

WIDENER UNIVERSITY SCHOOL OF LAW

Torts (518B)

Fall 2008

Professor Thaddeus Pope

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Time and Place: MTW 2:15 – 3:30 p.m. in L-119

Midterm Exam: Monday, October 20, 2008 from 2:15 to 3:30 p.m.

Final Exam: Monday, December 15, 2008 from 9:30 a.m. to 1:30 p.m.

I. Course Description

We will analyze appellate opinions, statutory provisions, and other legal materials to: (i) extract tort law principles and rules, (ii) draw analogies and distinctions, and (iii) develop legal arguments. We will generally cover intentional torts and negligence.

II. Course Objectives

- A. You will develop your ability to present relevant legal arguments in a logical and coherent fashion. Using the law of torts, you will learn the process of legal analysis. The emphasis is on problem solving, *not* on memorizing and regurgitating facts, case names, case holdings or other similar information.
- B. You will learn the basic legal principles and issues commonly encountered in the tort law, so that you can begin your preparation for the bar exam and the practice of tort law. Specifically, you will learn to identify and analyze legal issues relating to tort law in an unfamiliar set of facts.

III. Required Materials

- A. VICTOR E. SCHWARTZ, KATHRYN KELLY & DAVID F. PARTLETT, PROSSER, WADE AND SCHWARTZ'S TORTS: CASES AND MATERIALS (11th ed. Foundation 2005) (ISBN-13: 978-1587788741) ["CB"].

- B. Torts is a “hot” and rapidly developing area. Accordingly, from time to time, I will post additional current materials to the course TWEN site. I will clarify both in class and on TWEN whether these are required or suggested materials.

IV. Class Schedule

- A. The class will meet on Mondays, Tuesdays, and Wednesdays from 2:15 to 3:30 p.m. in Room L-119.
- B. The class will *not* meet on the following dates: (i) Monday, September 1st due to Labor Day, (ii) Monday, September 8th due to a conference conflict, (iii) Tuesday, September 16th due to Professionalism Day, and (iv) Tuesday, October 21st due to In-Service Day. The last class will meet on Tuesday, December 2nd. To clarify the University Academic Calendar, we will meet on *both* November 11th and 12th.
- C. Depending on class interest, I am happy to schedule a “review” class during the weeks before the final exam. Please email your questions to me 24 hours before such session to better enable me to answer them.

V. Attendance, Preparation, and Participation

- A. Attendance: Under American Bar Association rules, 80% attendance is required to allow you to write the final exam. Attendance will be taken by passing class lists for signature at the start of each class session.
- B. Preparation: I employ little lecture but lots of case method questions and problems. Consequently, students must come to class prepared to discuss the material assigned. All assigned cases must be read *and briefed*. Analyze each case using the following headings: (i) essential substantive facts, (ii) procedural posture, (iii) issue(s), (iv) legal principle(s), (v) reasoning and (vi) holding. All note problems must be considered before the applicable class session. You do not need to know the correct answer (if there is one), but know the reading material and make a reasonable effort to think about the issues raised.
- C. Warning about Preparation: Brief the cases *yourself*. Do not make use of commercially prepared outlines before writing your own brief. As Professor DeWolf (at Gonzaga Law) explains, “they are like narcotics. Initially they make you feel good (by taking away your anxiety), but precisely for that reason they have a corrosive effect upon your learning. It is as though you were taking violin lessons, and instead of playing the scales you were assigned by your teacher, you bought a tape of Itzak Perlman playing those scales. . . . [I]t is by listening carefully to your work that you will gradually improve.”

