

TORTS

University of Houston
Spring, 2013

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Class meets: Tu & Th 6:00 – 7:20 PM and Wed 7:30-8:50 PM

**Office Hours: Tues & Thurs 1:30-2:30 & 4:00 – 6:00 PM & by appointment.
Note that I will also be in my office generally on Wednesdays before class.**

TEXTBOOK: Torts And Compensation, Dobbs, Hayden & Bublick
(6th ed. - West Publishing - ISBN No. 978-0-314-18490-0)

COURSE DESCRIPTION & OBJECTIVES: Students will be introduced to the basic principles of tort law and theory. Students will be required to understand the theoretical justifications for, and differences among, the primary areas of tort liability (intentional torts, negligence, dignitary torts, and strict liability) and the history and theory behind these areas of tort law. Students are required to know all elements of all torts covered in class, as well as all defenses to all such torts. Students will be required to understand the social policy aspects of tort law, such as how the law of torts theoretically shapes social behavior and expectations based on the rational actor assumption, spreads the costs of harm, and balances the costs and benefits of doing business in contemporary 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 reading assignments are meant to aid your study and are representative of what may be covered on the exam.

COURSE GRADES:

100% of the grade is based on the final exam: May 7, 6:00 – 10:00 PM. This will be a closed book four-hour final exam: 2 hours of essay and 2 hours of multiple choice questions. Coverage: all material assigned and discussed in class during the semester.

Practice exams will be given on Wednesday, 2.27.13, Wednesday, 4.24.13 & Thursday 4.25.13 during class time. Exam-taking skills will be covered in class, and I am available for one-on-one exam-taking skills training.

CLASS ATTENDANCE: The ABA requires minimum class attendance to receive credit for the course, and attendance will be taken daily. Please contact the law school administration for details on the number of classes you must attend to receive credit for the class.

A.D.A. STATEMENT: The University of Houston is A.D.A. compliant. Please submit ADA documentation to the law school administration during the first week of classes or as soon as possible.

READING ASSIGNMENTS¹

Class Date

Reading Assignment

Tuesday, 1.15.13

No assignment.

We will discuss class objectives, assignments, examinations, and grading. I will then present an overview of tort law and theory and explain the fundamental differences among the major theories of tort liability, how to establish tort claims, and how the defenses are categorized depending on the theory of tort liability.

Wednesday, 1.16.13

2 – 19

This section discusses basic tort theory. We will discuss in some detail the functions of tort law, including deterrence, risk-spreading, norm influence, and enterprise liability in later sections, but we will touch upon these ideas during this 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 peace among citizens?*

Thursday, 1.17.13

20 – 32 & 774-779 (to end of Martin) & 796-803

This assignment addresses the 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 recover 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 change this? Do you think pre-trial and*

¹ 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.** I will do my best to stick to the syllabus precisely.

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?

Tuesday, 1.22.13

35-48

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. *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 cases? 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. What is the Restatement of Torts? What is the difference between common law and statutory law, and what is "black letter" law?*

Wednesday, 1.23.13

48-61

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 social usages of the region? 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 based on a kiss, hug, or other well-intended physical contact?*

Thursday, 1.24.13

61-77 & 431-435

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?*

Tuesday, 1.29.13

78-95 (to end of Notes)

Defenses to intentional torts. Self-defense, defense of others, arrest and detention/shopkeeper's privilege, defense of property, consent, justification, and the "discipline" defense to commit intentional torts against children. *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 wellbeing? Does the law reflect this hierarchy? What are the parameters of the defense of discipline to torts committed against one's child? What are the various ways in which consent can be established, including consent for minors, implied consent, and substituted consent? How can consent be vitiated?

