

# Torts: The Common Law Process

Fall 2016

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Mitchell Hamline School of Law

**Time:** Most Saturdays from 1:00 to 5:20 PM

**Place:** MHSL Room 123

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**Midterm Exam:** Saturday, October 8, 2015, from 1:00 to 5:20

**Final Exam:** To be Announced by the Registrar

## I. Course Description

This is the first-year introductory course in Torts required in virtually every U.S. law school. Torts is a fundamental topic for all of law school for at least three reasons. First, it is one of the broad categories of civil wrongs. Second, it introduces you to common law (and to a far lesser degree, legislative and regulatory) processes of law making. Third, Torts is intrinsically relevant both to the regulation of conduct causing personal injuries and to the regulation of many commercial transactions.

But that is all substance. In fact, a good deal of what we will do in this first semester, first year course will not focus on doctrinal content. It will focus on skills. Specifically, you will learn how to read and analyze cases. You will learn how to make clear and persuasive arguments. We will analyze appellate opinions, statutory provisions, and other legal materials: (i) to extract tort law principles and rules, (ii) to draw analogies and distinctions, and (iii) to develop cogent legal arguments.

Since this is only a 4-credit course, the scope of coverage is necessarily limited. We will cover intentional torts and negligence. You should take an upper-level elective to cover other topics, such as products liability, that are also tested on the multistate exam and on the essay portion of some bar exams.

## II. Course Objectives

Upon completion of this course, you will have:

- A. A developed ability to present relevant legal arguments in a logical and coherent fashion. Using the law of torts as a vehicle, 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. An understanding of the basic legal principles and issues commonly encountered in tort law. But please note that a command of the “black letter” rules, while certainly necessary, is not sufficient for success.
- C. An ability to apply the basic “black letter” rules to new fact patterns. This includes the abilities both to identify and to analyze legal issues relating to unfamiliar sets of facts.
- D. Competency in tackling a majority of the 27 Torts MBE multiple choice and essay questions on the bar exam.
- E. Further honed legal analysis and writing abilities, through:
  - 1. Exposure to and critique of legal arguments in judicial opinions, legislative reports, and scholarly writing
  - 2. Participation in classroom discussion and group-based exercises
  - 3. Completion of, and feedback on, weekly problems
  - 4. Completion of, and feedback on, a written midterm examination
  - 5. Completion of, and feedback on, a written final examination

## III. Required Materials

- A. Casebook
  - 1. VICTOR E. SCHWARTZ, KATHRYN KELLY & DAVID F. PARTLETT, PROSSER, WADE AND SCHWARTZ’S TORTS: CASES AND MATERIALS (12<sup>th</sup> ed. Foundation 2010) (ISBN-13: 978-1599417042).
  - 2. The casebook is the primary source of content and the basis for class discussion. Note that while many retailers are now selling the 13<sup>th</sup> editions of this casebook, we will be using the 12<sup>th</sup> edition. For those portions that we will use in this class, the two editions are nearly identical.

Since there is now a 13<sup>th</sup> edition of this casebook, inexpensive copies of the 12<sup>th</sup> edition can be readily obtained from Amazon, Barristers, and other merchants.

B. Litigation documents

1. I will post additional and more current materials (*e.g.* pleadings, judicial opinions, articles) to the course Blackboard course management system for this course.
2. Remember to use Firefox or Chrome as your web browser.

C. PowerPoint

1. I will use 100 to 200 slides per class to guide and focus the discussion. I will post these to Blackboard before class.
2. These slides will include graphics to illustrate concepts. They will include key excerpts of statutory text. And they will include flowcharts and other summaries.

D. Podcast & Video Summaries

1. After most classes, I will prepare an audio or video summary of the main points from that class. These will normally be just 5 to 10 minutes in length.
2. In addition to recapping the key points of the day, I will expand on questions left unanswered and provide additional case examples of key principles.

E. Video Lectures

1. To enable us to focus most of our class time on problems and exercises, I will record narrated PowerPoint slides providing an overview of key rules and doctrines.
2. I will distribute links to these videos, so that you can view them before class.

F. Upcoming Assignments

1. The immediately upcoming assignments (readings, quizzes) will always be posted on the Blackboard home page.

2. Pedagogical literature indicates that receiving reminders helps students stay on top of course requirements. To get these text messages, go to [rmd.at/hc6f4](https://rmd.at/hc6f4) on your phone and follow the instructions. Alternatively, text the message @hc6f4 to the number 81010. These are one-way messages. REMIND does not share your numbers with me. This is only an additional way to receive the same information that will already be on Blackboard.

