

Torts
Law 110-003 (73856)

Prof. Claeys
Fall 2021

Syllabus
Current as of August 19, 2021

Meeting Times: Monday, Wednesday, 1:50 – 3:50 p.m.
Exam: Thursday, December 9, 2021, 12-4 p.m.

Office hours and contact information

My phone number is (703) 993-8247. My email address is eclaeys@gmu.edu. The course also has a TWEN site, and I am reachable on the discussion board of that site. Please register for the TWEN site; it is my primary medium for group communications with students.

This semester, I will hold office hours Mondays, 4-5 p.m. These are “drop-in” hours, meaning that I do not have any other appointments during them. You are free to come in to my office without appointment. However, I am happy to schedule appointments if you have a conflict during office hours or if you prefer for other reasons.

Course coverage

A really, really thorough study of torts probably takes 8 class-hours. Such a study covers (1) intentional torts to interests in one’s body, emotional well-being, and property; (2) traditional forms of strict liability; (3) negligence; (4) causation issues that arise in strict liability and negligence; (5) issues that arise in strict liability and negligence when more than one defendant is sued for the same accident; (6) modern products liability; (7) intentional torts to personal interests in reputation and privacy; (8) torts associated with unfair competition and interference with contract; (9) workers’ compensation and other statutory alternatives for torts; (10) various immunities against tort suits; and (11) damages and other remedies for torts.

Obviously, this class has only 4 class hours, and we can’t possibly cover all of the topics I listed in the last paragraph. I hope to cover topics (1)-(5) thoroughly. I hope to give you a brief overview of topic (6). But I hope also to help to teach you how lawyers organize torts, what elements they possess, what arguments arise in hard cases, and to what fundamental principles lawyers appeal when they deal with torts problems of first impression. In other words, I hope to teach you enough general principles that you readily can learn on your own the doctrines we can’t cover in class. I also hope to give you a theoretical perspective on torts. Torts scholars argue whether torts law is best justified on economic grounds and philosophical grounds; I hope to help you appreciate both perspectives.

Learning outcomes

Learn the common law doctrines for intentional torts to persons and property, for the main fields of traditional strict liability, and for negligent damage to persons or property.

Learn standard arguments in tort about causation and liability, in two- and multi-party disputes.

Get a brief overview of products liability.

Learn economic, corrective justice, and rights-based justifications for tort.

Learn standard policy arguments made by plaintiffs and defendants (respectively) for and against tort liability in cases of first impression.

Learn basics of common law reasoning.

Get a brief overview of the ways in which statutes inform common law reasoning in torts.

Cancellations and make-up classes

At this time, I do not anticipate canceling any classes. If I need to cancel class suddenly due to illness or some emergency, I will have my secretary post notices in the atrium and on the door of our classroom, and I will send an email to the class via the course TWEN page's email system.

Class reading

Reading will vary anywhere from 7 pages per class session to 40 pages per class session.

Class attendance

Regulation 4.1 in the law school's Academic Regulations requires that students attend class at our law school on a regular basis. The same regulation specifically states: "If a student is absent for any reason for more than 20 percent of the sessions of a course, the student is not eligible for credit in that course." For a 26-class-session course like Torts, AR 4.1 requires that students not be absent for more than 6 classes. I do not enforce this requirement when I need to reschedule class due to illness or non-GMU commitments. Otherwise, however, I do follow this regulation, and I administer it by distributing and asking you to sign an attendance sheet during class.

AR 4.1 applies to absences "for any reason." In other words, it is your responsibility to keep track of your absences. It is also your responsibility to anticipate possible absences. You may decide you need to be absent to explore professional opportunities, to observe holidays in your religion, or to take care of personal matters. It is your responsibility to limit the number of class days for which you're absent for such reasons, and also to factor in the possibility that you may be absent from class unexpectedly for illnesses or personal emergencies.

