

# WIDENER UNIVERSITY SCHOOL OF LAW

# Torts

Professor Thaddeus Pope    Section 518-B1    Fall 2011

**Contacts:** Room 325; tmpope@widener.edu; 302-477-2230

**Times:** TUE 2:15-3:30 p.m. and THU 12:30-1:45 p.m. and FRI 10:00-11:15 a.m.

**Place:** POL- 401

**Midterm Exam:** Friday, October 14, 2011 from 10:00-11:15 a.m.

**Final Exam:** Saturday, December 17, 2011 from 9:30 a.m. to 1:30 p.m.

## 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 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 a good deal of what we will do in this first semester, first year course will not be focused on doctrinal *content*, but rather on *skills*. Specifically, you will learn how to read and analyze cases, and 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 legal arguments. 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 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 Torts MBE and essay questions on the bar exam.
- E. Further honed legal analysis and writing abilities, through: (i) exposure to and critique of legal arguments in judicial opinions, legislative reports, and scholarly writing; (ii) participation in classroom discussion; (iii) completion of and feedback on weekly problems; (iv) completion of and feedback on a written midterm examination; and (v) completion of and feedback on a written final examination.

### III. Required Materials

- A. Casebook: VICTOR E. SCHWARTZ, KATHRYN KELLY & DAVID F. PARTLETT, PROSSER, WADE AND SCHWARTZ’S TORTS: CASES AND MATERIALS (11<sup>th</sup> ed. Foundation 2005) (ISBN-13: 978-1587788741).
- B. While many retailers are now selling the 12<sup>th</sup> edition of this casebook, we will be using the 11<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 12<sup>th</sup> edition of this casebook, inexpensive copies of the 11<sup>th</sup> edition can be readily obtained from Amazon, Barristers, and other merchants.
- C. Litigation documents: I will post additional and more current materials (*e.g.* pleadings, judicial opinions, articles) to the course TWEN site.

### IV. Class Schedule

- A. The class will meet in POL-410 on Tuesdays from 2:15-3:30 p.m., on Thursdays from 12:30-1:45 p.m., and on Fridays from 10:00-11:15 a.m.
- B. The class **will not** meet on the following four dates: (i) Tuesday, October 11<sup>th</sup> due to In-service, (ii) Friday, November 18<sup>th</sup> due to a conference conflict, and (iii) Thursday and Friday, November 24-25 due to Thanksgiving. The last class of the semester meets on Friday, December 2<sup>nd</sup>.

- C. Depending on class interest, I am happy to schedule one or more extra “review” classes 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. I am also happy to meet, at any time during the semester, both with individual students in my office, and with small groups in the 3<sup>rd</sup> Floor Faculty Conference Room.

V. **What to Do First – at the Beginning of the Semester**

- A. Purchase the casebook.
- B. Register for the TWEN site with the email address that you use most regularly.
- C. If you have not used TWEN before, review the student user guide:  
<http://west.thomson.com/productdetail/1-5704-5/RM157045/productdetail.aspx>
- D. Calendar key course dates into your planner(s).
- E. Register with the Registrar to **type** your midterm and final exams (highly, highly recommended but not required).
- F. 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. This course meets 40 times; so you **may not** miss more than eight (8) classes. I must report excessive absences to the Registrar.
- B. Class Preparation: I employ only a moderate amount of 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) issues, (iv) legal principles, (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. 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 class. This includes: (i) reading the casebook, (ii) briefing the cases, (iii) reading the hornbook, (iv) consolidating prior notes, (v) taking the weekly quiz, and (vi) taking practice CALI questions.
- D. 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."
- E. 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 rules to new fact patterns. That skill can be best developed by *doing* rather than by *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.
- F. Class Participation: *All* students are expected to participate in class discussions. Sometimes this will be through "clickers" like PollAnywhere. Other times, it will be by "cold calling." If illness or emergency prevents you from being fully prepared, please notify me *before* class.
- G. 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 scores of students hostage to the too-peculiar line of inquiry of just one student. If we did not get to them, I am happy to explore your questions outside class in any of the ways described in section XII below.
- H. Laptops: I will use an instant-poll tool 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.