## IV. Class Schedule

- A. The class will meet on Saturday afternoons from 1:00 p.m. to 5:20 p.m.
- B. The first class meets on Saturday, August 13. The last class meets on Saturday, November 19. The class will meet twelve times live and in person.
- C. The class will **not** meet on the following three dates:
  1. Saturday, September 3 due to Labor Day holiday
  2. Saturday, October 8 due to a conference conflict
  3. Saturday, October 15 due to a conference conflict
  4. Saturday, October 22, due to MHLS Fall Break

At least one of these October sessions will be “made up” in an asynchronous online format. This means that you will be able to “attend” from wherever you have Internet access. There will be a take home midterm exam during the other missed session (see below).
- D. **Lunch:** Given the timing and long duration of this class, feel free to bring and eat your lunch (quietly).
- E. **Required Extracurricular Meeting.** I would like to get to know each of you outside class. Therefore, before October, please schedule a 20-minute meeting at a convenient time, perhaps before or after class.
- F. **Extra Review Class:** Depending on class interest, I am happy to schedule an extra “review” class during the weeks before the final exam.
  1. Please email your questions to me at least 24 hours before such session to better enable me to answer them.
  2. I am also happy to meet, at any time during the semester, both with individual students in my office, and with small groups. For example, last year, several students found it useful to review essays that they wrote on extra practice problems.

## V. What to Do First - before August 13

- A. Confirm that you are registered for the course Blackboard site with the email address that you use most regularly.
- B. If you have not used Blackboard before, review the student user guide. <https://connect.mitchellhamline.edu/>
- C. Review this syllabus.
- D. Calendar key course dates into your planning and calendaring systems.
- E. Read the initial class assignments posted on Blackboard and emailed to you:
  - 1. Casebook pages 1 to 37.
  - 2. Orin Kerr, *How to Read a Legal Opinion*, Green Bag (2007).
- F. If you have time, review the instructions for my old exams (available at [www.thaddeuspope.com](http://www.thaddeuspope.com)).
- G. If you have time, familiarize yourself with the following terms through a legal dictionary (like *Black's* or *Wex*).

**Litigation procedure terms:** complaint, directed verdict, summary judgment, demurrer, answer, motion to dismiss, preponderance of the evidence.

**Judicial decision making terms:** precedent, common law, dicta, remand, holding, appellant/appellee, majority opinion, concurring opinion, dissenting opinion, de novo, prima facie, question of fact, question of law.

## VI. 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. **Class Preparation:** I employ only a moderate amount of lecture but lots of case method and problem method questions and problems. Consequently, students must come to class prepared to discuss the material assigned.

- C. **Case Briefing:** All assigned cases should be read and briefed. It is useful to analyze each case using the following headings: (i) essential substantive facts, (ii) procedural posture, (iii) issues, (iv) legal principles, (v) reasoning, and (vi) holding. 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.
- D. **Preparation Time:** It is impossible to say exactly how much time you will need for class preparation, since each person's needs are different. But it is likely that you will need around **three hours** of preparation for each hour of class. That means in addition to four hours of class, you should spend **another twelve** hours on Torts each week. This includes: reading the materials, briefing the cases, consolidating prior class and margin notes, and taking the weekly quiz.
- E. **Warning about Class 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."
- F. **Warning about the Casebook:** The value of the case opinions in the casebook is instrumental only. These cases introduce you to the "black letter" rules and illustrate how these rules can be applied to a particular fact situation. You will be tested (both here and on the bar exam) not on the holdings of these or any particular cases, but rather on your ability to **apply** the underlying rules to new fact patterns. That skill can be best developed by actually doing rather than by just observing legal analysis. Consequently, I will pose "hypos" in class, and I will give you problems on the weekly quizzes, midterm exam, and final exam. Ideally, you will engage in still additional practice by looking at my old exams, CALI lessons, and other materials.
- G. **Class Participation:** Every student is expected to participate in class discussions. Sometimes this will be through "clickers" like Poll Anywhere. Other times, it will be by "cold calling." If illness or emergency prevents you from being fully prepared, please notify me **before** class. As explained in Section X below, 5% of your course grade is based on class participation.
- H. **Meandering Discussion:** I want to leave discussion sufficiently free so that you discover key points on your own and feel ownership in lessons learned. Still, I must exert control over class discussion to ensure that you are exposed to key points and to ensure that you are not confused by a discussion that runs too long or too tangentially. It is inappropriate and unfair to hold other students hostage to the too-peculiar line of inquiry of just one or two students. If we did not get to them, I am happy to explore your questions outside class in any of the ways described in section XIV below.

