George Mason University

Tort theory seminar 2016

Professor Krauss

SYLLABUS

I. General Comments
The "common denominator" of the selected readings and topics for discussion, and one of the two main goals of the seminar, is the exploration of aspects of the Tort 'iceberg' that we could only chip away at in the basic Torts course. A good knowledge of and interest in the subjects studied in Torts is the only prerequisite for this seminar.

The other main goal of the seminar is to see you produce excellent written work. Published work originating in this seminar has resulted in clerkships and has enhanced and changed professional goals. As you will see, the very structured timetable for the written work is meant to ensure that you produce excellent material. There is no "mandatory mean" for this seminar, because of the small numbers involved, so I look forward to rewarding this excellence.

II. Course materials

The assigned readings for each class session will be posted at the TWEN site for the course before the beginning of the term. Some of the assigned articles are "classic"; others are recent. Some you will love, others will infuriate you (and me!) -- the fact that an article is required reading doesn't mean it is approved of by yours truly!

Readings will come from many sources. To save you money, many law review articles will not be photocopied, as these may be downloaded free of charge via TWEN. Where no downloaded version is available, you must purchase copies at the copy center.

Interesting periodicals to peruse in the law library in determining your essay topic and in researching it (these periodicals are NOT on Westlaw or LEXIS, but they are chock full of tort theory articles) include Philosophy and Public Policy, Philosophy and Public Affairs, Economics and Philosophy, and Ethics.
Several interesting books about torts (to spur thought, instil anger, or elicit praise) are worthy of consideration as background for the seminar, and to help you choose an essay topic. Titles include:

Atiyah, *The Damages Lottery*, 1997
Calabresi, *Tragic Choices*, 1978
Cane, *The Anatomy of Tort Law*, 1997
Cross, *America the Adversarial*, 2003
Dyson, *Unraveling Tort and Crime*, 2014
Gerhart, *Tort Law and Social Morality*, 2010
Harlow, *State Liability*, 2004
Harris (ed.), *Bioethics*, Oxford Readings in Philosophy, 2001
Honoré, *Responsibility and Fault*, 1999
Levin, *Tort Wars*, 2008
Levmore, *Perspectives on Tort Theory*, 1993
Owen (ed.), *Philosophical Foundations of Tort Law*, 1995
Rabin (ed.), *Perspectives on Tort Law*, 3rd ed., 1990
Sosa & Tooley (eds.), *Causation*, Oxford Readings in Philosophy, 1993
Scheffler (ed.), *Consequentialism and Its Critics*, Oxford Readings in Philosophy, 1988
Watson et al. (eds.) *Free Will*, Oxford Readings in Philosophy, 2003
White, *Tort Law in America: An Intellectual History*, 2003
III. The Term Paper

In addition to the 1/3 class participation component (see infra), the seminar grade is 2/3 based on a written paper. The paper must be on a topic relevant to the seminar. Types of papers include: an argument for or against a particular position regarding an important issue of tort law; a detailed and critical review of a recent book or article having implications for tort theory; a critical or historical analysis of a theoretically interesting case; etc.

All drafts of your paper (see infra) should be double-spaced with normal margins. Footnotes should be single-spaced and contained on each page of text (i.e. no endnotes). Use a consistent citation method; parallel cites are not required.

Total length of the final paper must be 20-50 pages, unless written authorization to submit a longer paper is granted. First drafts can be shorter or longer.

An annotated bibliography must accompany your paper (but its length is not included in the page total above). The bibliography will list and summarize (one short paragraph per entry) relevant sources read in preparing your paper, whether or not you cited to them in the paper. First drafts need not contain a bibliography.

The following calendar is mandatory. Failure to comply with any deadline will result in terrible things happening to you!

1. On or before January 26, 2016, you must submit your proposal for your paper. The proposal should be 2-3 pages long, should demonstrate that you have read a bit (maybe 2 or 3 sources, enough to get a good feel for the subject) about your topic, and should show me that you're genuinely interested in it. The key is to convince me that this is not a last-minute choice, but something you have thought about and researched and are seriously interested in. You are very strongly encouraged (but not obliged) to meet with me beforehand to discuss possible topics. [Office hours are Tuesdays, 2-4PM or by appointment]

I will return the proposal to your mailbox, briefly annotated and marked "approved" or "disapproved" by Tuesday, Jan. 31. If the topic is disapproved, you must meet with me before Friday, Feb. 3 to select a topic. If you don't have a suitable topic to propose at this meeting I will assign one. I've almost never had to do this.

It is my experience that a "sham" paper proposal (put together at the last minute by a procrastinating student) is almost a guarantee of a disappointing final paper. Please be prepared to hit the ground running in this seminar!

2. If you wish to request an extension for submission of your draft and final paper, you must do so on or before Feb. 2, 2016 [no exceptions allowed on this]. An extension request must demonstrate more developed reading, a more well-
defined project and a plan for use of the extended time period (see immediately infra). A response to your request will be provided within three days.

The Extension Option

If, say, 100 quality hours are spent on research and writing during the Summer semester, what might have been a very good Spring term paper can be transformed into a prize-winning, publishable article that can reap professional and personal rewards. This is not a pipe dream: it has happened for several students. It has changed career plans and enriched lives.