- D. Class Participation: *All* students are expected to participate in class discussions. If illness or emergency prevents you from being fully prepared, please notify me *before* class. I reserve the right to reward exemplary class participation by raising your grade one step (e.g. B+ to A-). Typically, around 10% of the class receives such grade “bumps.”
- E. Volunteering: I will frequently ask a question that stumps the person whom I have called on. I will give that person time to think about the question, and see if they can come up with an answer. It will sometimes happen that you have an answer, and instinctively raise your hand to volunteer. I may or may not call on you at that moment. I would prefer your attempt to answer than mine, but best of all is to continue the dialogue with the student who was initially called on. Nonetheless, to move things along I may let the volunteer help. Please be sensitive to the fact that the student who is called on often suffers from stage fright, and the most obvious things slip from their mind.
- F. Ask Questions: I begin each class by asking for both administrative and substantive questions. If you want to know what pages we will cover, please ask. If you are having trouble grasping a particular doctrine, please ask. Alternatively, send an email or start a discussion thread on TWEN.
- G. Show & Tell: The topics in this class are constantly in the news and in the plot lines of movies and broadcast shows. If you notice a story that illustrates or discusses a class topic, please send me an email or post it to a discussion thread on TWEN.

VI. Classroom Etiquette

- A. The classroom environment must be conducive to learning for all students. Distractions made possible by advances in technology may undermine that goal.
- B. Audial: During class, in addition to the usual courtesies, kindly disable and refrain from using cell phones, pagers, and any other communication device other than your laptop computer.
- C. Visual: Please refrain from displaying wallpaper, screen savers, or other material on your laptop computer that you can reasonably expect to be offensive or distracting to other students.
- D. End Time: I will be diligent about starting the class precisely at 2:15 and ending it precisely at 3:30. In return, please do not begin to pack-up while others are still trying to be engaged in the class discourse.

VII. Grading

- A. Weekly Problems (20%).
- B. Midterm Exam (20%)
- C. Final Exam (60%).
- D. To make my calculations more objective and transparent, I convert all the above percentages into points. There are a total of 400 points for the course. The final exam is worth 240 points. The midterm exam is worth 80 points. The weekly problem analyses are worth a total of 80 points. Grading methods are more fully explained in the next three sections.

VIII. Required Quizzes and Problems

- A. While I will provide informal, oral feedback during class discussions, I do not want the first *formal* feedback that you receive to be your graded final exam, provided several weeks *after* the end of the semester. Therefore, I will assign weekly multiple choice quizzes and/or short essay problems. These may often be quite short, consisting, for example, of just one question or just one paragraph.
- B. Grading: I will grade the quizzes. For the short essays, I will distribute a score sheet and/or a model answer. But I am happy to review and provide individualized feedback on your essay. Just ask.
- C. Weight: The ten quizzes and essays, in the cumulative, comprise 20% of your total course grade. Each one is worth eight points or roughly 2% of your total course grade.
- D. TWEN: While I may ask you to complete some quizzes and essays during class, you will complete most of the quizzes and essays before class on the course TWEN site. I will announce and post the problems and questions at least five days in advance of the due date – typically posted by Wednesday and due on Monday. I will either review the quiz/problem in class or pose a feedback memo. More details will be discussed when the first problem is assigned.

IX. Midterm Exam

- A. Date: The midterm exam is scheduled from 2:15 to 3:30 p.m. on Monday, October 20, 2008.
- B. Weight: The midterm exam comprises 20% of your course grade, 80 of the 400 total course points.

- C. Everything else about the midterm exam is the same as for the final exam except that the midterm is only one-hour instead of four hours.