- I. **Clicker Quizzes & Laptops:** I will use an instant-poll tool (probably Poll Anywhere) in which the entire class “votes” on the answers to orally-posed problems through a browser-supported template. Accordingly, laptops are welcome. If you do not bring a laptop, I expect that you can “vote” either through a neighbor’s laptop (after refreshing the browser) or through your cell phone. After clicking-in, students will discuss their answers in small groups and then re-vote. Only then will we review the problems.
- J. **Blackboard Participation:** Students are encouraged to participate not only in class but also through the Blackboard discussion boards. Start a new thread or comment on one already in progress. The best posts: (i) are full of insight and analysis (critical thinking), (ii) reference the course materials, and (iii) are clearly written (organization & style).
- K. **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 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.
- L. **Ask Questions:** I will 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 Blackboard. **Never hesitate** to seek more clarity about any substantive topic or administrative matter concerning this course.
- M. **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 start a discussion thread on Blackboard. It is both fun and rewarding to work through legal problems in the context of a visually compelling, dramatic clip.
- N. **Minute Papers:** Every few weeks, I will ask you to reflect for about one minute on the class. For example, what is working well? What are you finding the most difficult? I will collect these anonymous papers and take measures to address your concerns.

- O. **Outlining:** The traditional method of exam preparation for law students involves making an outline of all course material. After every unit of material (*e.g.* formation and termination), but at least every two weeks, you should review and **consolidate** your case notes, class notes, and other material into an outline, flowchart, or other documents. Furthermore, you should aim to edit and revise this growing document every time you add to it, both to improve the organization and to clarify the content. In short, the more **actively** you engage the materials, the better your grasp and retention will be.

## VII. 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. And please mute your laptop.
- 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 1:00 PM and ending it precisely at 5:20 PM. In return, please do not begin to pack-up early while others are still trying to be engaged in the class discourse.

## VIII. Grading Summary

- A. This course is comprised of four components from which you can earn a total of 300 points.

Course Component	Percent	Points	Explanation
Weekly Quizzes	20%	60	<i>see</i> section X
Class Participation	5%	15	<i>see</i> section XI
Midterm Exam	25%	75	<i>see</i> section XII
Final Exam	50%	150	<i>see</i> section XIII
	100%	300	

- B. Your total point sum (of 300) is meaningful only relative to the point sums of other students in the class. Your total will be converted to a scaled score, based on the class curve. For example, if the highest raw score in the class were 240/300, then that student would receive an A. The final grades will comport with Law School's grading policies.



## IX. Required Weekly Quizzes

- A. **Rationale:** I will assign weekly quizzes for three reasons. First, 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 midterm or final exam. Second, I want you to approach the material **actively**. Third, because later topics in this course build on and interrelate to earlier ones, I want to provide some external motivation to stay current and “connected” to the material.
- B. **Format:** Most quizzes will be comprised of five to ten multiple choice questions. A few may entail drafting a roughly 250-word essay. These (along with the midterm) constitute “formative assessment,” while the final exam constitutes “summative assessment.”
- C. **Blackboard:** You will complete the quizzes on the course Blackboard site. They are not timed. But they are designed to take approximately 15 minutes for you to complete.
- D. **Due Date:** A quiz is due by 9:00 PM on **every** Friday of the semester, except September 2 (for Labor Day weekend) and October 7 (because of the midterm exam).

Quiz	Available by 6:00 p.m.	DUE by 9:00 p.m.
1	Saturday, August 13	Friday, August 19
2	Saturday, August 20	Friday, August 26
3	Saturday, August 27	Friday, September 9
4	Saturday, September 10	Friday, September 16
5	Saturday, September 17	Friday, September 23
6	Saturday, September 24	Friday, September 30
7	Saturday, October 1	Friday, October 14
8	Saturday, October 15	Friday, October 21
9	Saturday, October 22	Friday, October 28
10	Saturday, October 29	Friday, November 4
11	Saturday, November 5	Friday, November 11
12	Saturday, November 12	Friday, November 18

- E. **Feedback:** We will review the quiz in Saturday’s class and/or I will post a feedback memo.
- F. **Coverage:** These weekly quizzes are primarily meant to test basic understanding of legal principles covered at about the time of the quiz. They are simpler than questions on the midterm and final exams that require more analysis.

- G. **Grading:** I will grade the quizzes. The twelve quizzes, in the cumulative, comprise 20% of your total course grade (60 of 300 points). Therefore, each quiz is worth 5 points, 1.66% of your total course grade (300 points). If there are more than five questions, the grading will be pro rate. For example, if you get four of ten questions correct, you will earn two points on that quiz.

