

## Torts I

University of North Dakota School of Law  
Fall 2017

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### SYLLABUS

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**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:

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 as 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 cases.

In making reference to “tort law,” the above learning objectives are meant to refer to the subject matter of the Torts I course.

**2. COVERAGE:** This semester, in Torts I, we will be covering negligence, issues of liability arising in the health-care context, and strict liability. In the Spring semester, in Torts II, we will proceed at a faster pace, building on the foundations laid in the first semester, and our subjects will include intentional torts, economic torts, defamation, remedies, 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](http://ericejohnson.com) and find the link

on the upper left. The direct URL is:  
[http://www.ericjohnson.com/courses/torts\\_1718/](http://www.ericjohnson.com/courses/torts_1718/)

#### **4. MATERIALS:**

##### **4-1. Required Titles, Downloadable:**

The following books are available for free download from the web or purchase in paper form:

*Torts: Cases and Context, Volume One*  
by Eric E. Johnson  
Published: 2015, eLangdell Press

*Torts: Cases and Context, Volume Two*  
by Eric E. Johnson  
Published: 2016, eLangdell Press

The class webpage links to the publisher page where you can download a copy in PDF or DOC format. Here is the direct URL to the publisher page:

<https://www.cali.org/books/torts-cases-and-contexts-volume-1>

<https://www.cali.org/books/torts-cases-and-contexts-volume-2>

Note that on the essay portion of the exam, you will be allowed to have with you any printed materials you like to reference, so long as you are not sharing them with anyone else. Therefore, consider that you will probably want to have your own printed copy at some point of the above books. Legally, because of the open-source copyright licenses of the above books, you can print them or have them printed for you any time you want. One option that might be convenient is to purchase printed, bound copies from Lulu.com. As of mid-August 2017, the cost of printed, bound copies of Volume 1 and Volume 2 are, respectively, \$8.41 and \$11.68.

##### **4-2. Required Titles, Other:**

You must have your own physical, printed copy of the following:

*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

##### **4-3. Technology Expectation:**

Please bring an internet-connected/web-browsing-capable laptop, tablet, phone, or other portable general computing device to class for use in interactive polling. It is my hope is that all students will be able to do so without incurring any additional expense; if you don't already have such device you can bring to class, please let me know so we can discuss how I can otherwise accommodate your polling participation in class. (Note

that a TurningPoint clicker device will not work for this course, as the class will not have a TurningPoint receiver device in operation.)

**4-4. Other:** Beyond the required books, other 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 or recommend 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.

**4-5. 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 tort law, 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 an unassigned 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 keen to know what is contributing to people's learning.

## 5. ASSIGNMENTS:

**5-1. Posting:** Reading assignments will be posted to the chart of assignments, which may be accessed from the class webpage.

**5-2. Out-of-Class Workload Expectation:** The vast majority of your law-school education is meant to take place outside of class. For this class, it is expected that you will do out-of-class work that averages at least 6.5 hours per week. This is the ABA's expectation,<sup>1</sup> UND Law's, and mine as your teacher. I have crafted the assignments of readings and problems with this minimum expectation in mind. Note that this out-of-class workload expectation is an average across the semester. A few classes might require less time than the average, other classes more. But when planning your semester in terms of employment, volunteer obligations, commuting, or other demands on your time, you should keep the minimum expectation in mind. And likewise, during the semester, you should keep the numerical expectation in mind when gauging whether you are devoting adequate time to preparing, studying, and reviewing.

**5-3. Approach:** 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

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<sup>1</sup> See Standard 310 at

[https://www.americanbar.org/content/dam/aba/publications/misc/legal\\_education/Standards/2016\\_2017\\_standards\\_chapter3.authcheckdam.pdf](https://www.americanbar.org/content/dam/aba/publications/misc/legal_education/Standards/2016_2017_standards_chapter3.authcheckdam.pdf). In terms of looking at the standard, note that the

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 potentially count in calculating your final grade.

(a) I may 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-. (For instance, a student who was one of the best ever in class but who did very poorly on the exam might get a two-steps-up adjustment.)

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. I make adjustments at the end of the semester with a view to the context of other students in the same class and my experience with other classes over time. Thus, assessing an upward or downward adjustment is largely a matter of determining whether a given student is a stand-out in a positive or negative sense.