X. Final Exam

- A. Date: The final exam is scheduled from 9:30 a.m. to 1:30 p.m. on Monday, December 15, 2008.
- B. Weight: The final exam comprises 60% of your course grade, 240 of the 400 total course points.
- C. Format and Length: The final examination will be comprised of three roughly equal parts. The first part will include multiple choice questions. The second part will include short essay problems. The third part will include a long essay problem. The essays are essentially hypothetical factual circumstances in which you will be expected to: (i) identify the legal issues, (ii) analyze the problems by applying the correct legal principles, and (iii) come to a reasonable conclusion.
- D. Coverage: The exam will test those concepts and issues either covered in assigned readings or explored during class lectures and discussions. The exam will roughly reflect the relative time and emphasis on topics in the course. For example, negligence will be more heavily tested than intentional torts.
- E. Open Book: On the exam, you will be allowed to use any written or printed materials you choose. No electronic devices are permitted.
- F. Warning about Open Book: Having your notes and materials will *not* relieve you of the need to already know the material. Indeed, it is very probable that if you do not study for this exam as you would for a closed-book exam, then you will do very poorly and perhaps not pass.
- G. ExamSoft: I strongly encourage you to register to *type* your midterm and final exams, using your laptop and special security software that you can download from the Law School's website, <<https://www.examsoft.com/widenerlaw>>. Typing your exam allows you to create a work product in a way that will be least distracting from the substance.
- H. Grading: All exams will receive a raw score from zero to 240. The raw score is meaningful only relative to the raw score of the other students in the class. The raw score will be converted to a scaled score, based on the class curve. For example, if the highest raw score in the class were 170, then that student would receive an A. The final grades will comport with Law School's grading policies and suggested grading curve.
- I. Exam Review and Feedback: Several weeks after the exam, I will post on the TWEN site both a copy of the exam and an explanatory memo and/or a model

answer. All grades are final; there will be no negotiations regarding, revisions, except to correct any mathematical or clerical errors in computing the final score. Of course, I will be happy to go over the exam with anyone who schedules an appointment to review the exam. I will give you a copy of your exam answers. If – after reviewing these against the exam, the feedback memo, and your notes – you have questions about your exam, please email those to me in advance of our meeting so that I can be sufficiently prepared.

J. Grading Criteria: I will post my old exams and my old exam feedback memos and score sheets on TWEN. While those are from upper-level *Health Law* exams, you can get a good sense of the criteria that I employ in grading. In short, I look for:

1. An ability to muster relevant evidence and authority to make arguments cogently and clearly
2. An understanding of substantive legal doctrine
3. An appreciation for broader policy concerns that influence how legal doctrine applies to novel situations

XI. Office Hours

I look forward to talking to you outside class. There are several means of doing this:

- A. After class: I will remain in the classroom after each class for all trailing questions, until or unless we are kicked out by another class.
- B. Office: I can typically be found in my office before and after class. If this is not a convenient time, just let me know in class or by email and we can make an appointment with each other. You are welcome to drop in my office anytime, but it is best to confirm a specific time in advance. If you have a specific question, I recommend that you send me the question via email ahead of time. In this way, I can think about your question and offer my best assistance.
- C. Email: Feel free to e-mail me anytime at tmpope@widener.edu. I will try to promptly answer any question you have as soon as possible.
- D. TWEN: Whether you want to elaborate or clarify the casebook materials or class discussions, you can start a discussion thread on the TWEN site. You are encouraged to provide constructive comments within each other's threads.
- E. Lunch or Coffee: I have found that grabbing a quick lunch or coffee/tea is a good way to get to know each other. If you and one or two other students want to share a bite/coffee/tea, please let me know.

XII. TWEN Site

You will be issued Westlaw passwords early in the semester. At that point, you must register with the TWEN site for this course:

<<http://lawschool.westlaw.com/manage/homepage.aspx?courseid=63832>>.

The TWEN site will include the following materials:

- A. PowerPoint slides for each class, posted shortly before each class
- B. Links to MP3 recordings of selected classes
- C. Problems and Quizzes (see section VIII, *supra*)
- D. Handouts to supplement or synthesize the casebook material

Warning!! Do not permit the availability of these materials to deter you from preparing and participating in class. I provide these materials to supplement and enhance classroom learning, not to substitute for it. It is important to remember that knowledge acquisition is only one small part of law school education. I plan to do little lecturing during classes. Lectures may seem to provide more value – more content, more certainty. It may seem like you are “learning” more. But this would be poor preparation for the practice of law where there is little certainty. Furthermore, nonattendance is not an option given University and ABA attendance requirements, and the grading policy described above.