## X. Class Participation

- A. Class participation comprises 5% of your course grade, 15 of the 300 total course points.
- B. The typical student who regularly meaningfully participates will earn all 15 points. In other words, most students presumptively will and actually will earn all these points. Those who are regularly unprepared or frequently absent will earn either half or none of these points.

## XI. Midterm Exam

- A. **Date:** The midterm exam is a take-home exam that you can download and take during the time that class would have met on Saturday, October 8, 2016.
- B. **Scope & Coverage:** The midterm will cover only intentional torts and privileges. Even if we begin coverage of negligence before the midterm, negligence will not be tested on the midterm.
- C. **Method:** The exam will be available as a PDF download from the Blackboard site at 1:00 PM on October 8. You must upload your answers (identified only by exam ID number) back to Blackboard by 5:20 PM.
- D. **Questions:** If you have technical problems submitting the exam, please contact Student Affairs or the Registrar. That way, anonymity is preserved.
- E. **Weight:** The midterm exam comprises 25% of your course grade, 75 of the 300 total course points.
- F. **Grades:** The only letter grade for this course is the final course grade based on the total 300 points. Nevertheless, to enable you to gauge your relative performance, I will assign letter grades to the midterm exams. While the numeric scores compute into the “course” grade (75 of 300 points), midterm letter grades are informational only.
- G. Everything else about the midterm exam is the same as the final exam, except that the midterm is shorter.

## XII. Final Exam

- A. **Date:** I intend that the final exam will be a take-home that you may obtain and complete during any 48 hours within the final exam period. But I am waiting to confirm that method is approved by the Law School Registrar.
- B. **Duration:** This exam is designed to be completed within just five hours. The 48-hour window is designed to permit you to step away and refresh. That way, you can revise and polish your answer to be more complete and lucid.
- C. **Weight:** The final exam comprises 50% of your course grade, 150 of the 300 total course points.
- D. **Format and Length:** The final examination will be comprised of three roughly equal parts. This three-part structure has been proven to maximize an exam's reliability and validity.
1. The first part will include around 25 multiple choice questions.
  2. The second part will include around two short or "directed" essay questions focused on one or two specific issues.
  3. 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 to the facts, and (iii) argue for a reasonable conclusion.
- E. **Scope & 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 devoted to topics in the course. For example, negligence will be more heavily tested than intentional torts. The final exam is cumulative and will include intentional torts, even though that will have already been tested on the midterm.
- F. **Cumulative:** The final exam is cumulative. Topics already tested on the midterm may also appear on the final exam. But the emphasis will be on topics covered after the midterm.
- G. **Open Book:** The midterm and final exams are OPEN book exams. You may use any written or printed materials, including, but not limited to: any required and recommended materials, any handouts from class, PowerPoint slides, class notes, and your own personal or group outlines. But no consultation or discussion with any other person is permitted.
- H. **Additional Research:** While you may use any materials that you have collected for this class, you are neither expected nor are you permitted to do any online or library research (e.g. on Lexis, Westlaw, Google, Bing, reference materials) to answer the exam questions.

- I. **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 **exactly** as you would for a closed-book exam, then you will do very poorly and perhaps not pass.
- J. **Grading:** All exams will receive a raw score from zero to 150. The raw score is meaningful only relative to the raw score of the other students in the class. The raw score will be added to the midterm and quiz scores. That total will then be converted to a scaled score, based on the class curve. For example, if the highest raw score in the class were 100/150, then that student would receive an A. The final grades will comport with Law School's grading policies. Note that this course must comply with the maximum average GPA rules in the Student Handbook.
- K. **Exam Feedback:** Several weeks after the exam, I will post on Blackboard:
1. A copy of the exam
  2. A blank scoring sheet and explanatory memo
  3. Model answers.
- I will also email you directly a scanned copy of your own marked exam with your individual scoring sheet.
- L. **Exam Review:** I will be happy to go over the exam with anyone who schedules an appointment to review the exam. Please first review my scoring and notes on your exam, the feedback memo, model answers, and your own notes. If you still have questions about your exam, please email those to me in advance of our meeting so that I can be sufficiently prepared to ensure a productive and efficient meeting.
- M. **Grade Finality:** All grades are final. While sometimes seemingly unfair in application, pursuant to school rules, there will be no negotiations regarding revisions, except to correct any mathematical or clerical errors in computing the final score.

