

TORTS

Course: LAW 508

Fall Semester 2017

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

Class Location and Time:

Section 2: M, W, F - 1-1:50 PM Room 106

Section 4: M, W, F - 3-3:50 PM, Room 203

Office Hours:

Mondays & Wednesdays: 2-3 pm & 4-6 PM

Contact Information:

TSU Phone: 713.313.7159; Cell phone (preferred): 713.927.9935

Email: DeanaPollardSacks@gmail.com

TEXTBOOK: Torts And Compensation, Dobbs, Hayden & Bublick
8th ed. (2017) – West Academic Publishing

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 behind these types of tort actions. 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 may 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, which is given by the law school. 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. There are four 50 minute exams during class, two in the fall semester and two in the spring semester. Each is worth 100 points for a total possible 400 points. No books or notes are allowed for any of the four mid term exams.

Fall Exam 1: Wednesday, October 18, 2017. 100 points possible, which is 25% of professor's class points. In class 50 minute essay exam. Coverage: intentional torts and defenses to intentional torts.

Fall Exam 2: Monday, November 27, 2016. 100 points possible, 25% of professor's score. In class 50 minute multiple choice 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 I need to minimize the time we spend on taking attendance so that we can focus on substantive law (and you should get used to never being late, because being late to court can result in an adverse result for tardiness alone).

No recording of any type (audio, video, or still photo shots, inter alia) is permitted during class without my express, written consent of the professor 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. Please not attempt to save seats for friends. Seating is on a first come basis, and each student may occupy only one seat. If you have a strong seating preference, come to class early until the seating chart is set.

A.D.A. STATEMENT: The Thurgood Marshall School of Law is bound to follow 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 ASSIGNMENTS¹

Class Date

Reading Assignment

Monday, August 21, 2017

No reading required, but please review the syllabus as soon as possible and read it in full, as it will explain where we are going with torts class. It is helpful to have read our textbook, pp. (the next class assignment).

Introduction to civil liability and tort theories. We may discuss the syllabus and classroom policies.

Wednesday, August 23, 2017

Pages 3-16

This section discusses basic tort law theory. We will discuss in some detail the functions of tort law, including deterrence theory, risk-spreading, norm influence, and enterprise liability in later sections, but we will touch upon these ideas during class. While reading the materials, consider: *Why do we need tort law if we have criminal law to deter wrongdoing? Does tort law affect human behavior? What real life circumstances make tort law more or less likely to affect social behavior? Can tort law shape the behavior of insolvent persons? Is tort law primarily about compensation for injury, or is it much broader, perhaps a means of social engineering? What kinds of behavior should give rise to tort liability? Is it socially desirable to charge fault-free wealthy parties for others' injuries based on their ability to pay? How do we strike the optimal balance among these important considerations: respecting individuals' privacy, deterring wrongful conduct, shifting costs to parties at fault (or to parties who caused the harm without fault), minimizing the costs of accidents, and creating pro-social behavior and peace among citizens?*

Friday, August 25, 2017

17-31 & 883-888

Types of damages recoverable in tort law, media influence and the public's perception of the law and lawyers, and pre-trial, trial, and post-trial procedures, which you will need to know to understand the appellate opinions contained in the textbook. While reading the materials, consider: *What are the policies behind the various damages remedies? What is the plaintiff's burden of proof to recover each type of damages? Can you ever get your attorneys' fees in tort lawsuits? What is the public's perception of lawyers in today's world? To the extent that the public's perception of lawyers is negative, how do we*

¹ You will need to attend class regularly to know exactly which pages we are covering— it is very difficult to know precisely which pages we will cover each day, because it depends on the number of questions students ask, and so forth. In general, I will assign reading ahead of time to make sure you have read it when we cover it. I highly recommend doing the readings as far in advance of the lectures as possible, highlighting the reading, and reviewing it just before the class lecture concerning the reading assignments. **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.**

change this? Do you think pre-trial and post-trial procedures can be abused, and if so, how? What remedies do lawyers have when opposing counsel abuses the litigation process and runs up litigation costs?