XIII. Study Aids and Reference Materials

Since Torts is a central part of the law school curriculum, there is a plethora of study aids and reference materials available in the library, on Westlaw and Lexis, and for purchase. Study aids are directed at law students, and often contain both sample problems and advice on taking a torts exam. Reference materials provide clear “black letter” explanations of legal principles; but given their level of detail and sophistication, you should consult them sparingly. While I can list just a few supplementary materials, you may find that the style of some other source really “clicks” with the way you read or think. Nevertheless, I strongly recommend using substantive materials instead of commercial outlines or canned briefs. I have ordered the sources below roughly according to the strength of my recommendation.

A. Study Aids

1. JOSEPH W. GLANNON, *THE LAW OF TORTS: EXAMPLES AND EXPLANATIONS* (3rd ed. Aspen 2005).
2. Center for Computer-Assisted Legal Instruction (CALI), *Library of Lessons on Torts* (containing nearly 50 online, interactive tutorials on topics that we cover, ranging from 15 to 90 minutes completion time).

3. JOHN L. DIAMOND, LAWRENCE C. LEVINE & M. STUART MADDEN, UNDERSTANDING TORTS (3d ed. Matthew Bender 2007).
4. KENNETH S. ABRAHAM, THE FORMS AND FUNCTIONS OF TORT LAW (3d ed. West Concepts & Insights Series 2007).
5. MARSHALL S. SHAPO, PRINCIPLES OF TORT LAW (West Concise Hornbook Series 2003).
6. EDWARD J. KIONKA, TORTS IN A NUTSHELL (5th ed. West 2005).
7. VINCENT R. JOHNSON, MASTERING TORTS: A STUDENT'S GUIDE TO THE LAW OF TORTS (3rd ed. 2005).

B. Reference Materials

1. DAN B. DOBBS, DOBBS' HORNBOOK ON THE LAW OF TORTS (West 2000) (the successor to the 1984 hornbook below).
2. DAN B. DOBBS, ROBERT E. KEETON & DAVID G. OWEN, PROSSER AND KEETON ON TORTS (5th ed. West 1984) (helpfully, the structure of this hornbook patterns that of your casebook).
3. FOWLER V. HARPER, FLEMING JAMES & OSCAR S. GRAY, THE LAW OF TORTS (3d ed. Aspen 2006) (6 volumes).
4. STUART M. SPEISER ET AL., THE AMERICAN LAW OF TORTS (Bancroft-Whitney Looseleaf) (10 volumes).
5. J.D. LEE & BARRY LINDAHL, MODERN TORT LAW: LIABILITY AND LITIGATION (2d ed. West Looseleaf) (5 volumes, available in Westlaw MTLLE).
6. RESTATEMENT OF THE LAW, SECOND, TORTS (ALI 1965) (available in Westlaw REST-TORTS).
7. You may wish to read some of the cases or law review articles cited in the notes in the casebook to enhance your understanding of the assigned materials.

XIV. Course Reading Outline

The outline below is intended to give you a sense of the course coverage. It is *not* a reading schedule. Following its sequence, I will give the specific assignment for the following week during the prior week. We will cover an average of 12 pages per class in the first part of the semester. We will cover slightly more, later in the semester.

1. <u>Introduction</u>	1-16
2. <u>Intentional Torts</u> [~ 10 classes]	
2.1. Intent	17-28
2.1.1. Children	
2.1.2. Intent v. Negligence	
2.1.3. Insanity	
2.1.4. Transferred Intent	
2.2. Harm to Persons	
2.2.1. Battery	28-37
2.2.2. Assault	37-40
2.2.3. False Imprisonment	40-50
2.2.4. Intentional Infliction of Emotional Distress	50-66
2.3. Harm to Property	
2.3.1. Trespass to Land	66-75
2.3.2. Trespass to Chattels	75-81
2.3.3. Conversion	81-90
2.4. Privileges	
2.4.1. Consent	91-103
2.4.2. Self-Defense	103-106
2.4.3. Defense of Others	106-107
2.4.4. Defense of Property	107-113
2.4.5. Recovery of Property	113-118
2.4.6. Necessity	118-124
2.4.6.1. Public	
2.4.6.2. Private	
2.4.7. Authority of Law	125-126
2.4.8. Discipline	127-128
2.4.9. Justification	128-130
3. <u>Negligence</u> [~ 7 classes]	
3.1. History	131-132
3.2. Elements	132-133
3.3. Formula	133-145
3.3.1. Risk vs. Utility	