### **XIII. Exam Taking Tips**

- A. **Old Exams:** I have posted four years of my *Torts* midterm and final exams and exam feedback memos to [www.thaddeuspope.com](http://www.thaddeuspope.com). Please note that the coverage in none of these prior classes will be identical to yours. Your exams will be **based only** on what we cover in this class. Still, by working through these old exams, you can get a good sense of the criteria that I employ in grading.

- B. **Grading Criteria:** In your exam answer, I look for:
1. An ability to identify torts issues fairly implicated by a fact pattern
  2. An ability to muster relevant evidence and authority to make arguments both cogently and clearly
  3. An understanding of substantive torts legal doctrine
  4. An appreciation for broader policy concerns that influence how legal doctrine applies to novel situations
- C. **Outline Your Answer:** I strongly encourage you to use at least one-fourth of the allotted time per question to outline your answers before beginning to write. Do this because you will be graded not only on the substance of your answer but also on its clarity and conciseness. In other words, organization, precision, and brevity count. If you run out of insightful things to say about the issues raised by the exam question, stop writing until you think of something. Tedious repetition, regurgitations of law unrelated to the facts, or rambling about irrelevant issues will negatively affect your grade.
- D. **Answer Format:** This is important. Use headings and subheadings. Use short single-idea paragraphs (leaving a blank line between paragraphs). Do not completely fill the page with text. Leave white space both between sections and paragraphs.
- E. **Headings & Subheadings:** Use headings and subheadings to divide different legal theories and distinct types and parts of analysis. Keep your paragraphs short – to around three to eight lines.
- F. **Answer Content:** Address all relevant issues that arise from and are implicated by the fact pattern and that are responsive to the “call” of the question. Do not just summarize all the facts or all the legal principles relevant to an issue. Instead, apply the law you see relevant to the facts you see relevant. Take the issues that you identify and organize them into a coherent structure. Then, within that structure, examine issues and argue for a conclusion. If you are writing whole paragraphs of pure law or pure fact, that is a symptom that you may not be engaged in legal analysis.

- G. **Citing Cases:** You are welcome, but not required, to cite cases. While it is sometimes helpful to the reader and a way to economize on words, do not cite case names as a complete substitute for legal analysis. For example, do not write: “Plaintiff should be able to recover under A v. B.” Why? What is the rule in that case? What are the facts in the instant case that satisfy that rule?
- H. **Cross-Referencing:** You may reference your own previous analysis (e.g. B’s claim against C is identical to A’s claim against C, because \_\_.” But be very clear and precise what you are referencing. As in contract interpretation, ambiguity is construed against the drafter.
- I. **Balanced Argument:** Facts rarely perfectly fit rules of law. So, recognize the key weaknesses in your position and make the argument on the other side.
- J. **Additional Facts:** If you think that an exam question fairly raises an issue but cannot be answered without additional facts, state clearly those facts (reasonably implied by, suggested by, or at least consistent with, the fact pattern) that you believe to be necessary to answer the question. Do not invent facts out of whole cloth.
- K. **Honor Code:** While you are taking a midterm or final exam, you are subject to the Mitchell Hamline Code of Conduct. You may not discuss it with anyone until after the end of the entire exam period. Please review the student handbook, <http://mitchellhamline.edu/students/student-handbook/>.

## XIV. 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. **Walks:** Discussing health law while walking around campus or the neighborhood is a great way to get exercise and to assure a creative and alert discussion.
- D. **Email:** Feel free to e-mail me anytime at [thaddeus.pope@mitchellhamline.edu](mailto:thaddeus.pope@mitchellhamline.edu). Please use a descriptive subject heading. In urgent circumstances cc [thadmpope@aol.com](mailto:thadmpope@aol.com) and [thaddeus.pope@gmail.com](mailto:thaddeus.pope@gmail.com), and text 310-270-3618. I will try to promptly answer any question as soon as possible.

- E. **Blackboard:** Whether you want to elaborate on or clarify the required materials or class discussions, you can start a discussion thread on the Blackboard site. You are encouraged to provide constructive comments within each other's threads.
- F. **Lunch or Coffee:** I have found that grabbing a quick breakfast, 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.

## XV. Blackboard Site

The Blackboard site will include the following materials:

- A. PowerPoint slides for each class, posted before each class
- B. Links to MP3 recordings of selected classes and periodic summaries
- C. Links to periodic video summaries of selected topics
- D. Weekly Quizzes (see *supra*)
- E. Optional supplementary and background reading

**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.

## XVI. Study Aids & 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.

While I can list just a few such 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, like those below, instead of commercial outlines or canned briefs. I have ordered the sources below roughly according to the strength of my recommendation. In other words, I most strongly recommend Glannon and CALI.

