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Torts (LAW 110) 2009-2010 Fall Semester 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 promised obligations exist. When no promise has been made, and there's no blood tie, why, when, and to what extent should one citizen *ever* be liable to another?

The main purpose of this course 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 all 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 the commission of "obvious" wrongs such as battery, drunk driving and medical malpractice. We will also look at emotionally charged "current event" wrongs like sexual harassment, racial slurs and infliction of second-hand smoke. We will examine whether and to what

extent Tort law *should* address these wrongs, as well as how Torts *does* address them. We will conduct these normative and positive discussions without any "politically correct" classroom self-censorship. I mean that: do not be offended by frank discussion of, for example, rape, cross-burning or anti-Semitic taunting – you may one day be obliged to discuss these acts in a courtroom! The classroom is the forum *par excellence* for frank expression of views, and I will not tolerate "PC" censorship. If you find frank discussion off-limits, you have chosen the wrong field of study.

Required texts:

1. EPSTEIN, *Cases and Materials on Torts* (Aspen, Ninth Edition), 2008 (hereafter called "The Casebook"). Only the Ninth Edition, NOT any older editions, may be used.

The Casebook is crafted for a maximum of eight-credit-hours. At George Mason our course is four credits. Thus, the entire book will not be covered. We will go through the Casebook in the following order (selective pages in several chapters being omitted):

Chapter 1-8, and parts of Chapter 10

2. WERTH, *Damages* (Berkley, 1999)

This book is a journalistic case study of a medical malpractice case, from start to finish. It incorporates many of the lessons of the casebook, and highlights many ethical issues involved in tort lawyering. The must be read in its entirety. Reading it too soon (before you have tort concepts firmly at hand) is counterproductive, so don't read it just yet. I suggest reading this book between Nov. 1 and Nov. 8. In late November or early December we will hold one or two classes to discuss the book, and we will hopefully be assisted by a prominent Virginia medical malpractice attorney.

All compulsory readings will be indicated on the "Calendar" page of the TWEN site [see "Additional readings/ TWEN Virtual Classroom" below]. These readings must be done before the corresponding class. [See "Grading", below]

Other Torts material is seen the Tort Theory Seminar, an advanced elective offered by me every other year at GMUSL, and in Products Liability, which I also teach. I am currently writing a Products Liability textbook for West Publications.

Additional readings/ TWEN Virtual Classroom:

During the semester "outside" cases and readings will quite often be mentioned. Some will be hot-linked on TWEN [*The Westlaw Educational Network*], the online "virtual

classroom” in which you all must enroll as soon as possible (Library staff can help you to do this). Outside readings may be labeled *useful* (i.e., helpful if you are interested in a particular point), *suggested* (i.e., you will not be required 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 and understood them for exam purposes).

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

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. If you are interested in a particular topic, I will be glad to suggest readings for you.

Relatively recent “useful” (as per the description above) books include:

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

Krauss, *Fire and Smoke: Government Lawsuits and the Rule of Law*, 2001

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

Sugarman, *Doing Away with Personal Injury Law*, 1989

Weinrib, *The Idea of Private Law*, 1995

Office Hours:

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

Office Hours (Room 316) are every Wednesday from 12:00 – 5:00 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 snacks or drinks to my office.

To schedule appointments outside office hours, leave a message e-mail at mkrauss@gmu.edu -- I'm flexible if given advance notice. You can reach me by phone at 993-8024 but email works better.

Class Attendance, Grading, and Class Participation Adjustments:

Note: no laptops are allowed in the classroom. All note-taking must be pen-to-paper. I will post an article on TWEN explaining my decision on this count – I reached it three years ago after long deliberation, and students have almost unanimously approved this decision in their evaluations.

This course is taught using the Socratic method: I ask questions of you, and your answers prompt additional questions (by me or by your peers). Your silence will lead me to pass on to other things. Our progress crucially depends on your ability to answer questions posed and to pose questions yourself. Hundreds of questions are posed in the casebook; hundreds of additional questions will be posed in class. Not every question in the casebook or other compulsory readings will be posed in class – but all are subject to be tested.

1. Attendance. 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 you satisfy the 80% attendance requirement. Failure to sign the class list when it comes around to your seat is conclusive evidence of non-attendance that day. I expect you to act as honorable men and women -- do *not* come to see me after class to ask to sign the list "retroactively" because you arrived "just a bit late".
2. Grading. There will be one final exam. The exam will be "closed-book", i.e., you will not be allowed to bring any material into the exam room except for three pages of hand-written notes. Sample exam questions will be posted on TWEN in due course. Your result on the final exam will be your final grade, except that there may be an adjustment for your class and TWEN 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.

What are these things?

- *Exceptional class participation* is a function of high quality rather than of quantity of interventions. Those whose regular contributions advance class discussion, in class and/or on TWEN, 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, it's not an insult –I am bound by a mandated law school grade point mean, so with too many bumps up, exam grades must be lower.
- I often ask for volunteers, but during class sessions I just as often 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, 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, by email or by approaching the podium before I get started. 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. To repeat, the "pass" must be invoked before the start of class.

Compulsory reading for the first session:

-Casebook, pp. 1-10 [We will look at approximately 25 pages per class, on average, but this first session entails some "housekeeping."]

-Two Documents, on TWEN, indicating how to read a case, and detailing the procedural steps in a Torts suit.

-Finally, be prepared to discuss the following problem: [Remember, the course is Socratic.]

Is there *any* wrongful behavior that you feel should not result in 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 without justification.

Why should any of these instances, or others, be exempt from Tort liability? Or should all wrongful acts be covered by tort?