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 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 such as sexual
harassment, racial slurs, stalking and infliction of second-hand smoke. We will examine whether and to what extent Tort law should address these wrongs, as well has 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 intellectual 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 of or by anyone. If you find frank discussion and respectful voicing of views with which you strongly disagree hurtful, you have chosen the wrong field of study.

**Required texts:**

1. KRAUSS, *Selected Materials on Torts*, ISBN: 9781454869542 (hereafter called "The Casebook"). This custom made book is available at the bookstore, for well below the price of the original Epstein casebook from which it's largely derived. We will be covering the entirety of this custom made book.

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 counter-productive, so even though the book is a faster read than the casebook, don't read it early in the semester. I suggest reading this book between Oct. 20 and Nov. 1. In mid November we will hold one or two classes to discuss the book, hopefully be assisted by a Virginia appellate judge with considerable medical malpractice experience.

All compulsory readings will be indicated on the "calendar" page of the TWEN site [see immediately 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, also offered by me.

**Additional readings/ TWEN Virtual Classroom:**

During the term, "outside" cases and readings will often be mentioned in class and online. Some will be hot-linked on TWEN [The Westlaw Educational Network], the online "virtual classroom" in which you all must enroll (get help from Library staff if you don’t know how to do this). I will label outside readings as 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 helpful 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).

Much of the 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.

“Useful” (as per the description above) books include:

Owen (ed.), *Philosophical Foundations of Tort Law*, 1995
Sugarman, *Torts, a Wider View*, 2014

**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 11:30 AM until 3:30 PM, starting on the second week of classes. 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, e-mail me at mkrauss@gmu.edu.
Make up Classes, Class Attendance, Grading, and Class Participation Adjustments:

We must make up the following classes, which are hereby cancelled:

- SEPTEMBER 15
- OCTOBER 15

I will announce make up dates for these classes during our first class session on August 20.

No laptops are allowed in the classroom. All note-taking must be pen-to-paper.

I have posted an article on TWEN explaining my decision – I reached it several years ago after long deliberation, and students almost unanimously approve this decision in their evaluations at the end of the semester.

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). Our progress crucially depends on your ability to answer questions posed. Hundreds of questions are posed in the casebook; hundreds of different ones 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.

- **Attendance.** Following ABA (American Bar Association) guidelines, 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 overall 80% attendance requirement. Failure to sign the class list when it comes around to your seat is conclusive evidence of non-attendance that day. Be honorable -- please do not come to see me after class to ask to sign the list "retroactively" because you arrived "just a bit late". And if you will have to leave class early, don’t sign the attendance sheet for that day unless you will be in attendance for at least 80% of the session.

- **Grading.** There will be one final exam (worth 75% of your final grade) and one mid-term exam (worth 25%). Both exams will be "closed-book", i.e., you will not be allowed to bring any material into the exam room except for one (mid-term) or three (final) pages of hand-written notes and the Tables of Contents of the Casebook. Typical exam questions will be posted on TWEN in due course. The date for the mid-term will be announced in September, and will NOT be on a class day. Finally, an adjustment to your final grade for class participation may take place as follows:

  At my discretion, to determine your final grade the global exams result may be raised by one grade level (e.g., B to B+) for exceptional class
participation. The global exams result may also be lowered by one grade level for *unacceptable* class participation. What are these things?

- *Exceptional* class participation is more a function of high quality than of quantity of interventions. Those whose recurrent 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 up, it's not an insult – remember that I am bound by a mandated law school mean, so the more the bumps up I give, the lower the average exam grade must be.

- I often ask for volunteers, but during every class session I will also randomly call on students from a deck of cards with students’ names on them. The deck is reshuffled 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, 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 during the semester. To repeat, the “pass” must be invoked before the start of class.

**Assignment for the first session:**

- **Casebook**, pp. 1-9 [We will look at approximately 25 pages per class, on average, but this first session entails some "housekeeping."]

- **Documents**, on TWEN, indicating how to read a case, why laptops are banned, and detailing the procedural steps in a Torts suit.

- Finally, be prepared to discuss the following problem: [Remember, the course is Socratic – our discussion of this problem depends crucially on you.]

Is there *any* wrongful behavior that 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.

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