

Torts II

University of North Dakota School of Law
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SYLLABUS

GOALS: My primary goals for the Torts II course are for you to: (1) become literate and conversant in tort law and theory, and able to intelligently critique the same, and (2) be able to thoroughly analyze torts problems and apply tort law to facts. In addition, I have the subsidiary goals that, by the end of the semester, you will: (3) have sharpened oral skills in presenting, explaining, and arguing legal issues with confidence and crispness, in a manner befitting a lawyer, (4) have an appreciation of how torts works in practice.

COVERAGE: In Torts I, during the Fall semester, we conducted an overview of the entire doctrinal landscape of torts, and we covered negligence in depth. This course, Torts II, will proceed at a faster pace, building on the foundations laid in the first semester. We will cover intentional torts, strict liability, products liability, economic torts, defamation, privacy torts, practical perspectives of tort lawyers, and theoretical viewpoints on tort law.

CONTACT INFORMATION:

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Office: School of Law No. 303
Hours: 10:40 to 11:10 a.m., M, Tu, Th, & F,
or by appointment.

Please note that, unfortunately, my office hours may be frequently interrupted by university and law school committee meetings.

Also, feel free to knock on my door after 4 p.m. I often have time to talk in the late afternoons.

COMMUNICATIONS: 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 or even day-by-day basis. I may not respond at all to an e-mailed question which is clearly answered in this syllabus. Any e-mail communication to me may be shared with the class as a whole, with or without attribution, unless you request otherwise. 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.

CLASS WEBSITE: http://www.eejlaw.com/courses/torts_0708/
Various notes and other materials will be made available on the website.

REQUIRED MATERIALS AND SUPPLIES:

Books: The two required books for this course are:

Tort Law: Responsibilities and Redress by John C. Goldberg, Anthony J. Sebok, and Benjamin C. Zipursky; 2004; Aspen Publishers;
ISBN 0-7355-2620-6

Understanding Torts, Third Edition, by John L. Diamond, Lawrence C. Levine, M. Stuart Madden; 2007; Lexis Nexis; ISBN: 9781422411605

Compendium (internet): Additional materials that are part of the required reading will be available through the course website for free download, titled "Johnson's Torts Compendium for 2007-2008." Materials will be added to the Compendium throughout the course.

Referenced Works (proprietary online services): Certain copyrighted materials cannot be made available on the class website for free download, but are available to law students for free download through a proprietary service such as Westlaw or Lexis. To the extent any such materials are required reading, they will be listed under the heading "Johnson's Torts Referenced Works for 2007-2008."

Supplement (printed): Certain copyrighted materials cannot be made available to students for free download at all, and therefore can be made available for purchase in printed form. To the extent any such materials are required reading, they will be listed under the heading "Johnson's Torts Supplement for 2007-2008," printed in one or more volumes, as necessary, distribution to be announced.

STUDY AIDS AND UNASSIGNED, ADDITIONAL READING: Beyond the required materials, you are encouraged to use any other materials you find helpful or interesting, including, for instance, commercial outlines. The more you learn about the law, the better.

Commercial outlines, nutshells, and hornbooks can be 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 casebook and in class. 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. I would appreciate your letting me know your experience with any commercial study aid – whether good or bad. I would be happy to recommend good ones to future classes.

ASSIGNED READING: Reading assignments will be given out during the course of the semester. I will 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.

One way to approach the reading, suggested by Professor Scott Brewer of Harvard Law School, 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.

Moreover, put yourself in the position of the judge and force yourself to confront the challenge of trying to interpret the law in a way that is fair, unbiased, and beneficial for society. Using this kind of viewpoint, you are bound to get something extra out of every case you read.

Understanding Torts is a supplemental text. If you have time to do only some of the reading before class, but not all of it, prioritize the cases. The cases are key for classroom discussion. The *Understanding Torts* reading, if need be, can be done after class. That being said, doing the *Understanding Torts* reading before class will allow you to make the most out of class time, as you will have a good foundation for discussing the cases and considering the questions and hypotheticals we will tackle.