Monday, August 28, 2017

35-47 + 888-896 + 903-905

This assignment discusses the element-based method of establishing a prima facie case of tort liability based on a theory of fault and begins the section on intentional torts. The elements of a battery claim are reviewed, as well as pain and suffering and punitive damages. *Consider: What social policies are furthered by tort liability for intentional antisocial conduct? What personal interests are protected? Why isn't liability limited through the necessity of actual damages as it is in negligence law? What are the various ways in which a plaintiff may establish intent? What does it mean to "intend" conduct that may result in liability? What must be intended? Distinguish intent to harm and intent to offend. Does intent to offend mean defendant actually sought to make someone uncomfortable, or does the word "offend" have a particular legal meaning in the context of intentional torts? What is the Restatement of Torts? What is the difference between common law and statutory law, and what is "black letter" law? How do punitive damages affect people's behavior? How do caps on punitive damages change the analysis? Who benefits from caps? Who stands to lose from caps, and how? Time permitting, we will discuss the social and legal effects of tort reform relative to caps on punitive damages.*

Wednesday, August 30, 2017

48-60

Battery and assault. *What personal interests are protected by battery and assault, i.e., why is there no element of damages? What does it mean to "intend" to harm or offend someone for purposes of intentional torts? Can the meaning change depending on the region, and who decides whether a contact is offensive? What is transferred intent, and which torts are subject to transferred intent? How are child defendants treated differently in intentional tort law? What is the extended liability principle? Do we need transferred intent if we accept the extended liability principle? What does "apprehension" mean for purposes of assault analysis? Can a person ever sue another person over a kiss, hug, or friendly embrace?*

Friday, September 1, 2017

61-75 & 509-513

False imprisonment, trespass to land, trespass to chattels, conversion and 42 U.S.C. Sec. 1983 claims. *What are the elements to establish false imprisonment, trespass to land, trespass to chattels, conversion, and a 42 U.S.C. Section 1983 claim? What personal interests are protected by false imprisonment, trespass to land, conversion, and trespass to chattels? What kind of intent satisfies the intent element for false imprisonment? Trespass to land? Trespass to chattels and conversion? Why isn't conversion a transferred intent tort? Why is there an element of damages/lost use for conversion and*

trespass to chattels but not trespass to land? What is the remedy for conversion, trespass to chattels and trespass to land? What are the benefits of filing a Section 1983 claim?

Monday, September 4, 2017: Labor Day – no classes.

Wednesday, September 6, 2017 77-99

Defenses to intentional torts. Self-defense, defense of others, arrest and detention/shopkeeper's privilege, defense of property, the "discipline" defense to intentional torts perpetrated against minors (but never adults), and consent. *What is the fundamental principle that drives analysis of all defenses to intentional torts? Who determines whether conduct was reasonable, and from whose perspective is reasonableness determined? Is there a hierarchy of states' interests in protecting human life, health, property, emotional and dignitary harms? Does the law reflect this hierarchy? What are the parameters of the defense of discipline to beating a child? Is it the same for parents and educators? What are the various ways in which consent can be established, including consent for minors, implied consent, and substituted consent. Is consent procured by fraud valid? Can consent to sexual relations procured through lies be vitiated, such that a battery claim (or even rape, according to four states) may be established upon proof of fraud in the inducement of sexual relations?*

Friday, September 8, 2017 99-107 (review session; light reading)

Defenses to intentional torts, continued: privileges (public and private necessity). Review of intentional tort doctrine. *When are people privileged to take action that would be an intentional tort but for the privilege? Does the existence of a privilege destroy the prima facie case or constitute an affirmative defense? What are the elements of private and public necessity and when does the distinction matter?*

Monday, September 11, 2017 111-128

The law of negligence. First element of the prima facie case: Duty. *What is the law of negligence about, and what interests are protected? How are the elements of a negligence claim different from the elements of intentional tort claims? Who decides whether a duty is owed, and who decides all of the other elements? What is the general duty of due care/prudent person standard? How much does the composition of the jury affect this determination?*

Wednesday, September 13, 2017 128-145

Continue duty analysis and negligence per se (duty and breach established by law). *How does a child's duty of care differ from the general duty of due care? When can children be held to a general duty of due care? Why do courts and legislatures adopt rules of negligence per se? What are the exceptions to negligence per se? (See p. 137). If*

violating a statute constitutes negligence per se, does abiding by statutory requirements provide a defense to negligence?

