

# **TORTS**

**Course: LAW 509 (Sections 2 & 4)  
Spring Semester 2018**

Professor Deana Pollard Sacks  
Texas Southern University  
Thurgood Marshall School of Law

## **Classes**

**Section 2: Room 202, Noon – 12:50 P.M. (M, W, F)**

**Section 4: Room 107, 1:00 – 1:50 P.M. (M, W, F)**

## **Office Hours (Room 236E)**

**Mondays: 2:00 – 6:00 P.M.**

**Wednesdays: 2:00 – 6:00 P.M.**

## **Contact Information:**

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**TEXTBOOK: Torts And Compensation, Dobbs, Hayden & Bublick  
8th ed. (2017) - West Publishing - ISBN No. 978-1-63460-815-2**

**COURSE DESCRIPTION & OBJECTIVES:** Students will be introduced to the basic principles of tort law and theory. Students will be required to understand the primary types of tort actions (intentional torts, negligence, and strict liability) and the history and theory underlying tort claims. In addition to knowing the elements of the torts covered in class, students will be required to understand the social policy aspects of tort law, such as how the law of torts shapes behavior and expectations, spreads the costs of harm, and balances the costs and benefits of doing business in an industrialized society. Some class information and notices will be posted on TWEN, so please make sure that you are familiar with TWEN. The questions following the assignments are meant to aid your study and are representative of what may be covered on the exams.

## **COURSE GRADES:**

**In torts, the professor turns in raw scores at the end of the year, which comprise 50% of the final grade, and the final grade is given by the law school. The score on the comprehensive exam is the other 50% of the final grade. To be clear: the professor does not actually turn in grades, just raw scores.**

**Exams 1 and 2 were given in the fall, one essay and one multiple choice exam in class, each worth a total possible 100 points. Possible fall points: 200.**

**Spring Exam: There will be a final multiple choice exam per the TMSL spring finals schedule, worth up to 200 points.**

Class participation points: up to 10 additional points for in-class participation when called upon by the professor.

Extra credit assignment: up to 10 additional points (due Monday, March 19, 2018, the day classes resume after spring break). Please note that the extra credit assignment must be submitted in hard copy to the professor no later than 5:00 P.M. on March 19, 2018 in the professor's office (the professor will be in the office from 2:00 – 6:00 P.M. on March 19, 2018).

**Total possible points from torts professor: 420.**

ALL EXAMS ARE CLOSED-BOOK EXAMS, LIKE THE BAR EXAM.

**CLASS ATTENDANCE & CONDUCT POLICY:** The ABA requires class attendance, and the Thurgood Marshall School of Law permits a limited number of absences in order to receive credit for the course. Please familiarize yourself with TMSL policy on class absences. Attendance will be taken daily. Please refrain from entering or exiting the classroom during class time. Please do not interrupt class by asking to be marked present if you are not present when attendance is taken. **If you do not respond to your name being called while attendance is being taken, you will be deemed absent for the day.** The reason is that taking attendance takes up a couple minutes of class time even when it is done very efficiently, and the time we spend on taking attendance should be minimized so that we can focus on substantive law. **No recording of any type (audio, video, or still photo shots, inter alia) is permitted during class without my express, written consent ahead of time. Please turn off all cell phones and other electronic or handheld devices during class or silence them and put them out of your view.**

**SEATING POLICY:** Please decide where you would like to sit during the first few days of class and keep that seat for the year. This allows me to create a seating chart to learn your names.

**A.D.A. STATEMENT:** The Thurgood Marshall School of Law must abide by the Americans with Disabilities Act. Please submit ADA documentation to Dean Mouton, Associate Dean for Student Affairs, in writing, of your request for accommodation during the first week of classes.