A. **Study Aids**

1. JOSEPH W. GLANNON, *THE LAW OF TORTS: EXAMPLES AND EXPLANATIONS* (5<sup>th</sup> ed. Wolters Kluwer 2015).
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 of completion time).
3. JOHN L. DIAMOND, LAWRENCE C. LEVINE & M. STUART MADDEN, *UNDERSTANDING TORTS* (5<sup>th</sup> ed. LexisNexis 2013).
4. KENNETH S. ABRAHAM, *THE FORMS AND FUNCTIONS OF TORT LAW* (4<sup>th</sup> ed. Foundation Concepts & Insights Series 2012). I once required this small paperback book as a companion to the casebook.
5. MARSHALL S. SHAPO, *PRINCIPLES OF TORT LAW* (Foundation Concise Hornbook Series 3<sup>rd</sup> ed. 2010).
6. RICHARD L. HASEN, *GLANNON GUIDE TO TORTS: LEARNING TORTS THROUGH MULTIPLE-CHOICE QUESTIONS AND ANALYSIS* (2d ed. 2011). Like the first two materials listed above, this is not just a book to read but also a source of practice problems.
7. EDWARD J. KIONKA, *TORTS IN A NUTSHELL* (5<sup>th</sup> ed. West 2010).
8. E. SCOTT FRUEHWALD, *A COMPANION TO TORTS: HOW TO THINK LIKE A TORTS LAWYER* (2015).
9. VINCENT R. JOHNSON, *MASTERING TORTS: A STUDENT'S GUIDE TO THE LAW OF TORTS* (4th ed. Carolina 2009).
10. There are other good sources of practice multiple choice and essay problems. The law library has an entire separate room devoted to law student study aids. In addition to those books focused exclusively on torts, you will find torts problems inside broader, all-subject bar exam preparation materials by Emanuel, Blond, Finz, and others.



## B. Reference Materials

Like study aids, “reference materials,” also provide clear “black letter” explanations of legal principles. But in contrast to the “study aids” listed above, given their level of detail and sophistication, you should consult reference books only sparingly (if at all). For example, if there is a particular unit or concept that you are struggling with, a treatise may provide a more thorough explanation than a student-oriented book. Here are a few reference materials (in alphabetical order):

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* (5<sup>th</sup> 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. Wolters Kluwer looseleaf) (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. Thomson Reuters looseleaf) (5 volumes).
6. *RESTATEMENT OF THE LAW, THIRD, TORTS LIABILITY FOR PHYSICAL AND EMOTIONAL HARM* (ALI 2010) (available in Westlaw REST-TORTS).
7. *RESTATEMENT OF THE LAW, SECOND, TORTS* (ALI 1965).
8. You may also wish to read some of the cases or law review articles cited in the “notes” of the casebook to enhance your understanding of the assigned materials. You will soon learn to navigate the law library and use Westlaw, Lexis, HeinOnline, and other resources.

## C. First Year Guides

Learning substantive tort law doctrine is necessary but not sufficient for success in this course. You will be tested not only on your *knowledge* but also on your ability to *apply* that knowledge. There are a number of good guides on how to succeed in law school and on how to write a law school exam. Here are just a few (in alphabetical order). You should choose one that “clicks” with you.

1. ANN BURKHART & ROBERT A. STEIN, *LAW SCHOOL SUCCESS IN A NUTSHELL* (2d ed. Thomson West 2008).
2. SUSAN DARROW-KLEINHAUS, *MASTERING THE LAW SCHOOL EXAM* (West 2007).
3. CHARLES RICHARD CALLEROS, *LAW SCHOOL EXAMS: PREPARING AND WRITING TO WIN* (2<sup>nd</sup> ed. Wolters Kluwer 2013).
4. JOHN C. DERNBACH, *WRITING ESSAY EXAMS TO SUCCEED IN LAW SCHOOL* (4<sup>th</sup> ed. Wolters Kluwer 2014).
5. TRACY E. GEORGE & SUZANNA SHERRY, *WHAT EVERY LAW STUDENT REALLY NEEDS TO KNOW: AN INTRODUCTION TO THE STUDY OF LAW* (Wolters Kluwer 2009).
6. ANN IJIMA, *THE LAW STUDENT'S POCKET MENTOR: FROM SURVIVING TO THRIVING* (Aspen 2007).
7. ALBERT J. MOORE & DAVID A. BINDER, *DEMYSTIFYING THE FIRST YEAR OF LAW SCHOOL* (Aspen 2009).
8. HELENE SHAPO & MARSHALL SHAPO, *LAW SCHOOL WITHOUT FEAR: STRATEGIES FOR SUCCESS* (3<sup>rd</sup> ed. Foundation 2009).
9. PETER T. WENDEL, *DECONSTRUCTING LEGAL ANALYSIS: A 1L PRIMER* (Aspen 2009).

