

Torts II

University of North Dakota School of Law
Spring 2009

Eric E. Johnson
Assistant Professor of Law

SYLLABUS

GOALS: My primary goals for the 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, explaining, and arguing legal issues with confidence and crispness, in a manner befitting a lawyer, and (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 some additional topics in negligence – primarily the defenses – and then we will cover remedies, intentional torts, strict liability, products liability, economic torts, defamation, worker’s compensation, § 1983 actions, constitutional limitations on damages, and theoretical perspectives on tort law, among others.

CLASS WEBSITE: Various materials and links can be found on the class website at: http://www.eejlaw.com/courses/torts_0809/. It’s easy to find from a link on the upper-left side of the eejlaw.com homepage.

MATERIALS: The three required textbooks for this course are:

Prosser, Wade, Schwartz, Kelly and Partlett's Cases and Materials on Torts, 11th Ed. (University Casebook Series) by Prosser, Wade, Schwartz, Kelly, and Partlett. Published: 2005, Foundation Press.

ISBN:1587788748

ISBN-13:9781587788741

Understanding Torts, Third Edition by John L. Diamond, Lawrence C. Levine, M. Stuart Madden. Published: 2007, Matthew Bender

ISBN-13: 9781422411605

Four Trials by John Edwards, with John Auchard. Paperback edition. Published: 2004, Simon & Schuster

ISBN-10: 0743272048

ISBN-13: 978-0743272049

Compendium and other reading: Additional materials that are part of the required reading will be made available for free download from the course website in a section titled "Johnson's Torts Compendium for 2008-2009." Certain other required materials may be handed out in class. In addition, materials may be placed on reserve in the library. Also, you may be required to retrieve an occasional document from a proprietary online legal research service, such as Westlaw or LexisNexis. Links to and information about obtaining certain other assigned materials may be found under the website section called "Johnson's Torts Referenced Works for 2008-2009."

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 torts, the better. Commercial outlines 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 reading 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. If you do use study aids, I would appreciate your letting me know your experience with them - whether good or bad.

ASSIGNED READING: In each class I will announce the reading assignment for the next class meeting. Do not read any material in the *Prosser* casebook except the cases themselves, unless I note otherwise.

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. "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 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, 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.

GRADING: Your grade 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 approximately 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.

Reasons for a negative effect of class participation on the overall course grade will include exhibiting poor performance in the classroom, excessive absence, tardiness, and being unprepared for class.

Please keep in mind that, despite the fact that class participation is graded, you should not worry unduly about the quality of your responses. As long as you do the reading and give it an honest effort when speaking in class, you will not be marked down. 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 and 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.

I plan to assign certain exercises as homework. In addition, depending on how the class evolves, I may give quizzes in class, and I may ask students do some minor oral presentations. None of these elements, to the extent they are included, will be unduly burdensome, but I am reserving the right so that we can vary the classroom experience. To the extent I include such elements in the course, students' performance will figure into class-participation grading and, therefore, will be a very minor part of any student's overall grade.

COMMUNICATIONS: My e-mail address is ejohnson@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 or even day-by-day basis. I may not respond at all to certain e-mailed questions, including those which ask for information which 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.

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.

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.

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.

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.

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 will not adversely affect your grade.

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.

ABSENCES AND TARDINESS: I view attendance in class as an essential component of the educational experience, and therefore, superior performance on an examination cannot make up for insufficient attendance. Deficient attendance may result in a lower class-participation grade. Further, I reserve the right to not award a passing grade for a student with a seriously deficient record of timely attendance.

That being said, an occasional absence or late arrival will not adversely affect your grade at all. But I do appreciate it if you e-mail me beforehand. If you will be late or absent, please let me know by e-mailing me before class, and please make sure you use this special e-mail address: attendance@eejlaw.com. Please make sure the subject line of your e-mail is “Torts.” Note that I may not read any such attendance e-mails until after all classes conclude. My practice is to review attendance e-mails at the end of the semester when reviewing attendance records and calculating class-participation grades. Please note that there is no need to tell me why you will be absent or late.

Also, if you are late, make sure you come up to me after class so that I can note your attendance. Otherwise, you may be marked absent.

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

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, 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 – 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 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, discussed below, for use as a reference in drafting an examination answer.

Your contributions to the wykadki 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 incorporate into the class wykadki material from wykadkis constructed by prior classes of mine, and the torts mindmaps that I created for the class along with any other class materials that I author and post on the class website under the heading "Classroom Notes and Presentations," unless otherwise noted.

In making a contribution to the wykadki, you are certifying that the material you add is original and does not include the copyrighted content of others. Also, by contributing, you are agreeing that the wykadki and/or any of your contributions to it may be used, copied, and/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.