I do not need to be notified in advance if you're going to be absent. Ordinarily, over the course of the semester, I communicate with you about the number of classes for which you've been absent. In such correspondence, I am not interested in knowing the grounds for absences; my intention is to administer AR 4.1, and that being so my intention is simply to get on the same page with a student about the number of class-hours attended and missed.

I reserve authority to take measures reasonably appropriate to ensure compliance with the law school's attendance requirements. If a student misses more classes than allowed by AR 4.1-1, the student is not eligible to sit for this course's examination. In extraordinary circumstances, I reserve discretion to have a student ineligible for the exam under AR 4.1-1 perform substitute work equivalent to class attendance ... as long as the student does not miss more than (8 85-minute class sessions) total. Students who believe they are eligible for this exception should petition me in writing and explain why (AR 4.1-2) they "have merit" in their request to substitute work for class lectures missed over the 6-class limit.

If a student misses more classes than allowed by AR 4.1-1, and does not receive the benefit of an exemption consistent with AR 4.1-2, I notify the law school's administration and the student is not eligible to sit for this course's final examination.

Class preparation and participation

I expect you to be prepared for class. For any case excerpted at any length longer than a page, I expect you to understand the facts, the lawsuit, the theories of the case adopted in the majority and any separate opinions.

When the casebook presents a "squib" case—that is, a case consolidated into a paragraph or so, I expect you to know the facts, the holding, the rationale, and the contribution to the general line of doctrine covered in class. When the casebook refers to statutes, I expect you to read them closely enough to answer questions about them.

I call on students during class, to discuss material that a lawyer should have been able to digest from the reading without much assistance. If you are unprepared and wish to avoid getting called on, please notify me before the beginning of class. (I prefer emails, at least an hour before class.)

I reserve the authority to take actions reasonably appropriate to ensure compliance with the participation policies discussed in this section. In particular, if a student refuses on several occasions to participate in class when called on, that refusal may justify lowering the student's final grade below the grade earned on the final examination.

Classroom decorum

During class, I expect you to be generally respectful to me and your classmates. Imagine the standards of comportment you would use if you were a lawyer, sitting in front of a judge, watching as the judge engages another lawyer in the proceeding. Please treat me and any of your colleagues with whom I am conversing with the same professional courtesy.

This respect and courtesy also extend to dress. (I'm sorry I need to raise the subject, but it became an issue teaching remote students last year.) Please dress in a manner appropriate for a classroom setting. If it helps, please avoid attending class (in person or virtually) in sleep wear, gym wear, or beach wear; please try to dress as you would if going to a nice mall or to a public meeting. I reserve the authority to ask students to leave class if they are dressed inappropriately (with appropriate repercussions following for class attendance.)

Virtual Classroom Management and Logistics

As I write this syllabus, I understand that our class is going to be in-person. In a world with COVID, however, I can't rule out the possibility that I may be directed to teach you remote or hybrid. Herewith some policies for online or virtual learning:

- If I need to teach hybrid, I'll teach synchronously in person and on Zoom. I'll set up the meeting links on Zoom, and I'll send those to everyone in advance of class.
- *Everyone* will be expected to sign in and join class on Zoom. This requirement applies to students attending in person and also students attending virtually.
- On your videoconference platform account, please make sure that your first name, last name, and school profile picture are all uploaded.
- *If you are attending in person*, please keep your computer microphone muted at all times. Keep your microphone muted even when you speak; we'll rely on ceiling microphones to carry your comments on Zoom. You may have your video feed OFF when you are not speaking in class. However, whenever you speak in class, please turn your video feed back ON.
- *If you are attending on line*, when class is in session, you are expected to have your computer camera ON and your microphone OFF. (Of course, please do turn your microphone on when you participate in class discussion.)
- If you're attending in person and have something to say, please put your hand up.
- If you're attending on line and have something to say, please send me a message via Zoom's chat function. I prefer that you send a short message that you have a question, and that you ask the question orally. (If you don't, I'll read your question back to the class anyway before answering it.)
- You are encouraged (though not mandated) to use a microphone or earphone/mike headset during class.
- To a large extent, we'll need to play things by ear if we need to go to remote learning for the whole class. That said, it is very likely that, for reading assignments that DON'T already have problems assigned, I'll construct problems in advance of class and we'll discuss those in addition to the materials assigned in the reading schedule below.

