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# George Mason University

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## Torts 2004-2005 Syllabus

### Introduction

"Torts is at once one of the simplest and one of the most complex areas of the law. It is simple because it concerns itself with fact patterns that can be understood and appreciated without the benefit of formal legal instruction. Almost everyone has some opinions, often strong even if unformed, about his rights and responsibilities towards his fellow man; and almost everyone has had occasion in contexts apart from the judicial process to apply his beliefs to the question or responsibility for some mishap that has come to pass...."

"But the simplicity of torts based upon its use of ordinary language is deceptive. Even if ordinary language contains most of the concepts that bear on questions of personal responsibility, ... more is required for the solution of those difficult cases where the use of ordinary language pulls in different directions at the same time. There is need for a systematic inquiry which refines, but which does not abandon, the shared impressions of everyday life. The task is to develop a normative theory of torts...."

**Family law** examines cases where *blood or marriage ties* result in obligations to others: **Contract law** looks at situations where certain *voluntary promises* create legal obligations. In **Torts**, classically, *neither* family relationships nor voluntary commitments exist. When no promise has been made, and there's no blood tie, why, when, and to what extent should one citizen *ever* be financially liable to another?

The main purpose of this course, as I see it, is to enable you to provide, in light of the case law and doctrine you will read, your own considered and coherent answer to the question posed in the preceding paragraph. The difficulty of this enterprise is matched, I think, only by its interest and importance. Moral philosophy, political theory, and economic analysis will arguably have a lot to say here, and these disciplines will *not* all pull in the same direction in every case.

"Torts" means (in French) "wrongs". We will be examining the legal consequences of "classic" wrongs such as battery, drunk driving and medical malpractice. We will also look at such emotionally charged "current event" conflicts as sexual harassment, racial slurs and defamation. We will examine whether and to what extent Tort law should address these wrongs. We will conduct these discussions without any "politically correct" classroom self-censorship. I mean that: please do not be offended by free-wheeling,

frank intellectual discussion of, say, rape, cross-burning and anti-Semitic taunting – you may one day be obliged to discuss these issues in a courtroom! The classroom is the forum *par excellence* for frank expression of views, and I won't tolerate "PC" censorship of anyone.

**Required text:**

-EPSTEIN, *Cases and Materials on Torts* (Aspen, Eighth Edition), 2004 (hereafter called "The Casebook") [*Do not purchase outmoded editions!*]

-WERTH, *Damages* (Simon & Schuster, 1998) [available in paperback]

The Casebook is crafted for a maximum of eight-credit-hours. At George Mason our course is six credits, spread over two semesters. Thus, the entire book will not be covered. I predict that we will go through the Casebook in the following order, (exact coverage may vary):

- Fall Semester: Chapters 1-6, 10
- Spring Semester: Chapters 7, 8, 13, 14, 16, 17

The *Damages* book by Werth should be read during the Christmas holidays, at the latest. We will go over this book, in some detail, at the very beginning of the Spring Semester.

The readings from both required texts are compulsory. All compulsory readings must be done before the corresponding class. [See "Grading", below] As we are proceeding in the the casebook, and as the Socratic method of this course means our progress varies from class to class, please always make sure you have read ahead at least thirty pages beyond the point reached during the previous class, otherwise you cannot be sure you are prepared. You can always check the TWEN calendar (see below) for the readings for each session.

Other Torts material is seen in Products Liability and in the Tort Theory Seminar, both of which are advanced electives at George Mason.

**Additional readings/ TWEN Virtual Classroom:**

During the term other cases and readings will often be mentioned. Many will be hot-linked on TWEN [*The Westlaw Educational Network*], the online "virtual classroom" in which you all must enroll. These readings will be labeled *useful* (i.e., helpful if you are interested in a particular point), *suggested* (i.e., you will not be deemed to have read them for exam purposes, but they are extremely beneficial to help understand a problem), or *compulsory* (you *will* be deemed to have read them for exam purposes).

TWEN is an integral part of this course. I will post cases and raise new issues for discussion on the TWEN site. You and I will also post comments for continued

discussion. Please make sure that your Westlaw account is active and that you are registered with TWEN. See the Library staff for help with this, as needed.