Registration: Contributing to the wykadki is voluntary, and not a class requirement. If you do choose to contribute to the wykadki, you must register. Note, though, that if you have already registered for the wykadki in Fall 2008, there is no need to register again. To get to the registration page, click on the link in the far upper-right corner of your browser window. When registering, please put your name in the following format:

Lastname.Firstname

Use your real name. Pseudonyms will not be accepted.

Registrations need to be approved before you can edit the wykadki. If you register during the accelerated approval period, which will be announced in class, please expect a delay of a day or so between registering and receiving approval. If you register afterward, the delay might be very long, and you might need to remind the professor that you have a pending registration in order to get it approved, so please register during the accelerated approval period. The very last date you can register is March 30. Attempted registrations will not be approved after March.

If the wiki software demands that you provide a biography, please ignore this. You should be able to register your user ID without filling out such a field.

In the past, some users have had technical problems with getting registered and logging on. Because of this, you are well advised to attempt to register early in the semester so that you have time to work out any problems you 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 Mark Conway of the law school's information technology staff.

EXAMINATION: I will give a final exam requiring written answers. You will have the choice of typing or handwriting your response.

You will be allowed to bring with you, into the exam, 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 of the

piece of paper. 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 wydadki to reference during the exam.

Other than the wydadki and the reference sheet, no other informational or reference materials will be permitted, except as otherwise permitted by the Dean of Students office as an accommodation.

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. You may also be asked to answer a "theme" or "theoretical" style question, in which you will critique the law. In the case of a theoretical-style question, I will provide a context for writing your answer and perhaps a stance for you to take, such as, "[A certain client] has asked you to write a letter to the editor of the *New York Times* arguing for [a certain change in the law]."

Be assured that I will not use any essay questions that have been used on any other prior exam. As noted above, I will not discuss the exam on an *ex parte* basis; any questions about the exam must be asked in open class.

My old exams in Torts should be quite useful to you in studying for and thinking about the exam. My old exams can be found in the exam archive at eejlaw.com.

The material covered by the exam will potentially comprise all the material covered in the Torts II course. That is, if we talked about it in class or if it was in the assigned reading or exercises, it is within the scope of the exam. This should not be a source of undue stress. Be assured that the emphases of the exam will mirror those of class. In other words, the exam's topic coverage will not be wildly disproportionate to that of the course. Put still another way, I want you to study everything, but if you fail to master a minor point, the results will not be catastrophic.

SUBJECT MATTER TO BE COVERED: Topics I plan to cover are listed below. This outline may change. Please be aware that some of the topics below will be covered very briefly with short lecture presentations and without assigned reading. To make the most efficient use of classroom time, I plan on taking certain topics found later in the outline - especially ones requiring less than a full class session to cover - and plugging them in where time permits earlier in the semester.

I. DEFENSES

- 1) Defenses to negligence based on the plaintiff's risk taking
 - a) Contributory and comparative negligence
 - b) Assumption of the risk
- 2) Defenses based on lapse of time
 - a) Statutes of limitations
 - b) Statutes of repose

II. PARTIES

- 1) The firefighter's rule
- 2) Immunities

- 3) Joint tortfeasors
- 4) Allocation, contribution, and indemnification

III. REMEDIES

- 1) Damages
 - a) Compensatory damages for property damage
 - b) Compensatory damages for personal injury
 - c) Mitigation
 - d) Nominal damages
 - e) Punitive damages
 - f) The collateral-source rule
- 2) Restitution
- 3) Injunction
- 4) Enforcing judgments

IV. FEDERAL TORT CLAIMS ACT

V. SPECIAL ISSUES IN RIGHTS OF ACTION

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

VI. SPECIAL PROBLEMS OF STANDING

- 1) Wrongful death
- 2) Survival actions
- 3) Loss of consortium

VII. INTENTIONAL TORTS

- 1) Assault
- 2) Battery
- 3) False imprisonment
- 4) Outrage
- 5) Trespass to land
- 6) Trespass to chattels
- 7) Conversion

VIII. NUISANCE

IX. STRICT LIABILITY

- 1) Animals
- 2) Ultrahazardous activities

X. PRODUCTS LIABILITY

XI. OBLIQUE TORTS

- 1) Negligent infliction of emotional distress
- 2) Negligently inflicted economic loss
- 3) Fraud
- 4) Intentional interference with contract

- 5) Intentional interference with prospective economic relations
- 6) Tortious breach of the covenant of good faith and fair dealing
- 7) Misuse of legal process
 - a) Malicious prosecution
 - b) Malicious institution of civil proceedings
 - c) Abuse of process
- 8) Defamation
- 9) Invasion of privacy
 - a) Intrusion
 - b) False light
 - c) Disclosure
 - d) Right of publicity
- 10) Seduction
- 11) Whistleblower statutes

XII. THEORETICAL PERSPECTIVES

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

XIII. ALTERNATIVES TO TORTS

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

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.

Good luck. I hope you enjoy the course.

- EEJ