Wednesday, 1.30.13

96-103 & 105-116 (to end of Notes)

Defenses to intentional torts, continued: privileges. *When are people privileged to take action that without the privilege would be an intentional tort? 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?*

Begin section on negligence. *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 is it established in most negligence cases?*

Thursday, 1.31.13

116-137 (to end of Notes)

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 an adult's general duty of due care? Why do courts and legislatures adopt rules of negligence per se?*

Tuesday, 2.5.13

138-157

Element of breach. *What are the various ways of proving breach? 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?" If violating a statute constitutes negligence per se, does abiding by the statute provide a defense to negligence?*

Wednesday, 2.6.13

157-170 & 738-745

Breach issues. Multiple defendant issues, circumstantial versus direct evidence, joint and several liability. *How do multiple defendants affect the analysis of breach? What are the bases for establishing joint and several liability? What is contribution? Indemnification? How does comparative fault maximize (or minimize) compensation? Define direct versus circumstantial evidence.*

Thursday, 2.7.13

170-192 (to end of Notes)

Proving breach. *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 admitted into evidence to help establish a prima facie case of*

negligence? 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?

Tuesday, 2.12.13 194-217

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” (a.k.a. sine qua non) the test for cause in fact? What alternative tests may prove cause in fact? Define alternative causes (Summers v. Tice) and substantial factor cause in fact. What does “preponderance” of evidence mean?

Wednesday, 2.13.13 218-235

Proximate cause, a.k.a. legal causation. What does Dobbs mean by the “risk rule.” How is the nature of the harm and its foreseeability determined? How is the class of persons to whom a duty is owed determined? How is the scope of the risk of harm created by defendant’s negligence determined? What policies may trump liability despite clear cause in fact? Does proximate cause analysis limit or expand liability?

Thursday, 2.14.13 236-250

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 and when does the defendant remain liable despite intervening causes? Is there a clear general rule? What policies are furthered by relieving the original defendant from liability? What policies justify allowing liability despite intervening causes? What is the rule for whether intentional or criminal intervening acts cut off liability as to the original defendant? What is the rule concerning negligent intervening acts? How does the MBE test intervening causes?

Tuesday, 2.19.13 251-266

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 the adoption of comparative fault? How does comparative fault established by statute usually differ from comparative fault adopted by courts?

Wednesday, 2.20.13 266-278.

Contributory negligence and comparative fault. Is guarding against foreseeable negligence of other people or even the plaintiff part of the defendant’s duty of care in some cases? What are the historical common law exceptions to the contributory negligence defense?

Thursday, 2.21.13

279-298 (to end of Notes) & 311-312

Express and implied assumption of the risk, statutes of limitation, and statutory compliance. *How is express assumption of the risk established? How is implied assumption of the risk established? Does a person have to understand the risks involved to assume them? Is theory different than practice? 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? Is statutory compliance ever a defense?*

Tuesday, 2.26.13

Review session for intentional torts/defenses to intentional torts and negligence/defenses to negligence and/or essay exam taking skills: IRAC and modified IRAC. **Note: negligence and intentional torts are the most heavily tested subjects on the bar exam.**

Wednesday, 2.27.13

Practice essay exam during class, to be reviewed in class.

Thursday, 2.28.13

313-330

Special duties of care based on the relationship of the parties: common carriers, host-drivers, and landowners. *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? Can a visitor's status as invitee, licensee or trespasser change in an instant? How? What duties do landowners owe to children? Define "attractive nuisance." When is danger so obvious that no warning is owed? Is any duty of care ever owed to trespassers? What are the differences between the duties owed to invitees, licensees and trespassers, and what events can trigger a different level of protection owed to persons on defendant's premises?*

Tuesday, 3.5.13

330- 345

The 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?*

Wednesday, 3.6.13

346-364

Professional liability – medical malpractice, legal malpractice, and other professional malpractice. 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 a very low standard of care to avoid liability? Can professionals ban together in a "code of silence" and refuse to provide evidence of any other professional's breach of duty? How can plaintiff's lawyers deal with this problem? How is res ipsa loquitur used in the medical context?

Thursday, 3.7.13

364-372 & 437-446

Informed consent and nonfeasance (the "no duty" rule). 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 create an action for battery or negligence? 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?

