

Torts I

University of North Dakota School of Law
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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 goal that, by the end of the academic year, you will: (3) understand how tort law works in practice, and (4) have sharpened oral skills in presenting points, explaining, and arguing legal issues with confidence and crispness, in a manner befitting a lawyer.

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, defamation, constitutional limitations on damages, and theoretical perspectives on tort law.

CLASS WEBSITE: Various materials and links are on the class website at: http://www.eejlaw.com/courses/torts_0910/

MATERIALS: The three required books and one required supply item for this course are:

Cases and Materials on Torts, Second Edition

by John L. Diamond

Published: 2008, Thomson West

ISBN-13: 978-0314154101

The Forms and Functions of Tort Law, 3d (Concepts and Insights)

by Kenneth S. Abraham

Published: 2007, Foundation Press

ISBN-10: 1599412004

ISBN-13: 978-1599412009

Four Trials by John Edwards, with John Auchard.

Published: 2004, Simon & Schuster

ISBN-10: 0743272048

ISBN-13: 978-0743272049

TurningPoint ResponseCard RF
Model name: ResponseCard RF
Manufacturer: Response Innovations
Distributor: Turning Technologies
Item model number: RCRF-01

In lieu of the TurningPoint ResponseCard RF, you may, at your option, purchase the following:

TurningPoint ResponseCard XR
Model name: ResponseCard XR
Manufacturer: Response Innovations
Distributor: Turning Technologies
Item model number: RCXR-01

Compendium and Referenced Works (internet): Additional materials that are part of the required reading will be available via links from the course website in a section titled "Johnson's Torts Referenced Works for 2009-2010," or for free download from the course website in a section titled "Johnson's Torts Compendium for 2009-2010." Materials may be added to these collections throughout the course.

CALI: You will need to be able to log on and do lessons on the website of The Center for Computer-Assisted Legal Instruction at <http://www.cali.org>.

Other: 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.

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 cases and in class. On the other hand, reading a commercial outline *as exam preparation* for this class could be a waste of your time and mental energy. But it's up to you, of course, to judge for yourself. If you do use study aids, I 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. You will notice that the Diamond casebook has many questions, notes, suggestions for further study, and other matter besides the cases. In general, we will be using the Diamond book only for cases. When I assign a span of pages for the Diamond book, unless I note otherwise, I am asking you only to read the cases within that span.

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 at Harvard, is to be aware of “the literary drama of the law,” that is, “be alert to the narratives of the hopes, aims, fears, aspirations and frustrations of the litigants ...” Behind every case there is a real story. The more you allow yourself to be absorbed into that story, the more you will get out of the case.

Also, you should attempt to put yourself in the position of the judge. Force yourself to confront the challenge of trying to 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.

CLICKERS: You will be expected to bring to each class your radio-frequency audience-response peripheral, the ResponseCard or “clicker.” The clicker will be used for taking attendance and for in-class participation.

You must register your clicker using an online software interface called Blackboard. It is only by registering your clicker that you can be counted as attending class and participating via your clicker. To register your clicker, follow these steps: (1) Logon to Blackboard. (2) Follow the link to course (LAW 110 Torts I). (3) Click on “Course Tools,” which is in the tool box on the left-hand side of the page. (4) Click on “TurningPoint Registration Tool,” which should be the eleventh icon on the page. (5) Input your response device ID, found on the clicker. (6) Press “submit.”

Technical support questions regarding the clickers, including registration of them, should be directed to the school’s information-technology staff.

Please be take special note: Only the student registered to a clicker may use that clicker. Bringing a clicker to class belonging to an absent student and using it for that student would constitute academic dishonesty. As such, it is punishable by the School of Law and University administrations, and reportable to state bar committees making moral-character determinations of fitness to practice law.

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 component 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 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 this 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. Once you are a full-fledged lawyer, having a confident voice under pressure will be indispensable. Now is the time to find that voice. Be bold.

I plan to assign certain exercises as homework. In addition, depending on how the class evolves, I may give quizzes in class, possibly using the clickers, and I may ask students do some minor oral presentations. 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. Thus, you should not become overly concerned about them. Note that I plan to do at least one quiz, using fill-in-the-bubble sheets, near the beginning of the semester after we have done the blackletter review.

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.

My office is No. 303. Open office hours are posted by my door and on eejlaw.com. If you would like to speak with me and you cannot come by office hours, I am very happy to arrange for another time to talk with you. Please make an appointment by sending me an e-mail with some suggested times.

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 will likely 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 counted as 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 law 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.

With the goal of saving time by reducing duplicative labor, I am providing the class with a chance to create an outline as a community - which we'll call a "wypadki." 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.

Contributions to the wypadki are voluntary. To the extent you do contribute, please note that 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 create for class and any other class materials that I author and post under the

heading "Classroom Notes and Presentations," unless otherwise noted. In making a contribution to the wypedki, 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 wypedki 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.

To contribute to the wypedki, you must register. In the past, some users have had technical problems with getting registered and logging on. Make sure you work out any problems early in the semester. 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. 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 Torts Wypedki to reference during the exam.

Other than the wypedki 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. As a minor part of the exam, you may 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 fictional 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. You will find them posted in the "Exam Archive" at eejlaw.com. In particular, I highly recommend that you try your hand at the "Ye Olde Sawmill" issue spotter from the Torts I 2007 Midterm, and then review and evaluate (as if you were the grader) the posted student responses. After that, read my evaluation memo for my detailed critique of the responses and my briefing on how to write a law-school exam.

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.

COURSE ORGANIZATION: The planned organization of the Torts I course is below. The structure is subject to minor adjustment.

PART I: Preliminaries

- Module 1:** Models of Tort Law and the Context of Torts
- Module 2:** Overview of Tort Law
- Module 3:** Procedural Context for Torts
- Module 4:** Example of a Tort Lawsuit: *Walter v. Wal-Mart*

PART II: The Prima Facie Case for Negligence

SUBPART A: The Duty Element

- Module 5:** Foreseeability
- Module 6:** Special Plaintiff Categories
- Module 7:** Failure to Act

SUBPART B: The Breach Element

- Module 8:** The Reasonable-Person Standard of Care
- Module 9:** Custom and the Negligence Calculus
- Module 10:** Negligence Per Se
- Module 11:** Res Ipsa Loquitor

SUBPART C: The Actual-Causation Element

- Module 12:** But-For Analysis
- Module 13:** Multiple Possible Causal Relationships

SUBPART D: The Proximate-Causation Element

- Module 14:** The Place of Proximate Cause: *Palsgraf v. Long Island Railroad*
- Module 15:** Various Tests for Proximate Causation

SUBPART E: The Damages Element

- Module 16:** Compensatory Damages
- Module 17:** Punitive Damages

PART III: Defenses to Negligence

- Module 18:** Contributory and Comparative Negligence
- Module 19:** Assumption of Risk
- Module 20:** Statutes of Limitations and Repose
- Module 21:** Immunities and Exemptions

PART IV: Liability Relating to Medical Care

- Module 22:** Medical Malpractice / Professional Negligence
- Module 23:** Informed Consent
- Module 24:** Medical Battery
- Module 25:** Tort Reform and Medical Torts
- Module 26:** Liability for Health Insurers