(b) 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 a quiz or assignment (as applicable), and various conduct that contributes positively to the educational process.

(c) 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), conduct contrary to other admonitions communicated in the syllabus or otherwise, and any 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, *infra*.)

(d) Positive and negative effects may, of course, offset.

(e) Please keep in mind that, despite the fact that class participation may factor into grading, 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. So, be bold.

(f) Note that I plan to do at least one quiz, using fill-in-the-bubble scantron 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, poor performance on the quiz will not count as a negative.

**6-3. Academic Honesty:** Cheating or serious academic misconduct of any kind in this class will presumptively result in a failing grade (e.g., a letter grade of F) for the semester. To be clear, failing to follow final exam instructions in a way that might give a student an advantage, even if done without intent to gain such an advantage, constitutes, in my judgment, serious academic misconduct, and will presumptively result in a failing grade. It is your responsibility to treat exam instructions with diligence and care. In any instance of misconduct, I reserve the right in my discretion to award a lower grade other than a failing grade if I find there to be extraordinary mitigating circumstances. Despite my reservation of rights in this regard, however, do not expect leniency. Please note that the awarding of a lower grade or a failing grade for misconduct is not to the exclusion of other sanctions, and I intend, in virtually all instances, to refer cheating or serious academic misconduct to the Honor Board and/or the administration of the University and/or School of Law.

## 7. COMMUNICATIONS AND OFFICE HOURS:

**7-1.** My e-mail address is [eric.e.johnson@law.und.edu](mailto: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 office is 220D in the East Wing. I post open office hours on my website at [ericejohnson.com](http://ericejohnson.com). If office hours are not convenient, 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 to chat – even if you have no questions or nothing specific to discuss. That’s not a requirement, just a request. I would like to 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, text messaging, and IM’ing. (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, Facebook (including, but not limited to, Facebook groups), Twitter, 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 also 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. Classroom Participation:

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.

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.

### **8-3. Audio Recordings and Video:**

No one is permitted to make an audio or video recording or transmission (e.g., livestream) of class without my express, written permission.

Be aware that I plan to make an audio recording of each class meeting. As a general matter, these recordings are for my own use. (They help me in myriad ways to improve my teaching from week to week and year to year.) Accordingly, I do not release recordings to students.

Notwithstanding my general rule of not releasing recordings, this semester, as an experiment, I plan to try posting online a few audio recordings from class. To this end, my plan is to try to structure a few segments of class where I explain things in a lecture-only format – that is, without comments or questions, because I don't want to sweep up students' voices into a recording that is posted online. If such a segment turns out good, I'll post it so that you and future students can use it. At any rate, understand that such segments of class will be the exception, not the norm. As a general matter, I want to keep class reasonably loose and freewheeling.

## **9. ATTENDANCE:**

**9-1 Communications About Attendance:** There is generally no need for you to e-mail me if you are or anticipate being absent. Moreover, there is generally no need for you to explain to me why you have been absent. The only reason I imagine that I would need to know why you are absent is if your attendance is approaching a very deficient level (discussed below) and it becomes necessary to discuss extenuating circumstances.

**9-2. In General:** My view is that punctual, regular attendance in class is an essential component of the educational experience. Superior performance on an examination is not enough if you haven't shown up. Moreover, the General Rules of the School of Law's Academic Program say, "Regular and punctual class attendance is required."<sup>2</sup> ABA standards put an emphasis on attendance as well.

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; therefore, it seems prudent to err on the side of particularity.

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<sup>2</sup> See [http://law.und.edu/\\_files/docs/policy-manual/section-l-b/1-b-1-class-attendance-reformatted.pdf](http://law.und.edu/_files/docs/policy-manual/section-l-b/1-b-1-class-attendance-reformatted.pdf).

### 9-3. 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 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 each and may, in my discretion, be construed to constitute a whole absence. It is your responsibility to keep track of your own absences, including with regard to the presumptive administrative withdrawal or failing grade. Thus, do not ask me to calculate your attendance record so that you can weigh whether to miss an additional class. And do not expect to get independent notice that you are approaching the threshold for failing or being administratively withdrawn. This syllabus provision is your notice.