- I. TWEN Participation: Students are encouraged to participate not only in class but also through the TWEN 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 course materials, and (iii) are clearly written (organization & style).
- J. 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.
- K. 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.
- L. 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.
- M. 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.
- N. Outlining: The traditional method of exam preparation for law students involves making an “outline” of all course material. Do **not** wait until December to prepare your outline. After every unit of material (*e.g.* battery), but at least every two weeks, you should review and consolidate your casebook notes, class notes, and other material into an outline, flowchart, or other document. Furthermore, you should aim to edit this growing document every time you add to it, both to improve the organization and to clarify the content.

## 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.
- 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 on time and ending it on time. In return, please do not begin to pack-up early while others are still trying to be engaged in the class discourse.

## VIII. Grading

- A. Weekly Quizzes (10%) – see section IX
- B. Midterm Exam (15%) – see section X
- C. Final Exam (75%) – see section XI
- D. To make my calculations more objective and transparent, I convert all the above percentages into points. There are a total of 320 points for the course. The final exam is worth 240 points. The midterm exam is worth 48 points. The weekly quizzes are worth a total of 32 points. Grading methods are more fully explained in the next three sections.

## IX. Required 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 earlier ones, I want to provide some external motivation to stay current.
- B. Format: Some quizzes will be comprised of three multiple choice questions. Others will entail drafting a roughly 250-word essay. These (along with the midterm) constitute “formative assessment,” while the final exam constitutes “summative assessment.”

- C. Due Date: You will complete the quizzes before class on the course TWEN site. I will announce and post the quizzes on most Thursdays. They will be due before class on the following Tuesday. I will review the quiz in Tuesday's class or post a feedback memo.
- D. Grading: I will grade the quizzes. The ten quizzes, in the cumulative, comprise 10% of your total course grade. Each quiz is worth 3.2 points or roughly 1% of your total course grade (320 points).
- E. TWEN: Many students have found it useful to approach the multiple choice question quizzes in this manner: (i) open and print the quiz, (ii) answer the questions "offline," and then (iii) log-in and submit their answers. The short essay quizzes should be submitted as Word or PDF files in TWEN's "Assignment Drop Box." If you ever have a technical problem that you cannot get West Help to fix, just email me the quiz.

## X. Midterm Exam

- A. Date: The midterm exam is scheduled from 10:00-11:15 a.m. on Friday, October 14, 2011.
- B. Weight: The midterm exam comprises 15% of your course grade, 48 of the 320 total course points.
- C. 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.
- D. Grades: The only letter grade for this course is the final course grade based on the total 320 points. Nevertheless, to enable you to gauge your relative performance, I will assign letter grades to the midterm exams based on the mandatory curve. The letter grades are informational only.
- E. Length: Everything else about the midterm exam is the same as for the final exam, except that the midterm is only 75 minutes instead of four hours. (While you will have 75 minutes in which to complete the midterm, the midterm is designed to be completed within one hour.)

## XI. Final Exam

- A. Date: The final exam is scheduled from 9:30 a.m. to 1:30 p.m. on Saturday, December 17, 2011.
- B. Weight: The final exam comprises 75% of your course grade, 240 of the 320 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 (roughly 30 questions in 90 minutes). The second part will include short or “directed” essay questions (roughly two questions in 80 minutes) focused on one or two specific issues. The third part will include a long essay problem (roughly one question in 90 minutes). 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. This three-part structure has been proven to maximize an exam’s reliability and validity.
- 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. The final exam is cumulative and will include intentional torts, even though that will have already been tested on the midterm.
- E. Open Book: On the exam, you will be allowed to use any written or printed materials you choose. No electronic devices are permitted except through ExamSoft.
- 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 *exactly* 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.examssoft.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 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 260/320, then that student would receive an A. The final grades will comport with Law School’s grading policies and grading curve.
- I. Grading Criteria: I have posted my 2008, 2009, and 2010 Torts midterm and final exams, exam feedback memoranda, and model answers to the library exam database. In addition, you might also look my *Health Law* exams to get a sense of the criteria that I employ in grading. In short, 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 cogently and clearly
  3. An understanding of substantive torts doctrines
  4. An appreciation for broader policy concerns that influence how legal doctrine applies to novel situations
- J. Exam Feedback: Several weeks after the exam, I will post on the TWEN site: (i) a copy of the exam, (ii) a blank scoring sheet and explanatory memo, and (iii) model answers.
- K. Exam Review: 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. Of course, I will be happy to go over the exam with anyone who schedules an appointment to review the exam. On request, I scan and email you a copy of *your* exam answers. If – after reviewing these against the exam, the feedback memo, model answers, 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 to ensure a productive and efficient meeting.