## READING ASSIGNMENTS<sup>1</sup>

### Class Date

### Reading Assignment

January 8, 2018

**223-247**

Proving cause in fact, continued. Cause in fact with multiple defendants, multiple causes, and apportionment. *Define alternative causes (Summers v. Tice) and substantial factor cause in fact. What does “preponderance” of evidence mean? How is it applied with defendants or causes that merge to cause plaintiff harm? Why does shifting the burden of proof matter?*

January 10, 2018

**249-265**

Fifth element of a negligence cause of action: Proximate cause, a.k.a. legal causation. *What does Dobbs mean by the “risk rule” (see p. 252, note 1). How is the nature of the harm and its foreseeability determined? How is the class of persons to whom a duty is owed determined? What policies may trump liability despite clear cause in fact? Does proximate cause analysis limit or expand liability?*

January 12, 2018

**265-289**

Intervening causes. *What is an intervening cause? What is a superseding cause (or a supervening cause)? When do intervening causes cut off liability of the original defendant? What policies are furthered by relieving the original negligent party from liability? What policies justify allowing liability against the original negligent party despite intervening causes? What is the rule for whether intentional or criminal intervening acts cut off liability as to the original negligent party? What is the rule concerning negligent intervening acts? Are the cases consistent?*

January 15, 2018:

**Martin Luther King, Jr. Holiday – No Classes**

January 17, 2018

**293-311**

Defenses to negligence: Contributory negligence and comparative fault analysis. *How is contributory negligence proven? Are the elements for the defense of contributory negligence the same as the prima facie case of negligence? What social policies are furthered by a contributory negligence rule? What social policies are furthered by*

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<sup>1</sup> You will need to attend class regularly to know exactly which pages we are covering– it is impossible to know precisely which pages we will cover each day, because it depends on the number of questions students ask, etc. **You are responsible for attending class regularly and keeping up with the reading, even if we get ahead of the assigned pages set forth in this syllabus.**

*adoption of a comparative fault standard? How does comparative fault established by statute (generally) differ from comparative fault adopted by courts?*

January 19, 2018

**311-328**

*Contributory negligence and comparative fault, continued. Is guarding against foreseeable negligence of another part of the duty of care in some cases? What are the traditional exceptions to the contributory negligence bar? Does Bexiga v. Havir strike the right balance of interests in the industrial employment context?*

January 22, 2018

**329-351**

*Express and implied assumption of the risk. How is express assumption of the risk established? How is implied assumption of the risk established? Does a person really have to understand the risks involved to assume them? Is theory different than practice?*

January 24, 2018

**353-369 & 375-392**

*Statutes of limitation, statutory defenses, and federal preemption. Why do we have statutes of limitation? What are the rules that toll the limitations period? What must a plaintiff show to get the benefit of the discovery rule, to toll limitations?*

*Special duties of care based on the relationship of the parties: common carriers, host-drivers, and landowners/premises liability. Define trespassers, licensees, and invitees. How does the plaintiff's status on the premises affect premises liability? Are house guests invited to a party licensees or invitees? What duties do landowners owe to children? Define "attractive nuisance." When is danger so obvious that no warning is owed? When are duties owed to trespassers? What are the differences between the duties owed to invitees, licensees and trespassers?*

January 26, 2018

**392-416**

*Modifications to the traditional categories of land entrants, open and obvious hazards, recreational use statutes, landlord duties to tenants, and the firefighter's rule. What is the firefighter's rule, and who is covered by it other than firefighters? What policies justify the firefighter rule? What is the trend in premises liability law? Why are states protecting landowners from lawsuits by recreational land use when the premises may be dangerous? What duties do landlords owe tenants?*

January 29, 2018

**417-444**

Professional liability – medical malpractice, legal malpractice, and malpractice of other professionals. *Res Ipsa Loquitur* in the medical context. *How does the duty of care change when it relates to health care and other professionals? How do you prove the standard of care in professional malpractice cases? Is it good policy to allow professionals to set the duty of care for themselves, and doesn't this open the door to no liability against professionals who ban together in a "code of silence" and create a very low standard of care or refuse to provide evidence of any other professional's breach of duty?*