(e) **Special Extenuating Circumstances:** In consultation with the Dean or the Assistant Dean for Student Life, I may take account of special extenuating circumstances in deciding whether to drop a grade, award a failing grade, or request administrative withdrawal. Special extenuating circumstances can include weather emergencies, personal illness, illness of a close family member, bereavement, etc. Extracurricular activities, job interviews, court appearances, or the like can be considered in this vein as well.

Notwithstanding the foregoing, it is expected that under almost all circumstances students will be able to keep absences within the numerical thresholds identified above



- including absences caused by illness, floods, job interviews, etc. Giving students special dispensation on the issue of attendance will only be done if appropriate under the totality of the circumstances. As an example, suppose a student was absent from class six times because the student wanted to sleep in; then, at the end of the semester, the student was absent twice because of an out-of-town job interview. A failing grade or administrative withdrawal would be appropriate in such a case. If the student had been generally conscientious about attendance from the beginning, the student would not have created any issue with the two absences for the job interview.

Note that you should not feel compelled to discuss with me reasons for absences or extenuating circumstances if your attendance is not approaching a seriously deficient level.

(f) **Required Student Self-Disclosure for Profoundly Deficient**

**Attendance:** Upon a student's accumulation of a record of profoundly deficient attendance (that is, a total of eight absences, including accounting for partial absences under §9-3(a), *supra*), that student is required to disclose such accumulation immediately in writing to me. The disclosure must be made to me by e-mail (eric.e.johnson@law.und.edu) with a paper copy handed to me in person, or, if in-person delivery is not practicable, to the faculty administrative assistant with an explicit explanation of the nature and urgency of the communication. The subject line of the disclosure e-mail must be "Profoundly Deficient Attendance Disclosure." If the student hopes to avoid administrative withdrawal or the awarding of a failing grade for the course, then the disclosure must additionally explain the reasons for the student's absences and must provide a rationale for why the student should be allowed to continue in the course notwithstanding the accumulated absences. To this end, the student is referred to §9-3(e), *supra*, regarding special extenuating circumstances.

If a student has already submitted a disclosure under this section and then subsequently accumulates another absence (including a partial absence in the form of a late arrival or early departure), the student must submit a supplemental disclosure, like the original disclosure in form and substance.

For counting absences to determine the necessity of submitting a disclosure under this section, where there are any interpretive questions, a student is instructed to err on the side of inclusiveness. That is, a student who is unsure of whether a given instance will count as an absence or partial absence should err on the side of inclusion of that absence or partial absence in the quantification of deficient attendance. A student is advised to note such interpretive questions and the student's erring on the side of inclusiveness in the disclosure. Further to this regard, refer to §9-4(e), *infra*.

**9-4. Attendance Record:** To avoid being distracted in class by constantly noting things like late arrivals and early departures, I frequently require 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 an attendance log or late slip will presumptively be referred to administration and/or the Honor Board and will presumptively result in a lowered grade or a failing grade. If an inaccuracy is inadvertent, prompt self-disclosure is encouraged and will generally be considered ameliorative.

(a) **Means of Taking Attendance:** Attendance may be taken by means of a log (paper sheet or card) for students to fill out during class, by roll call, by reference to the seating chart, or by some other method.

(b) **Indicating Attendance:** If attendance is taken by means of a paper log, then when the attendance log comes around to you, fill it out as instructed, indicating your attendance 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 and ask to fill it in. If you omit to fill in 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 fill out the attendance log on behalf of yourself and for the instant date. You may not mark the log on behalf of another person, even if that person is in attendance, and you may not permit another person to mark the log 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 Partial Attendance:** If an attendance log is used, and if you will need to depart class early and not return, then you must make an appropriate notation of that on the attendance log. Alternatively, if you have a change of plans requiring you to leave early despite not having indicated that in advance on the attendance log, then you must inform me by e-mail as soon as reasonably possible afterward to correct the record.

(d) **Filling Out of Late Arrival Slips:** If you arrive late to class, you must legibly and completely fill out a late arrival slip before you sit down. If a blank late arrival slip is not available for you, then before you take your seat you must leave on the podium a letter-size sheet of paper providing your name, the name of the class, the full date, the day of the week, and the time of your arrival.

