

Torts I

University of North Dakota School of Law
Fall 2007

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SYLLABUS

GOALS: My primary goals for the Torts I and Torts II courses are for you to: (1) become literate and conversant in tort law and theory 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 academic year, you will: (3) have sharpened oral skills in presenting points, explaining, and arguing legal issues with confidence and crispness, in a manner befitting a lawyer, (4) understand how the courts of one state, North Dakota, have developed a particular conception of tort law, and (5) have applied legal research and writing skills to torts.

COVERAGE: This course, Torts I, will include an overview of the entire doctrinal landscape of torts, but will cover in-depth primarily only the tort of negligence. Torts II, in the Spring semester, will proceed at a faster pace, building on the foundations laid in the first semester, and will cover intentional torts, strict liability, products liability, economic torts, worker's compensation, § 1983 actions, federal preemption of actions, mass torts, constitutional limitations on damages, and theoretical perspectives on tort law.

CONTACT INFORMATION:

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Hours: immediately following class
or by appointment

Substantive questions will not be answered via e-mail. Any e-mail communications to me may be shared with the class as a whole, with or without attribution, unless you request otherwise. Questions regarding exams will only be answered in open class.

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:

Casebook: The one required book for this course is:

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

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 aids – 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.

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 will add or subtract from students’ exam grades on a non-blind, discretionary basis, with the result forming your grade for the course. I anticipate that some students’ grades will be increased upward, some students’ grades will remain unchanged, and others will be adjusted downward. Reasons for downward adjustment include exhibiting poor performance in the classroom, excessive absence, tardiness, and being unprepared for class. Quizzes may figure into class-participation grading as well.

CLASS 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. Bear in mind that there are approximately 83 persons in this class – your voluntary participation in class should be calibrated accordingly.

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.

NORTH DAKOTA LEGAL RESEARCH PROJECT: As a common law subject, torts is an evolving creation of state courts, with its heritage going back to the courts of England before the American Revolution. Although much of tort law is consistent across the 50 states, there are many forks in the road, where doctrine has developed differently in different jurisdictions. Rules followed by the majority of jurisdictions are often called “majority rules,” with rules followed by other courts called “minority rules.” Throughout the course, when we come to such divergences, we will study the majority and minority rules, but we will also learn which path has been followed by North Dakota courts through a series of very short research assignments, each memorialized by a very short memorandum, to be done by members of the class. Each short research project will be assigned to a group, and the group, as a whole, will have responsibility for the project. By the end of the course, we will have learned how the opinions of the North Dakota courts fit into the scheme of American tort jurisprudence, and the class will have created a valuable exposition of North Dakota tort law. Performance in this regard will be figured into class-participation grading.

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. I am providing the class with a chance to create an outline as a community – which we’ll call a “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 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 December 2, 2007, 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 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 on December 12, 2007, 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 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 one-third of the total exam grade, will be one hour in duration and 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.

Part II of the exam, worth two-thirds of the total exam grade, will be two hours and thirty minutes in duration and will consist of: (1) open-ended questions calling for written essay responses to one or more hypothetical fact patterns and (2) directed response or “short answer” questions. This portion of the exam will be administered on a limited “open book” basis, in that students will have access to the class community’s wikioutline, discussed above. No other materials 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 questions that have been used on any other prior exam or 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. INTRODUCTION: VOSBURG V. PUTNEY**
- II. OVERVIEW OF THE LAW**
- III. OVERVIEW OF TORTS LAW**
- IV. PROCEDURAL CONTEXT FOR TORTS**
- V. EXAMPLE OF A TORT LAWSUIT: WALTER V. WAL-MART STORES, INC.**
- VI. NEGLIGENCE**
 - 1) The duty element
 - a) General duty of care
 - b) Qualified duties of care
 - 2) The breach element
 - a) Defining the reasonable person
 - b) Industry and professional custom
 - c) Cost-benefit analysis
 - d) Res ipsa loquitor
 - 3) The actual causation element
 - a) Proof and the preponderance standard
 - b) Multiple necessary causes
 - c) Multiple sufficient causes
 - d) *Summers v. Tice* doctrine
 - 4) The proximate cause element
 - a) *Palsgraf v. Long Island Railroad Co.*
 - b) Foreseeability
 - c) Superceding causes
 - 5) Negligence per se
 - 6) Wrongful death actions
 - 7) Wrongful life actions and wrongful birth actions
 - 8) The defenses of contributory and comparative negligence
 - 9) The defense of assumption of the risk
 - 10) The defense of the statute of limitations
 - 11) The defense of the statute of repose
 - 12) Immunities and exemptions from liability
 - 13) Damages
 - a) Compensatory damages
 - b) Nominal damages
 - c) Punitive damages
 - 14) Vicarious liability
 - 15) Joint liability and contribution
 - 16) Indemnification and liability insurance
 - 17) Enforcability of judgments