SPRING BREAK – March 11 – 15, 2013

Tuesday, 3.19.13

446-457 & 477-481

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 or even children known to be in danger? When do relationships and/or circumstances create a duty of care for someone who did not commit the original tortious act and/or did not directly cause injury? Is the law evolving in this regard?

Wednesday, 3.20.13

481-501 (to end of Tarasoff)

Exceptions to nonfeasance/no duty rule, balancing the interests. 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 party committing the harm-producing act? Do you agree with the holding of Tarasoff? Are there any drawbacks to the decision?

Thursday, 3.21.13

501-509 (to end of Notes) & 510-518

Exceptions to the no duty rule, continued. Intentional infliction of emotional distress. Are dram shop laws good public policy or too paternalistic? How do dram shop laws relate to enterprise liability in terms of justifications for liability? In general, how can you establish negligent entrustment? What are the elements of intentional infliction of emotional distress? What are the interests protected by the tort of IIED? How is injury established?

Tuesday, 3.26.13

518-538

Negligent infliction of emotional distress. *What are the tests that courts have used to limit liability for emotional distress that was inflicted negligently? What is the prevailing rule? When can bystanders recover for harms to others? What is a claim for loss of consortium, and how is it proven? When can a person recover for freestanding emotional distress, i.e., without physical manifestation of distress.*

Wednesday, 3.27.13

544-564

Prenatal injuries and preconception injuries, wrongful birth, wrongful life, and wrongful conception. Wrongful death. *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? Which claims are recognized by a majority of jurisdictions? Why is wrongful birth much more commonly recognized than wrongful life? Why are actual damages (such as the costs of raising a healthy child) generally not sufficient “injury” to establish a claim for wrongful birth? How did Roe v. Wade affect wrongful birth and wrongful life jurisprudence analysis (in states such as Texas where abortion was illegal prior to Roe v. Wade)? Who can recover for wrongful death? What can they recover? How are they limited in recovery based on the decedent’s fault?*

Thursday, 3.28.13

565-583

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

Tuesday, 4.2.13

583-598

Vicarious liability, continued. *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? Note the various categories of vicarious liability, including parental liability for children’s torts. Should the parents of the shooters at Columbine High School have been liable for wrongful death? Can vicarious liability lead to a safer society or is vicarious liability purely about assuring compensation for victims?*

Wednesday, 4.3.13

599-614

Common law strict liability and the advent of a fault-based tort system. Nuisance. *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?*

Thursday, 4.4.13

614-630

Development of strict liability. *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?*

Tuesday, 4.9.13

631-648

Products liability – evolution and theory. Manufacturing defects. *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 advanced by imposing strict liability for defective products? How are manufacturing defects different from design or warning/information 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 depart from traditional/established products liability law?*

Wednesday, 4.10.13

648-666 (to end of Notes)

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? Who should bear the burden considering efficiency/economic analysis of law?*

Thursday, 4.11.13

668-682

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?*

Tuesday, 4.16.13

691-709

Defenses to strict products liability: assumption of the risk, comparative fault (not a defense traditionally), and statutory compliance (not usually a defense). *Distinguish the affirmative defenses from attacking plaintiff’s prima facie case based on misuse and*

proximate cause analysis/foreseeability. Does a product manufacturer have a duty to avoid foreseeable misuse of its products? Is standing on a stool to change a light bulb misuse of a stool? Is it foreseeable? Can you think of other common misuses of products that can greatly increase the risks of harm?

Wednesday, 4.17.13

890-907

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?

Thursday, 4.18.13

913-918 & 934-936 & 940-941

Invasion of privacy, appropriation of likeness, and constitutional limitations to liability for invasion of privacy and other torts. 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 and how does the First Amendment limit liability for torts other than defamation? How has technology changed expectations of privacy? How might Facebook and Twitter affect a party’s privacy case?

Tuesday, 4.23.13

Review of class materials.

Wednesday, 4.24.13

Practice essay exam.

Thursday, 4.25.13

Last day of class. Practice MBE/multiple choice torts questions.

Final Exam:

May 7, 2013, 6:00 – 10:00 PM