## **XVII. Course Reading Outline**

The outline below is intended to give you a sense of the course coverage. It is *not* a reading schedule. Closely (but not exactly) following its sequence, I will give the specific assignment for the following week during the prior week. Given the interactive nature of the law school classroom, it is difficult to predict, much less promise, exactly what material we will be covering on a specific future date. In general, at the beginning of the semester, we will be covering around 30 pages per class. Later, we will cover between 40 and 60 pages per class.

The current assignment will always be posted on the Blackboard home page. Old assignments will be archived on the Blackboard site.

## 1. Introduction

- 1.1. Class Policies
- 1.2. Overview: Types of Torts
- 1.3. The Litigation Process

## 2. Intentional Torts

There are three main theories of tort liability: (i) intentional torts, (ii) negligence, and (iii) strict liability. We will cover the first two in this course. Negligence is, by far, the more important theory of liability. But we will begin with intentional torts. Because it is doctrinally simpler, we can master the legal rules while learning to read cases and make legal arguments.

### 2.1. Intent

Intent is one essential element of each of the seven intentional torts that we will cover. So, before we separately examine each of these seven torts, we will get a firm grasp of intent.

#### 2.1.1. Definition

2.1.1.1. **Volitional conduct:** It is a prerequisite, necessary but not sufficient, that the defendant act voluntarily, not under the control of external forces.

2.1.1.2. **Types of Intent** (either is sufficient)

2.1.1.2.1. **General Intent:** The defendant knew with substantial certainty the consequences of her conduct.

2.1.1.2.2. **Specific Intent:** The defendant subjectively desired the consequences of her conduct.

2.1.1.3. **Negligence and Recklessness** (neither is sufficient)

2.1.1.3.1. **Negligence:** The defendant knows there is a risk from her conduct.

2.1.1.3.2. **Recklessness:** The defendant knows there is a high risk from her conduct.

2.1.1.4. **Special Circumstances**

2.1.1.4.1. **Children**

2.1.1.4.2. **Mistake**

2.1.1.4.3. **Insanity**

2.1.1.4.4. **Transferred Intent**

## 2.2. Harm to Persons

We will examine the *prima facie* elements (including intent) of these four intentional torts that can be committed against a person's physical or mental interests.

- 2.2.1. Battery
- 2.2.2. Assault
- 2.2.3. False Imprisonment
- 2.2.4. Intentional Infliction of Emotional Distress

## 2.3. Harm to Real or Personal Property

We will examine the *prima facie* elements (including intent) of these three intentional torts that can be committed against real or personal property.

- 2.3.1. Trespass to Land
- 2.3.2. Trespass to Chattels
- 2.3.3. Conversion (serious trespass to chattel)

## 2.4. Privileges (Defenses)

Even if the plaintiff is able to establish all the *prima facie* elements of one of the seven torts above, the defendant may have been "privileged" to commit that tort. We will examine ten privileges. The defendant may be able to assert one or more to each of plaintiff's claims.

### 2.4.1. Burden of Proof

Just as plaintiff has the burden to establish the *prima facie* elements of each tort claim she brings, the defendant has the burden to establish the *prima facie* elements of each privilege she asserts.

### 2.4.2. Privileges Based on Plaintiff Conduct

- 2.4.2.1. Consent (express, implied)
- 2.4.2.2. Self-Defense
- 2.4.2.3. Defense of Others
- 2.4.2.4. Defense of Property
- 2.4.2.5. Recovery of Property
- 2.4.2.6. Authority of Law
- 2.4.2.7. Discipline

### 2.4.3. Privileges Not Based on Plaintiff Conduct

- 2.4.3.1. Public Necessity
- 2.4.3.2. Private Necessity

### 2.4.4. Justification

### 3. Negligence: Duty of Care

The majority of the course will focus on negligence. The plaintiff must establish: (i) duty, (ii) breach, (iii) factual causation, (iv) proximate causation, and (v) damages. The defendant can argue that plaintiff failed to establish a *prima facie* element. The defendant can also assert one or more affirmative defenses.

