONS AND OFFICE HOURS:**

**7-1.** My e-mail address is eric.johnson@email.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 may 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:**

- (a) Do nothing that might disrupt class or distract your fellow students.
- (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, and Google Plus. 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. 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.

**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. Your classroom participation should be appropriate – not too little, not too much. Everybody knows there are students who raise their hand too often and take up too much of the class's time. All of us also know that there are people who sit passively and rarely, if ever, contribute to classroom discussion. Take care that you do 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. ABSENCES AND TARDINESS:**

**9-1.** I take the view 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.”<sup>1</sup> I expect that students may have occasional, isolated absences, and I do not view this as a problem. Notably deficient attendance, however, may have a negative effect on the class-participation grading component. (See §6.) The class-participation grading component is discretionary and subjective, and, in keeping with that, there is no numerical formula by which absences and late arrivals will be deemed notably or 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 late arrivals, the student’s attendance record in compares with the attendance records of others, courteousness and professionalism in dealing with attendance issues, and extenuating circumstances. Further, for a student with a seriously deficient attendance record, I reserve the right to request of the Dean that the student be administratively withdrawn.

**9-2.** Attendance will usually be taken by means of a grid sheet with boxes to initial for individual days, with attendance indicated by the student’s initialing the appropriate box. It will be your responsibility to make sure you have initialed in the box for the day. 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. Any failure to comply with these rules is a violation of the School of Law’s Honor Code and will be dealt with accordingly.

**9-3.** Please note that there is no need to tell me why you will be absent or late.

**9-4.** If you are concerned about your attendance record, please talk to me. Of course, none of the foregoing supersedes the School of Law’s or the University’s policies.

**10. WYPADKI:** The traditional method of exam preparation for students involves making an outline of the course. Because traditional legal pedagogy eschews using a textbook in lieu of a casebook, the outline fulfills the place of a textbook – providing a written explanation of the subject matter.

**10-1.** With the goal of saving time by reducing duplicative labor, I am providing the class with a chance to create an outline as a community, which we’ll call a “wypadki.”

**10-2.** The wypadki will be accessible through the UND Blackboard system. Software-wise, the wypadki consists of a wiki, similar to Wikipedia. Only members of the class will be able to contribute to the wypadki, and each addition, edit, and deletion will be tagged with the name of the contributing class member. I intend to allow students broad latitude in creating the wypadki, though I will step in and provide guidance and restrictions if necessary. On or after a certain announced date at the end of the semester, before the exam, I will lock the wypadki. I will then have a chance to review and alter it before leaving it in a final version. Please note that I reserve the right to make any changes, deletions, and additions I deem appropriate, in my sole discretion, before or after locking the wypadki. The final version will be made available for download sometime before the exam, and copies will be printed and distributed to all students during the exam for use as a reference in drafting an examination answer.

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

**10-3.** In making a contribution to the wypadki, you are agreeing that the wypadki and any of your contributions to it may be used, copied, or changed by your fellow students for this course and by others for any education- or learning-related endeavor approved by me or my designee. Although the Blackboard site is not accessible to persons not enrolled in the class, the resulting wypadki document will be made publicly available online.

**10-4.** Your contributions to the wypadki must respect intellectual property law. By making a contribution, you are certifying that your contribution does not include copyrighted material (regardless of licensing), unless I have specifically authorized it. Limit your contributions to your own originally authored material and material in the public domain, which includes court-issued opinions. Notwithstanding the foregoing, you may incorporate material from other wypadkis constructed by prior classes of mine as well as any handouts and slides from class, unless I specify otherwise.

**10-5.** In the past, some users have had technical problems with regard to the wypadki. Thus, you are well advised to attempt access early in the semester, so that you have time to work out any problems you may encounter. If you wait until too late in the semester to try logging on, you may find yourself in a situation where you cannot make any contributions. For technical problems, please contact the law school's or university's information technology staff.

## **11. EXAMINATION:**

**11-1.** I will not discuss the exam on an *ex parte* basis. (See § 7-2.)

**11-2.** 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 few multiple-choice questions may be patterned off – but not copied from – certain released multistate bar exam questions. You may find links to previously released bar exam questions at: <http://www.ncbex.org/about-ncbe-exams/mbe/preparing-for-the-mbe/>

(7) 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 matter not just 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.

(8) 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 disciplinary 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 two hours. Nonetheless, you will have three hours in which to answer Part II.

(3) For Part II, you will be allowed to bring with you, and to reference during the exam, a “reference sheet,” consisting of a single 8.5-inch-by-11-inch sheet of paper, upon which you may write or print any information you wish, including on both sides. If you have concerns about receiving a disability accommodation with regard to the reference sheet, please contact the Dean of Students office. In addition to the reference sheet, you will be given a paper printout of the course wykadki to reference during Part II of the exam. You may also bring in adhesive flags or tabs with no more writing on them than is reasonably necessary to allow their use as index tabs for the exam copy of the wykadki. No other informational or reference materials will be permitted, except as otherwise permitted by the Dean of Students office as an accommodation.

(4) 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.

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



**11-3.** My old exams in Torts should be quite useful to you in studying for and thinking about the 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/](http://ericejohnson.com/exam_archive/)). Later in the semester I will have more to say about the exam and how I recommend preparing.

**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 I course is below. The structure is subject to minor adjustment.

### **PART I: Preliminaries**

- Module 1:** Overview of the Law and the Place of Torts
- Module 2:** A Model of a Tort
- Module 3:** Overview of Negligence, Health Care Liability, and Intentional Torts
- Module 4:** Procedural Context for Torts
- Module 5:** Example of a Tort Lawsuit

### **PART II: The Prima Facie Case for Negligence**

#### *SUBPART A: The Duty Element*

- Module 6:** Foreseeability
- Module 7:** The Duty of Care and Criminal Acts
- Module 8:** Affirmative Duties

#### *SUBPART B: The Breach Element*

- Module 9:** Determining Breach, in General
- Module 10:** The Reasonable Person Standard of Care
- Module 11:** Accounting for Differences Among People
- Module 12:** Negligence Per Se
- Module 13:** The Role of Custom or Standard Practices
- Module 14:** The Negligence Calculus
- Module 15:** Res Ipsa Loquitor
- Module 16:** Special Rules for Land Owners and Occupiers

#### *SUBPART C: The Actual-Causation Element*

- Module 17:** Basics
- Module 18:** Proof and Preponderance
- Special Module A:** Ethics/Professionalism Assignment: Opposing Counsel
- Module 19:** Multiplicity

#### *SUBPART D: The Proximate-Causation Element*

- Module 20:** Basics
- Module 21:** Various Tests for Proximate Causation

#### *SUBPART E: The Damages Element*

- Module 22:** Existence of an Injury

### **PART III: Affirmative Defenses to Negligence**

**Module 23:** Plaintiff's Negligence (Contributory and Comparative)

**Module 24:** Assumption of Risk

**Special Module B:** Writing Assignment: Express Assumption of Risk

### **PART IV: Liability Relating to Medical Care**

**Module 25:** Basics

**Module 26:** Medical Malpractice / Professional Negligence

**Module 27:** Medical Battery

**Module 28:** Informed Consent

**Module 29:** ERISA Pre-Emption

### **PART V: Intentional Torts**

**Module 30:** Introduction to Intentional Torts

**Module 31:** Battery and Assault

**Module 32:** False Imprisonment

**Module 33:** Intentional Infliction of Emotional Distress (Outrage)

**Module 34:** Trespass to Chattels and Conversion

**Module 35:** Trespass to Land

**Module 36:** Defenses

**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