

TORTS

Course: LAW 508
Fall Semester 2019

Professor Deana Pollard Sacks

Class Location and Time:
M, W, F - 1-1:50 PM Room 203

Office Hours:
Mondays: 2:00 – 3:00 & 4:15 – 6:15
Wednesdays: 2:00 – 3:00 & 4:15 – 6:15

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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: There will be two exams given in torts class during the fall semester. The first is an essay exam, and the second is a multiple-choice exam. No books or notes are allowed for the exams. The students will also take a multiple-choice comprehensive exam at the end of the course. Professor Sacks's exams are each worth about 25% of the grade, and the comprehensive exam score constitutes about 50% of the grade. Professor Sacks is required to turn in raw scores to the law school, and the law school assigns the grades after the comprehensive exam scores are factored in.

Fall Exam 1: Friday, October 18, 2019. In class 50 minute essay exam. 100 points possible. Coverage: intentional torts and defenses to intentional torts. Professor Sacks

meets with all interested students on a one-on-one basis, to review essay exam answers and scores.

Fall Exam 2: Friday, November 22, 2019. In class 50 minute multiple-choice exam. 100 points possible. Coverage: all of first semester topics. The answers are reviewed and explained in a later class.

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. If you do not respond to your name being called while attendance is being taken, you will be deemed absent for the day. Do not interrupt class time by coming in late and asking to be marked present.

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. Seating is on a first come basis, and each student may occupy only one seat.

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.

NOTE ON READING ASSIGNMENTS: I have created an aggressive reading schedule so that we will have time at the end of the semester to review all of the material together, which is when it begins to make sense as a coherent body of law. Please keep up on the readings so that you are prepared for class, even though we may get behind the reading assignments.

READING ASSIGNMENTS¹

Class Date

Reading Assignment

Monday, August 19, 2019

3-16

This section discusses basic tort law theory. What are the functions of tort law, including deterrence theory, risk-spreading, norm regulation, and enterprise liability? *Why do we need tort law if we have criminal law to deter wrongdoing? Can tort law shape the behavior of insolvent persons? What kinds of behavior should give rise to tort liability?*

Wednesday, August 21, 2019

17-31 & 883-888

Types of damages recoverable in tort law, 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 recover attorneys' fees in tort lawsuits?*

Friday, August 23, 2019

35-47 + 888-896 + 903-905

This assignment discusses how to establish a prima facie case of battery, as well as pain and suffering and punitive damages. *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? Distinguish intent to harm and intent to offend. How do courts define "intent to offend" in the context of intentional torts? What is the Restatement of Torts? What is the difference between common law and statutory law, what is "black letter" law, and what is dictum? How does the risk of incurring punitive damages affect people's behavior? How do caps on punitive damages change the analysis? Who benefits from caps?*

Monday, August 26, 2019

48-60

Battery and assault. *What personal interests are protected by the law of battery and assault? What is transferred intent, and which torts are subject to transferred intent? How are child defendants treated differently relative to intentional tort law? What is the extended liability rule? Do we need transferred intent if we accept the extended liability principle? What does "apprehension" mean for purposes of assault analysis?*

¹ You will need to attend class regularly to know exactly which pages we are covering, but we will adhere to the chronology of the assignments even if we get behind. 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.**

Wednesday, August 28, 2019

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 each of these claims? 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? When can you file a Section 1983 claim, and what are the benefits of filing a Section 1983 claim?*

Friday, August 30, 2019

Finish up and review intentional torts.

Come to class prepared to ask any questions about the course coverage to date.

Monday, September 2, 2019: Labor Day – no classes.

Wednesday, September 4, 2019

77-99

Defenses to intentional torts. Consent, self-defense, defense of others, arrest and detention/shopkeeper's privilege/recapture of property, defense of property, necessity, authority of law, justification, and the "discipline" defense to intentional torts perpetrated against minors. *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? What are the various ways in which consent can be established, including consent for minors, implied consent, and substituted consent?*

Friday, September 6, 2019

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 9, 2019

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?*

Wednesday, September 11, 2019

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?*

Friday, September 13, 2019

147-162

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

Monday, September 16, 2019

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 and the Connors Company in United States v. Carroll Towing?*

Wednesday, September 18, 2019

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 20, 2019

837-854

Joint and several liability/contribution/indemnity/satisfaction/release. *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?*

Monday, September 23, 2019

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 25, 2019

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 27, 2019

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, September 30, 2019

233-247

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?*

Wednesday, October 2, 2019

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?*

Friday, October 4, 2019

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 advanced when the original negligent party is relieved from liability? What policies justify allowing liability against the original negligent party despite intervening causes?*

Monday, October 7, 2019

375-409

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?*

Wednesday, October 9, 2019

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?*

Friday, October 11, 2019

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?*

Monday, October 14, 2019

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?*

Wednesday, October 16, 2019

Review session for Exam on 10.18.19.

Friday, October 18, 2019

In-class essay exam – 50 minutes.

Monday, October 21, 2019

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.*

Wednesday, October 23, 2019

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?*

Friday, October 25, 2019

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?*

Monday, October 28, 2019

590-611

Exceptions to the no duty rule based on defendant’s relationship with a dangerous person/tortfeasor. *Did the Tarasoff case change the relationship between therapist and patient? How can you establish negligent entrustment?*

Wednesday, October 30, 2019

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 1, 2019

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 4, 2019

643-663

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?*

Wednesday, November 6, 2019

Finish up wrongful life, birth, and conception.

Friday, November 8, 2019

Finish up lectures if necessary. Otherwise, review, Q & A, and practice released MBE torts questions.

Monday, November 11, 2019

Finish up lectures if necessary. Otherwise, review, Q & A, and practice released MBE torts questions.

Wednesday, November 13, 2019

Finish up lectures if necessary. Otherwise, review, Q & A, and practice released MBE torts questions.

Friday, November 15, 2019

Finish up lectures if necessary. Otherwise, review, Q & A, and practice released MBE torts questions.

Monday, November 18, 2019	Review session.
Wednesday, November 20, 2019	Review session.
Friday, November 22, 2019	In class multiple choice exam.
Monday, November 25, 2019	Review answers to exam.

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