GRADING: Your grades will primarily be based on your exam performance. The exam is discussed below. Each exam will be “blind graded,” so that I will not know the identity of the student as I am grading his or her exam.

Class participation will also count in calculating your grade. I may do this in one of a couple of ways. I may add or subtract from students’ exam grades on a non-blind, discretionary basis, with the result forming your grade for the course. Alternatively, I may create a class-participation grading component on a non-blind discretionary basis, and then have that grade form a small portion, not exceeding 10 percent, of the total grade for the course. Regardless of the method I use for factoring in class participation, I anticipate that some students’ grades will be increased upward, some students’ grades will remain unchanged, and others’ may end up being adjusted downward.

CLASS PARTICIPATION: There are two important forms of classroom participation. The first form is your voluntary 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 class as a whole. Take care that you do not fall into the extreme of either taking up too much of the class’s time or sitting by passively and rarely contributing to classroom discussion.

The second form is non-voluntary, where you are called upon to think on the spot and form logical, persuasive, and informed responses. I will attempt to challenge you in class. My aim is not to embarrass or harass you, but to train you to be able to think, talk, and react like a lawyer. If there is one constant for lawyers – whether litigators, transactional attorneys, tax attorneys, or in-house counsel –

lawyers have to talk. And they have to speak in a manner that inspires confidence in their clients and respect in their adversaries. I have known many lawyers who are hobbled by shyness and a lack of confidence in oral communications. I want to provide you with a classroom experience that will help you present yourself with bright professionalism. In the pursuit of that goal, I may impose upon you to think under pressure. I hope you will make the most of it. Please do not take it personally. If being called upon in class is causing you undue stress or discomfort, please come talk to me outside of class. I want to help all of you become the best lawyers you can be.

UNPREPAREDNESS, TARDINESS AND ABSENCES: If you cannot participate fully for a particular class, for whatever reason (and you don't have to tell me why), please tell me before class, in person, so that I can avoid calling on you. Reasonable requests of this sort will not adversely affect your grade.

If you will be late or absent, please make sure that you e-mail me at ejohnson@law.und.edu before class with an e-mail carrying the subject line "Attendance in Torts." An occasional absence or late arrival will not adversely affect your grade – just e-mail me beforehand. If you are concerned about your attendance record, please talk to me. If you are late and you did not e-mail me, make sure you come up to me after class so that I can note your attendance. Otherwise, you may be marked absent. Of course, my policy regarding absences and tardiness is subordinate to the school's.

IN THE CLASSROOM: Do not eat in class. Do not chew gum audibly or with your mouth open. Do nothing that might disrupt class or distract your fellow students. If you use a laptop, do not play computer games, surf the internet, or undertake other activities unrelated to class. Stay engaged.

Come to class each time, on time, prepared. You will be periodically asked to answer questions based on the assignments or the ongoing classroom dialogue. Be prepared to interact.

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.

STUDENTS WITH SPECIAL NEEDS AND DISABILITIES: If you have emergency medical information to share with me, need special arrangements in case the building must be evacuated, or need disability accommodations in this course, please make an appointment with me. If you plan to request disability accommodations, please be aware that you are expected to register with Disability Support Services, 190 McCannel Hall, 777-3425 v/tty.

NO NORTH DAKOTA LEGAL RESEARCH PROJECT: This semester, as our focus turns broader and more theoretical, we will not be doing memos on North Dakota law topics as we did in the Fall semester in Torts I.

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. As I did during the Fall semester, I am again providing the class with a chance to create an outline as a community – the “wypadki.” The wypadki will be enabled with a wiki, the same web application that is behind Wikipedia, the online encyclopedia that is authored and edited by its readership. Only members of the class may 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. I will lock the wypadki on or after a date certain, to be announced. This lock date will be after the last day of class and before the exam. I will then have a chance to review and alter the wypadki before leaving it in a final version. Please note that I reserve the right to make any change, 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 Part II of the exam, discussed below, for use as a reference in drafting an examination answer. Your contributions to the wypadki must respect intellectual property law. Do not add copyrighted material (regardless of licensing). Limit your contributions to your own originally authored material and material in the public domain, which includes court-issued opinions. In addition, you may add into the wypadki the torts mindmaps that I have created for class and any other class materials that I author and post under the heading “Classroom Notes and Presentations,” unless otherwise noted.