Informed consent, the ubiquity of medical malpractice, and tort reform. *What type of information must be disclosed for consent to be "informed?" Who decides whether consent was adequately informed? Does a failure to inform adequately prior to obtaining consent create an action for battery or negligence? How has sexual disease changed the law of informed consent, if at all? Should it? Expect a detailed policy discussion of the law of consent relative to sexual relations in an era of ubiquitous sexual disease. How common is medical malpractice? How does tort reform shift the costs of negligent health care? What would the rational actor assumption predict in terms of health care post tort-reform? Is tort reform good for society? If not, why do people think it is?*

January 31, 2018

**515-539**

Nonfeasance and the "no duty" rule. *What is nonfeasance? Is the rule of Yania v. Bigan good public policy? Do you think the case would turn out the same today? When does a duty arise where the defendant did not create the risk of harm? Does Soldano indicate a shift in the law and expansion of the duty of care/rejection of the no duty rule.*

Governmental nonfeasance. General exceptions to the no duty rule: the liable party's relationship with the injured party and/or the perpetrator of the injury. *What does it take to establish a duty of care by the government? Why isn't the government bound by a general duty of care in dealing with the public at large? When do relationships and circumstances create a duty of care as to people who did not commit the original tortious act? Do you agree with the Podias holding? Is the no duty rule in transition? How might DeShaney affect the plight of abused children?*

**Friday, February 2, 2018:** Read pp. 569-590 (8<sup>th</sup> ed., 2017) (7<sup>th</sup> ed. cross reference will be in blue – pp. 539-559).

Exceptions to nonfeasance/no duty rule based on defendant's relationship with the plaintiff. *When are businesses and professionals responsible to victims for tortious behavior of others? How much a role does foreseeability play in the analysis? When are people responsible to victims of torts based on their relationship to the injured party?*

**Monday, February 5, 2018**

**590-611**

**559-577**

Exceptions to the no duty rule based on defendant's relationship with a dangerous person/tortfeasor. *Do you agree with the holding of Tarasoff? How did Tarasoff change the law? Did the case change the relationship between therapist and patient? Are dram shop laws good public policy or too paternalistic? How do dram shop laws relate to enterprise liability? How can you establish negligent entrustment?*

**Wednesday, February 7, 2018**

**613-643**

**579-607**

Intentional and negligent infliction of emotional distress. *What are the elements of intentional infliction of emotional distress? What are the interests protected by the tort of IIED? How is injury established? What are the tests that courts have used to limit liability for emotional distress that was inflicted negligently? What are the prevailing rules? How is the prima facie case of negligent infliction of emotional distress different from a general negligence cause of action? When can bystanders recover for harms to others under a theory of negligent infliction of emotional distress? What are the general categories of negligent infliction of emotional distress, in the majority of jurisdictions that require specific types of harm to establish NIED (note that California and a few other jurisdictions do not limit the type of harm).*

Loss of consortium and emotional distress unrelated to any risk of physical injury to anyone. *What is a claim for loss of consortium, and how is it proven? When can a person recover for emotional distress unrelated to any risk of physical harm?*

Intentional and negligent infliction of emotional distress. *What are the elements of intentional infliction of emotional distress? What are the interests protected by the tort of IIED? How is injury established? What are the tests that courts have used to limit liability for emotional distress that was inflicted negligently? What are the prevailing rules? How is the prima facie case of negligent infliction of emotional distress different from a general negligence cause of action? When can bystanders recover for harms to others under a theory of negligent infliction of emotional distress? What are the general categories of negligent infliction of emotional distress, in the majority of jurisdictions that require specific types of harm to establish NIED (note that California and a few other jurisdictions do not limit the type of harm, and damages for emotional harm negligently inflicted are recovered under a cause of action for negligence [duty, breach, harm, cause in fact and proximate cause] as opposed to NIED).*

**Friday, February 9, 2018**

**643-663**

**607-625**

Fear of future harm: toxic exposure cases.