(e) **Unrecorded Absences:** At my discretion, I may announce that for a particular class meeting I will not record attendance and that absences from such a class meeting will not count for purposes of the attendance policy. Situations in which I might deem this appropriate are: (1) if it is necessary to hold a make-up class outside of the School of Law's designated make-up slot or (2) if there is the occurrence of a disaster that implicates issues of safety or public necessity. Such an unusual situation aside, the recordation of an absence is a distinct issue from the existence of an absence. And for the purposes of self-disclosures of profoundly deficient attendance under §9-3(f), *supra*, a student's self-disclosure obligation is not relieved by the fact that one or more absences (including partial absences) may be unrecorded. Toward the end of encouraging candor, however, I may in my discretion choose not to count one or more unrecorded-but-disclosed absences for purposes of grade penalties and administrative withdrawal. Thus, err on the side of disclosure.

## 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, *supra.*)

(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. Do not include your name in your exam response, and do not write your name on any exam materials, including the scantron answer sheet. Self-identification on the exam or otherwise 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 two-thirds of the total exam grade, will consist of multiple-choice questions. 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 of the exam will embrace subject matter across the entire course.

(3) Part I will be administered on a “closed-book” basis. That is, for Part I, you may not use or reference any materials at all, other than pencils, the answer sheet, and the examination booklet.

(4) Part I will be two hours and fifteen minutes (2¼ hours) in duration.

(5) Part I will consist of approximately 50 or so questions, and not more than 55 questions. A few of the questions in Part I may be “pre-test” questions, for which I will gather data, but which will not count in grading for this semester. Such pre-test questions will not be marked and you will not be able to distinguish them from the non-pre-test questions.

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

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

(8) 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. This is not trivial: The statistical data that results from a multiple-choice test administration is quite rich, suggesting which questions are good, which should be revised or thrown out, and which might serve as models for building new questions in the future. Using this data in a careful way helps me improve multiple-choice tests from year to year. That makes exams more fair – and fairness is my ultimate aim in designing examinations. There is, of course, a downside to reusing questions, which is the possibility that some questions may 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.

(9) 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.

(10) Also be aware that a crucial part of exam security is the numbering of exam booklets and the marking of booklets with students' exam identification numbers. Booklets are clearly marked with a space for you to write your exam identification number. This is particularly crucial for Part I. Do not omit to do this, and do not omit to turn the exam booklet back in. An omission in this regard, even an innocent one, will be catastrophic for your grade, likely resulting in a failing grade.

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

(1) Part II of the exam, worth approximately one-third of the total exam grade, will require a written response. This part of the exam will consist of one or more open-ended questions calling for a written essay response to a hypothetical fact pattern.

(2) Part II of the exam will be limited in subject-matter scope. That is, Part II will not be comprehensive in subject matter across the entire course.

(3) Part II will be administered on an open-book basis. You may bring with you any paper-based notes and books you like. But 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 in accordance with applicable policies, but you may not reference files stored thereon during the examination session.

(4) The total duration of Part II will be one hour and fifteen minutes (1¼ hours), divided up as follows: (1) a Reading-Outlining Period ("RO Period") of 30 minutes, and (2) an Exam-Writing Period ("EW Period") of 45 minutes.

(5) You may use the RO Period to read the exam booklet (that is, the facts and the question or questions), to take notes, to reference your outlines or books, and to outline your response on scratch paper. During the RO Period you may not begin recording the response upon which you will be graded. That is, if you are taking the exam on computer, you may not type any characters at all into the exam response file on your computer during the RO Period; and if you are taking the exam by handwriting,

you may not make any mark in a blue book (that is, an exam-response booklet, which has sometimes been labeled as a “green book”) during the RO Period.

(6) During the EW Period you are permitted to write your response. For the avoidance of doubt, it is acknowledged that during the EW Period you may also continue to do what is allowed during the RO Period (e.g., to refer back to the exam booklet, reference your notes and books, etc.), including notes you created during the RO Period.

(7) Being able to write in a concise, focused, and organized manner is extremely important for the practice of lawyering, and it is important for the bar exam as well. Thus, a factor in grading Part II will be concision, focus, and organization in your written response.

(7) 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.

(8) I do not re-use essay questions.

**10-3.** Toward the end of the semester, I may release an exam prospectus that provides additional information about the exam and how I recommend preparing.

**10-4.** My old exams should be quite useful to you in studying for and thinking about this semester’s exam. (Note, however, that this semester’s exam format differs from past exams. In recent past exams, the essay portion was comprehensive in coverage, included a much longer set of facts, and was administered with a much longer period for writing an answer.) You will find old exams 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/)).