## **XII. 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.

### **XIII. 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:

The TWEN site will include the following materials:

- A. PowerPoint slides for each class, posted before each class
- B. Links to MP3 recordings of periodic reviews and summaries
- C. Links to MP3 recordings of selected classes
- D. Weekly Quizzes (see section IX, *supra*)
- E. Statutes, cases, and other materials

**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.

### **XIV. 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.

#### **A. Study Aids**

1. JOSEPH W. GLANNON, *THE LAW OF TORTS: EXAMPLES AND EXPLANATIONS* (4<sup>th</sup> ed. Aspen 2010).
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 (4th ed. Matthew Bender 2010).
4. KENNETH S. ABRAHAM, THE FORMS AND FUNCTIONS OF TORT LAW (3d ed. West Concepts & Insights Series 2007). In Fall 2010, I required this small paperback book as a companion to the casebook.
5. MARSHALL S. SHAPO, PRINCIPLES OF TORT LAW (West Concise Hornbook Series 3d ed. 2010).
6. RICHARD L. HASEN, GLANNON GUIDE TO TORTS: LEARNING TORTS THROUGH MULTIPLE-CHOICE QUESTIONS AND ANALYSIS (Aspen 2009). 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. VINCENT R. JOHNSON, MASTERING TORTS: A STUDENT'S GUIDE TO THE LAW OF TORTS (4th ed. 2009).
9. 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**

“Reference materials,” on the other hand, provide clear “black letter” explanations of legal principles. In contrast to the “study aids” listed above, given their level of detail and sophistication, you should consult reference books only sparingly. 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. 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, THIRD, TORTS LIABILITY FOR PHYSICAL AND EMOTIONAL HARM (ALI 2010) (available in Westlaw REST-TORTS).
7. RESTATEMENT OF THE LAW, SECOND, TORTS (ALI 1965) (available in Westlaw REST-TORTS).
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. 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 (Aspen 2007).
4. JOHN C. DERNBACH, WRITING ESSAY EXAMS TO SUCCEED IN LAW SCHOOL (3d ed. Aspen 2009) (Dernbach is a Widener professor).
5. TRACY E. GEORGE & SUZANNA SHERRY, WHAT EVERY LAW STUDENT REALLY NEEDS TO KNOW: AN INTRODUCTION TO THE STUDY OF LAW (Aspen 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* (3d ed. Foundation 2009).
9. PETER T. WENDEL, *DECONSTRUCTING LEGAL ANALYSIS: A 1L PRIMER* (Aspen 2009).

## XV. 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 10 pages per class. Later, we will cover between 10 and 20 pages per class.

The current assignment will always be posted on the TWEN home page. Old assignments will be collected as a TWEN “document.”

### 1. Introduction

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

Kerr, *How to Read*

### 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

CB 17-28

- 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.
- 2.1.2. Special Circumstances
  - 2.1.2.1. Children
  - 2.1.2.2. Mistake
  - 2.1.2.3. Insanity
  - 2.1.2.4. 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 CB 28-37
- 2.2.2. Assault CB 37-40, 17-28
- 2.2.3. False Imprisonment CB 40-50
- 2.2.4. Intentional Infliction of Emotional Distress CB 50-66

## 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 CB 66-75
- 2.3.2. Trespass to Chattels CB 75-81
- 2.3.3. Conversion (serious trespass to chattel) CB 81-90