Recording classes

I reserve all property rights in my class lectures, presentations, and discussions. As a general rule, I prefer that classes not be recorded, and if I need to make recordings I prefer not to pass them on. I like to encourage free and frank discussions of class materials, and in my experience wide distribution of class recordings tends to chill discussions. However, I will grant permission to record (or, pass on recordings) in specific cases when a student can demonstrate a special need. If you think you have such a need, please inquire.

How you should inquire depends on the nature of the need. If your need is COVID-related, please let me know a.s.a.p. I'll record class and make the lecture available.

If you think you have a disability-related need, please contact GMU's [Office of Disability Services](#). ODS has a process for administering disability-related requests for accommodations, and in that process ODS serves as a go-between between a student-applicant and that student's instructor.

If your need is neither COVID- nor disability-related, you are free to ask me in personal communication or to ask me anonymously. To make an anonymous request, please contact Annamaria Niels, Associate Dean for Student Affairs (ანიელს@gmu.edu) or Christine Malone, Director, Student Affairs (cmalone4@gmu.edu). Deans Niels and Malone will be happy to explain the basis for a recording request to me while leaving a student's identity out of the request.

Grading

The grade for this class will be based exclusively on a 4 hour examination. (The only exception to the exclusivity of the exam is for serious breach of the class participation policy, see above.) If it is possible for the exam to be administered in person, it will be, and it will be a closed-book closed-note exam. It may not be possible for the exam to be administered in person. If so, it will be administered on line with Exam Pro (or some similar software program if the Records Office surprises me and gives up on Exam Pro). If the exam is online, it will be open-book, open-note.

Course materials

We will rely primarily on a casebook: Richard A. Epstein and Catherine M. Sharkey, *Cases and Materials on Torts*. Aspen, 12th ed. New York: Wolters Kluwer, 2020. ISBN-13: 978-1-5438-0445-4.

I will assign a few supplemental readings. I'll distribute a handout on the first day of class, and I'll also post copies of the supplemental readings on the TWEN site.

Reading schedule

What follows is a list of reading units I hope to cover in this class. I will assign 2 or 3 units per (2-hour) class session. All references to "pp." are to Epstein and Sharkey, *Cases and Materials*

on *Torts*, 12th ed. When the reading assignment mentions a case by name after the page assignments, you may assume that I'll discuss the case and you should be ready to be called on to discuss it. (Whether it's a "lead" case or a "squib" case.) If the assignment doesn't specifically mention a case, you may assume that I'm not planning to discuss it in class. I may bring it up if class conversation takes us in the direction of the case, and you should feel free to ask questions about it.

For our session on August 23, please read units 1 and 2.

1. Battery.

Pp. 1-11. Vosburg, Garratt, Talmage. And the issue in n. 4: When battery is classified as an 'intentional' tort, in what senses is battery 'intentional' and not 'intentional'?

2. Trespass to land.

Pp. 11-14 end n.3. Dougherty, Brown, Cleveland Park Club.

Supp. 1-3. McKee v. Gratz. (Again, this and all other supplemental materials are available on the course TWEN site.)

3. Trespass to chattels and conversion.

Pp. 554-55.

Supp. 4. RST Sec. 218.

Pp. 563-67 end n.3. Poggi, Fouldes, Maye.

4. Emergency assistance, and consent

Pp. 15-23. Mohr, Kennedy, Hoofnel, Schloendorff, Cooper, O'Brien.

5. Consent rendered void as being against public policy

Pp. 23-29. Hudson, Hart, Barton, the sports cases nn. 3-4.