**11. SAFE AND WELCOMING EDUCATIONAL ENVIRONMENT; ISSUES OF DISCRIMINATION, ACCOMMODATION, AND ACCESS:** As members of the School of Law community, each of us has the obligation to work toward an environment where all students are given the fullest possible opportunity to flourish. You should know that UND has a number of policies and programs that are part of its commitment to providing a safe and welcoming educational environment for all. These include provisions regarding discrimination, access, and accommodation.

**11-1.** The office of the Provost has encouraged the inclusion of the following in course syllabi with regard to UND’s commitment to provide a safe and welcoming educational environment for all:<sup>3</sup>

**Notice of Nondiscrimination**

It is the policy of the University of North Dakota that no person shall be discriminated against because of race, religion, age, color, gender, disability, national origin, creed, sexual orientation, gender identity, genetic information, marital status, veteran’s status, or political belief or affiliation and the equal opportunity and access to facilities shall be available to all. Concerns regarding

<sup>3</sup> See <https://und.edu/provost/course-resources.cfm>. Note that a portion of the Provost office’s language regarding disability access has been omitted, as it conflicts with School of Law policy.

Title IX, Title VI, Title VII, ADA, and Section 504 may be addressed to Donna Smith, Director of Equal Employment Opportunity/Affirmative Action and Title IX Coordinator, 401 Twamley Hall, 701.777.4171, und.affirmativeactionoffice@UND.edu or the Office for Civil Rights, U.S. Dept. of Education, 500 West Madison, Suite 1475, Chicago, IL 60611 or any other federal agency.

### **Reporting Sexual Violence**

If you or a friend has experienced sexual violence, such as sexual assault, domestic violence, dating violence or stalking, or sex-based harassment, please contact UND's Title IX Coordinator, Donna Smith, for assistance: 701.777.4171; donna.smith@UND.edu or go to [UND.edu/affirmative-action/title-ix](http://UND.edu/affirmative-action/title-ix).

### **Faculty Reporting Obligations Regarding Sexual Violence**

It is important for students to understand that faculty are required to share with UND's Title IX Coordinator any incidents of sexual violence they become aware of, even if those incidents occurred in the past or are disclosed as part of a class assignment. This does not mean an investigation will occur if the student does not want that, but it does allow UND to provide resources to help the student continue to be successful at UND. If you have been the victim of sexual violence, you can find information about confidential support services at [UND.edu/affirmative-action/title-ix](http://UND.edu/affirmative-action/title-ix).

**11-2. Additional Information Regarding Faculty Reporting Obligations:** All faculty are subject to the mandatory obligation to report all incidents of sex-based discrimination, harassment, violence, or other misconduct to the University's Title IX Coordinator or a Deputy Coordinator as soon as possible, including the names of the people involved (to the extent known), and the details of incident - including what happened when and where.

**11-3. Students with Special Needs and Disabilities:** If you have a disability and plan to request a disability accommodation, you should schedule an appointment to discuss the issue with the School of Law's Assistant Dean for Student Life, who may then refer you, as appropriate, to UND's Disability Services for Students office. Disability accommodations are generally kept confidential from instructors. 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.

**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**

1. Welcome
2. The Place of Torts and a Model Tort
3. Blackletter Overview

4. Procedural Context for Torts
5. Example of a Tort Lawsuit

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

### *SUBPART A: The Duty Element*

6. Duty of Care Basics and Foreseeability
7. The Duty of Care and Criminal Acts
8. Affirmative Duties

### *SUBPART B: The Breach Element*

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

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

17. Actual Causation Basics
18. Proof and Preponderance
19. Multiplicity Issues

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

20. Proximate Causation Basics
21. Various Tests for Proximate Causation

### *SUBPART E: The Damages Element*

22. Existence of an Injury

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

23. Plaintiff's Negligence (Contributory and Comparative)
24. Assumption of Risk
25. Waiver

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

26. Medical Malpractice / Professional Negligence
27. Medical Battery
28. Informed Consent
29. ERISA Preemption

## **PART V: Dealing with Accidents Outside of Negligence**

30. Strict Liability
31. Products Liability

**SPECIAL MODULE:**

Review Session

**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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