On the other hand, an extension should not be requested unless you expect to improve the paper over the extension period. My grading standards are higher for papers submitted after an extension than for papers delivered in April. What's more, students who are not really interested in their topic, but just ask for an extension as part of a procrastination strategy, tend to lose focus on a subject matter if they postpone work on it too long – this makes the final paper much worse. Extensions are not no-risk propositions, unless you are prepared to work during the Summer.

Obviously, if you are planning to graduate in May, no extension is available!

3. March 15, 2016 is the deadline for submission of the first draft of your paper. The delay is extended to April 5, 2016 for those to whom an extension has been granted.

The draft should be 15-60 pages long. It can be "rough", i.e., structure and form need not be polished, and research in every area of the paper need not be complete. The first draft must, however, demonstrate substantial research and thought and must demonstrate the “shape” of the final paper.

One week after the first draft is submitted, I will return the draft with written comments and a projected final grade, and schedule individual conferences to discuss each draft.

A projected grade on the first draft does not imply that this grade is ‘locked in’. A good grade on a first draft means it's headed in the right direction, NOT that it can remain untouched. An unimproved first draft would receive a considerably lower grade if submitted as a final paper.

4. On or before April 19, 2016 you must submit the final draft of your paper. The delay is prolonged for a time to be negotiated but not to exceed August 1, 2016, for those to whom an extension has been granted.....
IV. Class participation:

A seminar is a group effort. We all learn from each other -- I certainly hope to learn a lot from my co-seminarians. **If you don't want to prepare for each session and assume prime responsibility for one session, this seminar is not for you.**

I will direct the first two weeks of class. I anticipate that fellow seminarians (i.e., you) will direct remaining sessions, as indicated below. You will be placed "in charge" of a session, alone or with a colleague. This means you will direct class discussion on this topic, and should be very well prepared (typically, by doing research in addition to the required reading) that particular week. Your assigned class session will be communicated to you by **January 12, 2016**, BUT YOU SHOULD FEEL FREE TO APPROACH ME BEFORE THAT DATE TO VOLUNTEER TO LEAD A PARTICULAR SESSION – FIRST COME FIRST SERVED. Your assigned session might or might not be related to your paper topic, though after you submit your paper topic I may modify the class assignments to reflect a particularly interesting term paper proposal.

You are expected to attend and participate in every class session, whether you are leading it or not, and you must accomplish all compulsory readings. [Please notify me in advance if attendance on a particular date is impossible, or if you are not fully prepared for class].

To arrive at your final grade, the final paper grade will count for 67% of the grade. Your leadership of one class session and your participation throughout the semester will constitute 33%.

V. Sample list of discussion topics

(NB We will NOT get to all of these subjects this year. But this list may prove useful in your selection of a research topic. In the later part of the term the interests you have developed during the seminar may affect the assigned readings. **You should indicate any suggestions about readings and/or topics to me before August 1 (see calendar infra).**)

1. Is there a Torts "crisis" in 21st Century America?
2. Overview of competing theories of tort liability
   - efficiency: its meaning and content
   - corrective vs. distributive justice
   - rights-based theories of tort law
   - self-preference vs no-self-preference theories of tort law
   - the role of moral blame in liability
   - the impact of criticisms of free will on theories of tort liability
   - rights based views of moral autonomy (pursuit of life-plans)
3. Standards of care: what does the 'reasonable person' actually do?
-objective and subjective standards of care
-implemention of the negligence standard
-the appropriate role of "joint and several" liability

4. Causation
-the moral importance of causation
-is actual causation factual and determinate? How is it defined in the law, in theory and in practice? How do various tests (but-for, substantial factor, etc.) work?
-what is the appropriate role of statistical analysis in determining tort causation? Is proportional causation appropriate?

5. Damages:
-hedonic damages
-punitive damages
-damages for "loss of chance" and for increased risk
-'pain and suffering' damages
-the collateral benefits rule
-is there any justification for the award of non-compensatory economic, non-economic, or punitive damages?
-what is 'pure economic loss'? Should damages for this be recoverable only in contract, or also in tort?
-should the income of the parties determine damages payable?

6. Assumption of risk

7. Affirmative duties towards others
-duty to rescue
-duty to protect
-duties of government
-duties towards children and fetuses
-tortious interference with contract, tortious contracting (sale of heroin)
-is the active/passive dichotomy tenable?

9. Tort immunity
-should anyone ever be immune from tort liability?
-should corporations (as opposed to individuals) ever be liable in tort?
VI. Want to get an advance start?

Many students ask me what tort theory is. What makes an article a tort theory article, approvable by me, as opposed to just a tort article, which I am averse to approving? In essence, a tort theory article is an article that goes to the root of an issue. What should tort liability in general, or a type of tort liability in particular, look like, and why should it look that way?

Tort theory articles are to be found in many law journals. Examples of tort theory articles can easily be found in colloquia issues, one or more of which you might want to glance at if you’re interested in this seminar. Such colloquia include:


I hope this provisional syllabus gives you enough information to select Tort Theory this Spring. I look forward to an enriching seminar, and hope you will join us!