Prenatal injuries and preconception injuries: wrongful birth, wrongful life, and wrongful conception. *What is the difference between wrongful birth, wrongful life, and wrongful conception? Who are the plaintiffs in each type of case? How has the law changed relative to prenatal injuries, and how might it change in the future? Why are actual*

*damages (such as the costs of raising a healthy child) generally not sufficient “injury” to establish a claim for wrongful birth? Does it make sense that parents should have the cause of action when medical malpractice results in a severely unhealthy child being born that would have been born had the parents known of the grave/fatal condition of the fetus? Do you see any problems with this? Shouldn’t the child have the cause of action, so that any damages awarded go into trust for the child? If this interests you, see my article, Wrongful Analysis In Wrongful Life Jurisprudence, 55 ALABAMA LAW REVIEW 327 (2004).*

**Monday, February 12, 2018**

**665-682**

**627-636**

*Wrongful death. Who can recover for wrongful death? How can they recover/what is a derivative action? What can they recover? How are they limited in recovery based on the decedent’s fault?*

**Wednesday, February 14, 2018**

**683-703**

**637-654**

*Common law strict liability: vicarious liability/ respondeat superior. Why are some persons or entities held strictly liable for the tortious conduct of others? What policies drive vicarious liability? Are they fault-based or something else? What must a plaintiff prove to demonstrate that an employer is responsible for the torts of an employee?*

**Friday, February 16, 2018**

**704-719**

**654-669**

*Common law strict liability: vicarious liability, independent contractors and ostensible agents. What is the test for whether a worker is an employee or independent contractor? Can an employer ever be liable for tortious behavior of independent contractors? What is a “non-delegable” duty? How can you establish ostensible agency? Note the various categories of vicarious liability, including parents for children’s torts.*

**Monday, February 19, 2018**

**NO CLASS, President’s Day.**

**Wednesday, February 21, 2018**

**721-742**

**671-691**

*Common law strict liability and the advent of a fault-based tort system. Why did America move from a strict liability theory for trespassory torts to a fault-based theory of liability? Was the defendant in Brown v. Kendall at fault? What categories of strict liability survived Brown v. Kendall? What are the elements of a nuisance claim?*

*Common law strict liability for abnormally dangerous activities. What are abnormally dangerous activities subject to strict liability? Who decides which activities are*

*abnormally dangerous? What are the policies supporting strict liability for certain activities? What are the affirmative defenses to strict liability?*

**Friday, February 23, 2018**

**743-762**

**691-711**

*Products liability – evolution and theory. What theories of liability are available for harms caused by defective products? What are the elements of a claim for strict products liability? What is a “defective” product, and who decides? What types of injuries satisfy the injury element of a strict products liability claim? What social policies are furthered by imposing strict liability for products in the absence of fault?*

*Manufacturing defects. How are manufacturing defects different from design/warning defects? What was the social climate in the 1960s when strict products liability was recognized? Would you predict a decline in strict products liability law based on the current social/economic climate? How does the Third Restatement of Torts attempt to change strict products liability law?*

**Monday, February 26, 2018**

**762-782**

**712-733**

*Design defects. Can design defects occur in the absence of negligence or other fault? Who should absorb the costs of accidents where products cause harm through no fault of the product manufacturer, such as unforeseeable death resulting from prescription medications? What is the “cheapest cost avoider,” and what are “avoidance costs?” How does strict liability theoretically minimize the overall costs of accidents? What social policies mitigate in favor of and against strict liability for design defects? Whose burden is it to show that a reasonable/feasible alternative design was possible where such proof is required? Is the burden efficient?*

**Wednesday, February 28, 2018**

**782-801**

**734-752**

*Warning and information defects. Can an otherwise safe product be “defective” due to a poorly-written warning label or instruction manual? When is danger obvious enough that no warning is needed? What is a learned intermediary/sophisticated user, and whose burden is it to warn of product risks where such people are involved? When are post-sale warnings required?*