EXAMINATION: My challenge as your professor is to write an exam that fairly tests your knowledge and mastery of all the material presented in the course. That is, the exam should reward those students who have done the reading with interest, participated actively and appropriately in class, and truly mastered all the subject matter presented. The exam should not reward those who, by chance, happened to study the “right” material, those who guessed correctly what material the professor found most interesting, or those who have a particular aptitude for the format of the test used. With those goals in mind, I am structuring the exam as follows.

Part I of the exam, worth no more than approximately one-third of the total exam grade, and perhaps considerably less, will consist of multiple-choice questions administered on a closed-book basis. The questions may include, but may not be limited to, bar-exam-style hypotheticals testing the application of law to facts, questions that test literacy of pure law (e.g., legal doctrines and statutes), and questions that test understanding of relevant concepts of legal theory and scholarship.

Part II of the exam, worth at least approximately two-thirds of the total exam grade, and perhaps a much greater fraction, will consist of: (1) open-ended questions calling for written essay responses to one or more hypothetical fact patterns and, likely, (2) directed response or “short answer” questions. The exam may contain one or more “theme” or “theoretical” style question, in which you will critique the law. Part II of the exam will be administered on a limited “open book” basis, in that

students will have access to the class community's wypadki, discussed above. No other materials, however, may be referenced during the exam.

All testing and grading methods have their own unique inequities. By using a multi-format exam, I hope to eliminate the distorting effects of differences in test-taking skills and arrive at the most accurate grade possible for each student, based on the individual's mastery of the subject matter and ability to use that knowledge.

Be assured that I will not use any issue-spotter hypotheticals or essay questions that have been used on any other prior exam, nor any multiple-choice questions or other questions that have been previously published or otherwise made available anywhere. Also, to avoid "teaching to" particular questions, I will likely not write questions until after the material has been presented. In fact, I probably will not begin writing Part II of the exam until late in the course, or possibly after the last class meeting.

I may provide a more specific description of the examination at a later time.

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.

OUTLINE OF COVERAGE:

N.B.: The following is subject to change.

I. IMMUNITIES AND THE FIREFIGHTER'S RULE

II. FEDERAL TORT CLAIMS ACT

III. SPECIAL ISSUES IN RIGHTS OF ACTION

- 1) Implied rights of action
- 2) *Bivens* actions
- 3) Section 1983 actions

III. WRONGFUL DEATH, SURVIVAL ACTIONS, LOSS OF CONSORTIUM

IV. INTENTIONAL TORTS

- 1) Assault
- 2) Battery
- 3) False imprisonment
- 4) Outrage
 - a) NIED*

5) Trespass to land

6) Trespass to chattels

7) Conversion

V. NUISANCE

VI. STRICT LIABILITY

- 1) Animals
- 2) Ultrahazardous activities

VII. PRODUCTS LIABILITY

* Not an intentional tort, though covered here.

VIII. OBLIQUE TORTS

- 1) Fraud
- 2) Intentional interference with contract
- 3) Intentional interference with prospective economic relations
- 4) Defamation
- 5) Invasion of privacy
 - a) Intrusion
 - b) False light
 - c) Disclosure
 - d) Publicity
- 6) Seduction
- 7) Misuse of legal process
 - a) Abuse of process
 - b) Malicious prosecution
- 8) Legal and accounting malpractice
- 9) Whistleblower statutes

IX. PRACTICAL PERSPECTIVES

- 1) View of a personal-injury lawyer
- 2) View of a public-interest lawyer
- 3) View of corporate-defense lawyer
- 4) Settlement dynamics

X. THEORETICAL PERSPECTIVES

- 1) Basic theoretical concepts of jurisprudence
- 2) Law-and-economics analysis
- 3) Sociological perspectives
- 4) Feminist critique
- 5) Critical race theory

XI. ALTERNATIVES TO TORTS, REAL AND HYPOTHETICAL

- 1) Workers' comp
- 2) Safety regulation
- 3) No-fault insurance regimes