The general duty of care with which all defendants must comply is the reasonable (prudent) person standard. This standard can vary according to circumstances external to the defendant or intrinsic to the defendant. There are several ways to establish the standard of care. Each party may make arguments using one or more tools/guides to establish the standard of care. We will examine a variety of rules that the parties can use to establish the defendant's duty of care – what the reasonable prudent person would have done under the circumstances.

#### 3.1. History

#### 3.2. Elements of Negligence

#### 3.3. Balancing: Risk v. Utility and B>PL

#### 3.4. Reasonable Prudent Person: Intuition

3.4.1. Stupid Defendants

3.4.2. Skilled and Talented Defendants

#### 3.5. Custom and Usage

#### 3.6. Special Applications of the Reasonable Person

3.6.1.1. Emergencies

3.6.1.2. Physical Illness and Blackout

3.6.1.3. Physical Disability

3.6.1.4. Mental Disability

3.6.1.5. Children

3.6.1.6. Professionals

3.6.1.6.1. Legal Malpractice

3.6.1.6.2. Medical Malpractice

3.6.1.6.3. Informed Consent

#### 3.7. Rules of Law: Judicial Treatment of Specific Duties

#### 3.8. Violation of Statute: Legislative Treatment of Specific Duties, Negligence per se

3.8.1. Applicability of Statute

3.8.2. Effect of Borrowing Statutory Standard

3.8.3. Excused Violations

## 4. **Negligence: Proving Breach**

Once the plaintiff has established the defendant's duty of care, she must establish (factually) that the defendant failed to comply with that standard. We will examine three ways to prove breach.

### 4.1. **Direct Proof/Evidence**

### 4.2. **Circumstantial Proof**

### 4.3. **Res Ipsa Loquitur**

## 5. **Negligence: Factual (Actual) Causation**

Even if the plaintiff establishes that defendant has breached a duty she owed to the plaintiff, plaintiff must typically establish that her injuries would not have occurred "but for" defendant's negligence. However, in some special circumstances, causation can be established through satisfying an alternative test.

### 5.1. **Sine Qua Non / But For**

### 5.2. **Proof of Causation**

#### 5.2.1. "But For" Test

#### 5.2.2. Quantum of Proof Problems

#### 5.2.3. Special Test: Informed Consent

### 5.3. **Lost Chance**

For medical malpractice actions in some jurisdictions.

### 5.4. **Scientific Proof**

### 5.5. **Concurrent Sufficient Causes**

#### 5.5.1. Multiple Cause Problems

#### 5.5.2. Substantial Factor Test

### 5.6. **Problems in Determining Responsibility: Only One Defendant's Conduct Is Sufficient**

#### 5.6.1. Defendant Identification

#### 5.6.2. Alternative Liability

#### 5.6.3. Market Share Liability

## 6. Negligence: Proximate (Legal) Cause

Even if plaintiff can establish all the other elements of her negligence action (including actual causation), there are policy-based reasons to limit defendant's liability. These rules are captured within the confusingly-named element "proximate causation."

### 6.1. Unforeseeable Consequences

- 6.1.1. Connection between Negligence and Injury
- 6.1.2. Directness/Naturalness Test
- 6.1.3. Foreseeability of Harm Tests
- 6.1.4. *Palsgraf v. Long Island R.R.*

### 6.2. Superseding Causes: Forces that Break the Causal Chain

- 6.2.1. Negligent Intervening Causes
- 6.2.2. Intentional Intervening Causes

### 6.3. Public Policy – Limited Duties

### 6.4. Shifting Responsibility

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

## 7. Negligence: Defenses

Just as we saw with privileges in the intentional tort context, even if the plaintiff can establish all the prima facie elements of negligence, the defendant may have complete or partial defenses. We will examine three *types* of defenses.

### 7.1. Plaintiff's Conduct

- 7.1.1. Contributory Negligence
- 7.1.2. Comparative Negligence
- 7.1.3. Assumption of Risk
  - 7.1.3.1. Express
  - 7.1.3.2. Implied

### 7.2. Statutes of Limitations and Repose

### 7.3. Immunities

- 7.3.1. Family
- 7.3.2. Charities
- 7.3.3. Government
- 7.3.4. United States
- 7.3.5. Public Officers

## **8. Negligence: Damages**

**8.1. Personal Injuries**

**8.2. Property Damages**

**8.3. Punitive (Exemplary) Damages**

## **9. Vicarious Liability**

By this point in the course, we will have already seen, many times, that the defendant is often not the tortfeasor herself but the tortfeasor's employer. In this section, we will examine the rules determining when Party A can be held responsible for the torts of Party B based on the relationship between A and B.

**9.1. Respondeat Superior**

**9.2. Independent Contractors**