6. Mental disability.

Pp. 29-32. McGuire.

7. Self-defense.

Pp. 33-37. Courvoisier, Morris, Boston.

8. Defense of Property: The basic law.

Supp. 5. Restatement (Second) Torts § 260.

See also p. 13 n.3. Consider this hypothetical. Jane owns land, Dick flies a drone over it, Jane didn't consent to the overflight, and Jane shoots the drone down while it is over her property. What action does Dick have against Jane? Does Jane have a defense?

Pp. 42-43 n.3.

9. Defense of Property: Mechanical Devices.

Pp. 37-39. Bird v. Holbrook.

10. Interlude I: Law, economics, and intentional torts.

Supp. 6-8. Excerpts of Posner, "Killing or Wounding."

Supp. 9-11. Excerpts of Finnis, "Allocating Risks or Suffering."

11. Necessity.

Pp. 44-49. Ploof, Vincent.

12. Preemption for public health measures.

Supp. 12-18. Crosswhite v. Barnes, VA Code §§ 32.1-43 & -48, Sayers v. Bullar.

Read the materials with this hypothetical in mind.

The Virginia State Health Commissioner issues an order with the following finding: “I find it is necessary for all Virginia residents to be vaccinated against COVID-19 except those to whose health the administration of a COVID-19 vaccine would be detrimental (as certified in writing by a licensed Virginia physician).” The order proceeds to authorize employees of the State Health Commission and all Virginia city and county health departments to go about in public and inquire whether people they encounter have been vaccinated or are exempt under the detrimental-to-health exception. The order directs employees to vaccinate, on the spot, residents who do not have written proof of vaccination or a doctor’s excuse.

Barney is an employee of the Arlington County Health Department. Barney encounters Jane Doe on a sidewalk in Clarendon. Doe hasn’t been vaccinated, and Barney injects her with a vaccination then and there on the spot. Doe experiences pain at the injection but suffers no bad after-effects. The vaccine increases Doe’s resistance to COVID-19 but she is an anti-vaxxer and didn’t want the vaccine. Doe brings this suit against the official.

Result? Focus only on the tort principles we’ve covered to this point and on the legal issues from the materials assigned for this session. (In other words, there are a lot of other issues of law that would arise in a real-life dispute like this hypothetical—especially in administrative law, health law, and constitutional law. But don’t worry about them here.)

13. Assault, offensive battery.

Pp. 55-59. I. de S., Tuberville, Allen, Brower, Alcorn.

Supp. 19-21. Yahr, story on the Mueller v. Swift suit.

14. False imprisonment.

Pp. 60-65. Coblyn, Bird.

15. Emotional distress.

Pp. 65-71 end n. 2. Wilkinson, Bouillon, Siliznoff, George, Rockhill, Patterson.

16. Interlude II: Theories of tort.

Supp. 22-39. Excerpts from Shavell, Economic Analysis of Accident Law.

Supp. 40-41. Excerpts from Aristotle, Nicomachean Ethics.

Supp. 42. Excerpts from Blackstone, Commentaries on the Laws of England.

Supp. 43-46. Excerpts from Goldberg and Zipursky, “Torts As Wrongs.”

17. Negligence and strict liability: historical background.

Pp. 84-85 n.2, the discussion of Gibbons v. Pepper only.

Pp. 96-116. Brown v. Kendall, the Rylands litigation, Brown v. Collins.

18. Strict liability: Animals.

Pp. 576-81 end n.3. Gehrts, Baker, Kennedy, Rubenstein.

19. Strict liability: Ultrahazardous activities.

Pp. 585-92 end n.1. Spano, RST §§ 519-20, RTT § 20.

Pp. 601-03 n.3. Madsen, Yukon Equipment.

20. Strict liability: Nuisance (1).

607-09 nn.1-2. Cal. Civ. Code § 3479, materials on reasonability in nuisance.

Supp. 47-52. Pestey v. Cushman.