Friday, September 15, 2017

147-162

Second element of a negligence cause of action: Breach. *What are the various ways of proving breach.*

Monday, September 18, 2017

162-171

Proving breach via risk-utility analysis. *What are the various factors that are considered in the risk-utility analysis? When would you choose to establish breach through Judge Learned Hand's "risk-utility" analysis, and how does that affect the analysis of whether conduct was "unreasonable?" How was risk versus utility proven against Boston Edison? Against the Conners Company in US v. Carroll Towing?*

Wednesday, September 20, 2017

171-186

Breach issues. Multiple defendant issues, circumstantial versus direct evidence. *How do multiple defendants affect the analysis of breach? Define direct versus circumstantial evidence.*

Friday, September 22, 2017

837-854

Joint and several liability/contribution/indemnity. *What are the bases for establishing joint and several liability? How is concerted action and the other bases for joint and several liability proven factually? What is contribution? Indemnity? How does comparative fault maximize (or minimize) compensation to injured persons?*

Monday, September 25, 2017

187-202

Proving breach. Res Ipsa Loquitur. *Can custom, safety manuals, and other industry standards establish the duty of care, so that deviation from such standards constitutes breach? If not, can such industry standards be used as part of the prima facie case? What can industry standards prove? What does res ipsa loquitur mean, when might a plaintiff get an RIL instruction based on the facts and evidence, and whose burden is it to request a RIL instruction to the jury?*

Wednesday, September 27, 2017

202-213

Res Ipsa Loquitur. *How have the elements of RIL changed over the years? Do the changes mirror the changes to tort law generally?*

Friday, September 29, 2017

215-233

Third and fourth elements of a negligence cause of action: Harm and Cause in Fact, a.k.a. factual causation. *What type of harm is sufficient to establish the injury element of negligence? When is “but-for” the test for cause in fact? What alternative tests may prove cause in fact? When do you utilize an alternative test to the but for test of causation?*

Monday, October 2, 2017 **233-247**

Proving cause in fact. *Define alternative causes (Summers v. Tice) and substantial factor cause in fact. What does “preponderance” of evidence mean?*

Wednesday, October 4, 2017 **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. 240, 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?*

Friday, October 6, 2017 **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?*

Monday, October 9, 2017 **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 adoption of a comparative fault standard? How does comparative fault established by statute (generally) differ from comparative fault adopted by courts?*

Wednesday, October 11, 2017 **311-328**

Contributory negligence and comparative fault. *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?*

Friday, October 13, 2017 **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?*

Monday, October 16, 2017

Review for Exam 1 (essay).

Wednesday, October 18, 2017

Exam 1 during class (50 minutes).

Friday, October 20, 2017

Review answers to Exam 1.

Monday, October 23, 2017

353-369

Statutes of limitation, statutory compliance (not a defense, generally), 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?*

Wednesday, October 25, 2017

377-409

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?*

Friday, October 27, 2017

409-414

Firefighter's rule and its applicability, trends in the law regarding landowners, recreational land users and statutory protection of landowners. *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?*

Monday, October 30, 2017

414-429

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?

Tuesday: **HAPPY HALLOWEEN** ☺

Wednesday, November 1, 2017 **429-444** (*suggested reading: 444-459 & Sex Torts, 91 Minn. L. Rev. 769 (read only pp. 772-781 + 783-787). Suggested documentary: Hot Coffee.*)

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?

Friday, November 3, 2017 **517-533**

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.

Monday, November 6, 2017 **533-539**

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?

Wednesday, November 8, 2017 **569-590**

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?

Friday, November 10, 2017: Veteran's Day – No classes.

Monday, November 13, 2017 **590-611**

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, November 15, 2017 **613-633**

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).*

Friday, November 17, 2017 **633-643**

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?*

Monday, November 20, 2017 **Review session.**

Wednesday, November 22, 2017 **Review session.**

Thursday and Friday, November 23-24: Thanksgiving Holiday – no classes.

Monday, November 27, 2017 Exam 2 – Multiple Choice – 50 minutes.

Wednesday, November 19, 2017 Review Answers to Exam 2.
(last day of torts in the fall)