*Products liability, continued, cases on point of sale warnings and post-sale warnings/recalls.*



**Friday, March 2, 2018**

**801-834**

**753-785**

Defenses to strict products liability: comparative fault and assumption of the risk, statutory compliance (not a defense per se). *Distinguish affirmative defenses from failure of proof of a product defect: misuse and proximate cause. Does a product manufacturer have a duty to avoid foreseeable misuse of its products? Is standing on a chair to change a light bulb misuse of a chair? Is it foreseeable? Can you think of other common misuses of products that can greatly increase the risks of harm?*

Federal Preemption. *When does federal law preemption state tort law? Government contractor defense and statutes of limitation specific to products liability cases. Why do government contractors have defenses that contractors working for private industries do not? Why are there statutes of limitation specific to products liability?*

**Monday, March 5, 2018**

**1011-1033**

**965-985**

Defamation. *What are the elements of a defamation claim? What interests are protected by defamation law? Why did American courts depart from the English rule of strict liability for defamatory statements? What is slander per se? How common is defamation in our culture? Why does the defendant have the burden of truth? How does the First Amendment alter the prima facie case evidentiary requirements for public figures? Why does the First Amendment necessitate increased evidentiary burdens for some categories of speech? What are the conflicting interests the Supreme Court has sought to reconcile by “constitutionalizing” the tort of defamation?*

**Wednesday, March 7, 2018**

**1040-1047**

**991-997**

Invasion of privacy, appropriation of likeness, and constitutional limitations to liability for invasion of privacy. *What are the elements of the four types of privacy actions? How are they different? What interests are protected in each of the four types of privacy actions? Why does the First Amendment limit privacy (and emotional torts) as well as defamation? How has technology changed expectations of privacy? How might Facebook and Twitter affect a party’s privacy case?*

**Friday, March 9, 2018**

**Finish up lectures – catch up day/review/Q & A.**

**Monday, March 12 – Friday, March 16, 2018**

**SPRING BREAK, NO CLASSES.**

<b>Monday, March 19, 2018</b>	<b><u>Extra credit assignment due</u></b> – hard copy to Pollard during office hours 2:00 – 5:00 P.M. Papers must be received by 5:00 P.M.  In class: review intentional torts and defenses to intentional torts.
<b>Wednesday, March 21, 2018</b>	Review negligence and defenses to negligence.
<b>Friday, March 23, 2018</b>	Review strict liability and defenses to strict liability.
<b>Monday, March 26, 2018</b>	Review defamation and privacy, and the defenses to these torts.
<b>Wednesday, March 28, 2018</b>	Final review of materials, question and answer session with students.
<b>Friday, March 30, 2018</b>	<b>NO CLASS – Good Friday.</b>
<b>Monday, April 2, 2018</b>	<b>Practice essay exam-taking skills. Discuss organization and content of essay exam answers.</b>
<b>Wednesday, April 4, 2018</b>	<b>Practice released official MBE questions.</b>
<b>Friday, April 6, 2018</b>	<b>Practice released official MBE questions.</b>
<b>Monday, April 9, 2018</b>	<b>Practice released official MBE questions.</b>
<b>Wednesday, April 11, 2018</b>	<b>Practice released official MBE questions.</b>
<b>Friday, April 13, 2018</b>	<b>Practice released official MBE questions.</b>
<b>Monday, April 16, 2018</b>	<b>Practice released official MBE questions.</b>
<b>Wednesday, April 18, 2018</b>	<b>Practice released official MBE questions.</b>
<b>Friday, April 20, 2018</b>	<b>Practice released official MBE questions.</b>
<b>Monday, April 23, 2018</b>	<b>Students decide content, questions and answers.</b>
<b>Wednesday, April 25, 2018</b>	<b>Students decide content, questions and answers. LAST DAY OF TORTS CLASS.</b>