Pp. 612-13 n.3. The “live and let live” norm, and Bamford.

Supp. 53-55. Gilbert v. Showerman.

21. Strict liability: Nuisance (2).

Pp. 614-23. Fontainebleau Hotel, Prah and Tenn, the materials on projection, Mathewson and Rattigan, and Belmar.

22. Strict liability: vicarious liability; basics.

Pp. 649-57, but not 655 n.6. Bushey & Sons, Coe, Doe.

23. Strict liability: vicarious liability; independent contractors who aren't really independent.

P. 655 n.6.

Pp. 657-65. Saleem, Petrovich.

Read Saleem. Then imagine a hypothetical case Thomas v. Black Car Special. Thomas gets hit on a highway by a car driven by a driver named Ellis. Ellis hits Thomas while texting someone else. (I.e., you may assume that Ellis drove negligently.)

Ellis has few assets, but Ellis drives for Black Car Special. Black Car Special is a black-car service like Corporate Transportation in the Saleem case. Black Car Special's franchise agreement with Ellis is similar to the agreement Saleem had with Corporate Transportation, but there are two differences. Ellis covenanted in his agreement that he would not drive for any town-car service or rideshare service (like Uber or Lyft) as long as the agreement was in effect. The agreement also specifies that, if Ellis drives 20 hours a week and gives Black Car Special a week's notice of his intention to do so, Ellis will get priority for driving jobs that come open when he commits to work. In addition, customers of Black Car Special call it for rides and get assigned drivers by the company's dispatcher.

Thomas sues Black Car Special for the damage she suffers from Ellis' driving-while-texting. What result?

24. Negligence: Introduction, and the reasonable-person standard (1).

Pp. 143-54. Vaughan, Roberts, excerpts from Holmes, The Common Law.

25. Negligence: The reasonable-person standard (2).

Pp. 155-66. Daniels, Breunig, Fletcher, Denver.

26. Negligence: risk calculus (1).

Pp. 177-80. Carroll Towing.

Then circle back and read Pp. 167-73. Blyth, excerpts by Seavey and Terry, Osborne.

27. Negligence: risk calculus (2).

Pp. 173-76. Cooley.

Pp. 181-88. Andrews, Ross excerpt, notes on problems applying the Hand formula.

28. Negligence: custom.

Pp. 188-99 end n.3. Titus, Mayhew, T.J. Hooper.

29. Negligence: Breaches of protective statutes and regulations.

Pp. 226-33 end n.4. Osborne, Clinkscales, Stimpson, Gorris, licensing materials in n.4.

30. Negligence: res ipsa loquitur.

Pp. 259-261 end n.2. Byrne, Larson, Connolly.

Pp. 265-68, pp. 269-70. Colmenares, McGriff, Miles.

31. Plaintiff's conduct: contributory negligence.

Pp. 285-88. Butterfield, Beems.

Pp. 291-97 end n.3. Gyerman.

32. Plaintiff's conduct: contributory negligence in plaintiff's use of property.

Pp. 300-07. LeRoy Fibre, Derheim.

33. Interlude III: Law, economics, and disputes over accidental property damage.

Supp. 56-63. Excerpts from Coase, “The Problem of Social Cost.”

Supp. 64-69. Excerpts from Posner, *Economic Analysis of Law* (1st ed. 1973).

Supp. 70-80. Excerpts from Coleman, “Efficiency, Auction, and Exchange.”

34. Plaintiff’s conduct: Last clear chance, imputed contributory negligence.

Pp. 308-14. Fuller, Kumkumian.

35. Plaintiff’s conduct: Assumption of risk.

Pp. 315-24 end n.3, 326-27 n.6. Lamson, Murphy, the distinction between primary and secondary assumption of risk (322-23 n.2), Marshall v. Ranne.

36. Plaintiff’s conduct: Assumption of risk rendered void as against public policy.

Pp. 328-34. Dalury, Chepkevich.