## 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)	CB 91-103
2.4.2.2. Self-Defense	CB 103-106
2.4.2.3. Defense of Others	CB 106-107
2.4.2.4. Defense of Property	CB 107-113
2.4.2.5. Recovery of Property	CB 113-118
2.4.2.6. Authority of Law	CB 125-126
2.4.2.7. Discipline	CB 127-128
2.4.3. Privileges Not Based on Plaintiff Conduct	
2.4.3.1. Public Necessity	CB 118-124
2.4.3.2. Private Necessity	
2.4.4. Justification	CB 128-130

### 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. <b>History</b>	CB 131-132
3.2. <b>Elements of Negligence</b>	CB 132-133
3.3. <b>Balancing: Risk v. Utility and B&gt;PL</b>	CB 133-145

<b>3.4. Reasonable Prudent Person: Intuition</b>	CB 145-150
3.4.1. Stupid Defendants	
3.4.2. Skilled and Talented Defendants	
<b>3.5. Custom and Usage</b>	CB 150-154
<b>3.6. Special Applications of the Reasonable Person</b>	CB 154-168, 10-11
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	CB 168-185
3.6.1.6.3. Informed Consent	CB 185-200
<b>3.7. Rules of Law: Judicial Treatment of Specific Duties</b>	CB 200-204
<b>3.8. Violation of Statute: Legislative Treatment of Specific Duties, Negligence per se</b>	CB 204-206
3.8.1. Applicability of Statute	CB 206-222
3.8.2. Effect of Borrowing Statutory Standard	CB 222-229
3.8.3. Excused Violations	
<b>4. Negligence: Proving Breach</b>	
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.	
<b>4.1. Direct Proof/Evidence</b>	
<b>4.2. Circumstantial Proof</b>	CB 229-237
<b>4.3. Res Ipsa Loquitur</b>	CB 237-258
<b>5. Negligence: Factual (Actual) Causation</b>	
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. <b>Sine Qua Non / But For</b>	CB 252-262
5.2. <b>Proof of Causation</b>	CB 262-269
5.2.1. “But For” Test	
5.2.2. Quantum of Proof Problems	
5.2.3. Special Test: Informed Consent	CB 269-270
5.3. <b>Lost Chance</b>	CB 270-274
For medical malpractice actions in some jurisdictions.	
5.4. <b>Scientific Proof</b>	CB 274-282
5.5. <b>Concurrent Sufficient Causes</b>	CB 282-285
5.5.1. Multiple Cause Problems	
5.5.2. Substantial Factor Test	
5.6. <b>Problems in Determining Responsibility: Only One Defendant’s Conduct Is Sufficient</b>	CB 285-292
5.6.1. Defendant Identification	
5.6.2. Alternative Liability	
5.6.3. Market Share Liability	
<b>6. Negligence: Proximate (Legal) Cause</b>	
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. <b>Unforeseeable Consequences</b>	CB 293-325
6.1.1. Connection between Negligence and Injury	
6.1.2. Directness/Naturalness Test	
6.1.3. Foreseeability of Harm Tests	
6.1.4. <i>Palsgraf v. Long Island R.R</i>	
6.2. <b>Superseding Causes: Forces that Break the Causal Chain</b>	CB 325-344
6.2.1. Negligent Intervening Causes	
6.2.2. Intentional Intervening Causes	
6.3. <b>Public Policy – Limited Duties</b>	CB 344-355
6.4. <b>Shifting Responsibility</b>	CB 355-360

[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 CB 587-592
- 7.1.2. Comparative Negligence CB 592-601
- 7.1.3. Assumption of Risk CB 601-614
  - 7.1.3.1. Express
  - 7.1.3.2. Implied

### 7.2. **Statutes of Limitations and Repose** CB 614-621

### 7.3. **Immunities** CB 621-659

- 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** CB 519-548
- 8.2. **Property Damages** CB 548-550
- 8.3. **Punitive (Exemplary) Damages** CB 550-564

## 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** CB 660-667
- 9.2. **Independent Contractors** CB 667-673