3.4. Standard of Care	
3.4.1. Reasonable Prudent Person	145-154
3.4.1.1. Custom and Usage	
3.4.2. Special Applications of the Reasonable Person	154-168
3.4.2.1. Emergencies	
3.4.2.2. Physical Disability	
3.4.2.3. Mental Disability	
3.4.2.4. Children	
3.4.3. Professional	
3.4.3.1. Medical Malpractice	168-185
3.4.3.2. Informed Consent	185-200
3.5. Aggravated Negligence	
3.6. Rules of Law	200-204
3.7. Violation of Statute	204-206
3.7.1. Applicability of Statute	206-222
3.7.2. Effect of Statute	222-229
3.8. Proof of Negligence	
3.8.1. Circumstantial	229-237
3.8.2. Res Ipsa Loquitur	237-258
4. Causation in Fact [~ 3 classes]	
4.1. Sine Qua Non	252-262
4.2. Proof of Causation	262-282
4.2.1. “But For” Test	
4.2.2. Quantum of Proof Problems	
4.3. Concurrent Causes	282-285
4.3.1. Multiple Cause Problems	
4.3.2. Substantial Factor Test	
4.4. Problems in Determining Responsibility	285-292
4.4.1. Defendant Identification	
4.4.2. Alternative and Market Share Liability	
5. Proximate (Legal) Cause [~ 4 classes]	
5.1. Unforeseeable Consequences	293-325
5.1.1. Connection between Negligence and Injury	
5.1.2. Directness/Naturalness	
5.1.3. Foreseeability of Harm Tests	
5.1.4. <i>Palsgraf v. Long Island R.R.</i>	
5.2. Forces that Break the Causal Chain	325-344
5.2.1. Negligent Intervening Causes	
5.2.2. Intentional Intervening Causes	
5.3. Public Policy – Limited Duties	344-355
5.4. Shifting Responsibility	355-360

[Note: at this point, we are departing from the order of the casebook.]

6.	<u>Defenses</u>	[~ 3 classes]	
6.1.	Plaintiff's Conduct		
6.1.1.	Contributory Negligence		587-592
6.1.2.	Comparative Negligence		592-601
6.1.3.	Assumption of Risk		601-614
6.1.3.1.	Express		
6.1.3.2.	Implied		
6.2.	Statutes of Limitations and Repose		614-621
6.3.	Immunities		621-659
6.3.1.	Family		
6.3.2.	Charities		
6.3.3.	Government		
6.3.4.	United States		
6.3.5.	Public Officers		
7.	<u>Damages</u>	[~ 3 classes]	
7.1.	Personal Injuries		519-548
7.2.	Property Damages		548-550
7.3.	Punitive Damages		550-564
8.	<u>Wrongful Death and Survival</u>	[~ 2 classes]	
8.1.	Wrongful Death		565-578
8.2.	Survival		578-585
9.	<u>Vicarious Liability</u>	[~ 1 class]	
9.1.	Respondeat Superior		660-667
9.2.	Independent Contractors		667-673
10.	<u>Joint Tortfeasors</u>	[~ 3 classes]	
10.1.	Liability and Joinder		361-371
10.2.	Satisfaction and Release		371-383
10.3.	Contribution and Indemnity		383-402
11.	<u>Strict Liability</u>	[~ 2 classes]	
11.1.	Animals		686-691
11.2.	Abnormally Dangerous		692-710
11.2.1.	Development and Theory		
11.2.2.	Current Doctrine		
11.3.	Limitations on Strict Liability		710-717