37. Plaintiff’s conduct: Comparative negligence; its emergence.

Pp. 334-49. Li, materials on introduction of comparative negligence.

38. Plaintiff’s conduct: Comparative negligence in legislation.

Pp. 349-52. Please be prepared to discuss the problems on p. 351.

39. Causation: Cause in fact; the “but for” test.

Pp. 353-65. Grimstad, Zuchowicz, Haft.

40. Causation: Cause in fact; the “lost chance” doctrine and proof issues.

Pp. 399-404 end n.2. Herskovits.

Pp. 406-11 end n.2. Joiner, the Bendectin litigation.

41. Causation: Multiple causes and joint and several liability; traditional principles.

Pp. 365-68. Merryweather, Union Stock Yards.

Pp. 414-15. Restatement (Second) Torts § 431.

Reread p. 353, summarizing Rest. (Third): Liability for Physical and Emotional Harm § 26.

Pp. 379-84. Kingston. Restatement (Third) Torts: Liability for Physical and Emotional Harm § 27, Rest. (2d) Torts § 433A.

Supp. 81-82. Rest. (Third) Torts: Apportionment §§ 10-12, 15-17, 26.

Pp. 385-87. Summers.

42. Causation: Multiple causes and joint and several liability; modern apportionment.

Pp. 368-84. Cal Civ. Proc. Code §§ 875-877.5; American Motorcycle Association.

43. Causation: Market share liability.

Pp. 388-98. Sindell, Skipworth, Thomas.

44. Causation: Proximate cause I.

Pp. 415-24. Ryan, Berry, Smith, City of Lincoln, Tuttle, Price, Hines, Horton.

45. Causation: Proximate cause II.

P. 299 n.7. Smithwick, Mahoney.

Pp. 424-32. Brower, Wagner.

46. Causation: Palsgraf and proximate cause.

Pp. 444-57. Palsgraf and its effects.

47. Causation: Modern proximate cause doctrine.

Pp. 457-64. Marshall, Virden, Hebert.

48. Affirmative duties: The duty to rescue; the basic position.

Pp. 481-92. Buch, Hurley, the Good Samaritan parable, and the scholarly perspectives on the duty to rescue.

49. Affirmative duties: The duty to rescue; limitations on the basic position.

Pp. 493-96 nn. 3-4. Statutory responses to the duty to rescue, and empirical data about rescue attempts.

Pp. 496-500 end n.3. Montgomery, Newton, Scruggs, Zelenko, Soldano.

50. Affirmative duties: Duties of owners and occupiers.

Pp. 501-09 end n.5. Addie & Sons, Excelsior Wire Rope Co., Gould, cases noted nn. 4-5.

51. Affirmative duties: Deconstructing the traditional rules for owners and occupiers.

Pp. 509-17 end n.2. Rowland, Mallet, Koenig, Ward.

52. Affirmative duties: Gratuitous undertakings.

Pp. 519-31. Coggs, Erie R.R. Co., Moch.

53. Affirmative duties: Special relationships.

Pp. 533-34 n. Weirum.

Pp. 543-52. Tarasoff.

54. Products liability: background.

Pp. 667-79. Context for products' suits, Winterbottom, Huset, Kuelling, MacPherson.

Pp. 683-86. Escola.

55. Products liability: "sellers," and defects in manufacture.

Pp. 705-11 end n.2. Oberdorf, Vandermark, and Cafazzo.

Pp. 698. *Restatement (Third) of Torts: Products Liability* § 2(a).

Pp. 713-18.

56. Products liability: design defects.

Pp. 720-24. VW.

Pp. 728-33 end n.1. Barker.

Pp. 736-39 end n.2. *Restatement (Third) of Torts: Products Liability* § 2(b), Muskin, Potter.

57. Products liability: defect in virtue of a breach of the duty to warn.

P. 698. *Restatement (Third) of Torts: Products Liability* § 2(c).

Pp. 755-65. Hood, DeVries.