Excellent participation in TWEN will be considered for grading purposes (see "Grading", below).

Most interesting doctrinal material about Torts is contained in law review articles as opposed to full-length books. A bibliography of articles appears at p. 1265 of *The Casebook*. It is very incomplete. If you are interested in a particular topic, I will be glad to supplement the bibliography for you.

Recent "useful" (remember the description above) books include:

Bell & O'Connell, *Accidental Justice*, 1997

Krauss, *Fire and Smoke: Government Lawsuits and the Rule of Law*, 2000

Levmore (ed.), *Foundations of Tort Law*, 1994

Owen (ed.), *Philosophical Foundations of Tort Law*, 1995

Weinrib, *The Idea of Private Law*, 1995

### **Office Hours:**

I will remain in the classroom after each class for all trailing questions, until or unless we are kicked out by another class.

Office Hours (Room 316) are every Monday and Wednesday from 4:00-6:00 PM. No appointment is needed to see me during office hours. I look forward to meeting many (hopefully all) of you during office hours. Feel free to bring lunch to my office (I'll typically brown-bag it on office hours days).

To schedule appointments outside these hours, leave a message for me at 993-8024 or by e-mail at [mkrauss@gmu.edu](mailto:mkrauss@gmu.edu) -- I'm extremely flexible about meeting times, if given advance notice.

### **Attendance, Grading, and Class Participation:**

Under ABA (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 each group, morning and afternoon, out for signature at the start of each class session. There are no "excused absences" -- nor are you penalized for any absence, provided that you satisfy the 80% attendance requirement. Failure to sign the class list when it comes around will be conclusive evidence of non-attendance that day. Be honorable men and women -- *please* do not come to see me after class to ask to sign the list "retroactively" because you arrived "a bit late".

Note that no switching between morning and afternoon sessions is allowed. If you miss your session in the morning, therefore, you may not make it up by attending the afternoon session. It is important to keep the groups cohesive, and participation active.

Your result on the final exam (format to be announced before Thanksgiving: sample exam to be distributed beforehand via TWEN) will be your final grade, except that there may be an adjustment for class participation as follows:

At my discretion, to determine your final grade the exam result may be raised by one grade level for *exceptional* class participation. The result may also be lowered by one grade level for *unacceptable* class participation.

*Exceptional* class participation is principally a function of high quality, not quantity of interventions. This course is taught using the Socratic method: I ask questions of you, and our progress crucially depends on your willingness and ability to answer those questions. Those whose recurrent contributions advance class discussion, in class and/or on the TWEN site, will receive a bump up. This is obviously a judgment call, and by definition wherever I draw a line someone will fall just short of it. If you don't get the bump, don't take it personally!

I often ask for volunteers, but during every class session I will also randomly call on students from a deck of cards with your names on them. The deck is shuffled every day, so you may well be called on two or more days in a row, or you may not be called on for weeks – it's the luck of the shuffle. As noted above, you are required to have completed assigned readings before class. Not being prepared for class when called on, even once, constitutes *unacceptable* class participation, unless you have taken a "pass" (see immediately below).

If you're not prepared for a class, tell me before the start of that class. I'll give you a "pass"; i.e., I won't call on you that day and you will in no way be penalized. Only one "pass" is available to each student each semester. To repeat, the "pass" must be invoked before the start of class.

### **Compulsory reading for the first session:**

-Casebook, pp. 1-9

Additionally, be prepared to discuss the following problem, in light of your readings:

[Remember, the course is Socratic – our discussion of this problem depends crucially on *you*.]

Is there *any* wrongful behavior that should not result in any Tort liability? Here are examples of wrongful behavior some people believe should not be sanctioned in Tort:

- Mistreatment of one's own child.
- Seduction of a married person.
- Reneging on a promise.
- Cruelly killing a wild animal, or one's own animal.
- Lying.

Why should any of these instances, or others, be exempt from Tort liability? Why shouldn't all wrongful acts be covered by tort?