

Torts
Law 110-001 (71984)

Prof. Claeys
Fall 2024

Syllabus
Current as of August 8, 2024

Meeting Times: Monday, Wednesday, 9:50 – 11:50 a.m.

Final exam: Wednesday, December 11, 2024, 12-3 p.m.

There will also be a midterm exam. The midterm will take an hour and 30 minutes. Tentatively, I'm scheduling it for Wed., Oct. 2, 9:30 – 11 a.m. But the date and time may change after consultations with the Records Office and other Torts instructors.

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 Wednesdays, 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, online classes, 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.

At this time, I know I need to convert one of our classes from an in-person class to an online class—Wednesday, September 18, 2024. I'll post to the TWEN site a Zoom link for that class. (Since the class is taking place at the regularly-scheduled time, it will be a mandatory-attendance class as all in-person classes are.)

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 classes regularly. 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 5 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. (When I need to teach online, as on Sept. 18, I save a list of students who logged in for the 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 eight (8) 110-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 5-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.) Please do not get in the habit of asking off the class call list, however.

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. The same goes for asking off the class call list too often.

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 during the pandemic.) 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

In our world post-COVID, 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 (aniels@gmu.edu). Dean Niels 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 on two tests. I will administer a midterm examination during one regular class session (as of now, probably Wednesday, October 2). The midterm will be 1:30 and will count one quarter (25%) of your grade.

There will be a 3-hour final examination at the day and time set by the law school (see page 1 of this syllabus). Your grade on the final examination will count 75% of your grade.

In both the midterm and the final, you will be expected to write an essay and answer multiple choice questions. You will be expected to spend more than half of your time on the essay in each case, but I'll work out the ratio of time (and grade weight) between essay and multiple choice when I construct both exams. (I'll announce the ratios in advance of both exams.)

For both exams, if it is possible for them to be administered in person, they will be. If it is possible for them to be administered as secure, closed-book, closed-note exam, they will be. If the exams must be administered online, they will be administered online with whatever exam-taking software the Records Office chooses and they will be open-book, open-note.

The only inputs into your grade for the course are your exams unless I downgrade you for a serious breach of the class participation policy (see pp. 3-4 above).

Course materials

We will rely primarily on a casebook: Richard A. Epstein and Catherine M. Sharkey, *Cases and Materials on Torts*. Aspen, 13th ed. New York: Wolters Kluwer, 2020. ISBN-13: 979-8-8890-6056-7.

I will assign a few supplemental readings. I'll post copies of the supplemental readings on the TWEN site. Hard copies of the readings will be available by Friday, August 9, on the third floor of the law school, across from secretary Jane Barton's desk, at the front of the faculty suite on the third floor. (The main door to that suite is across the way from the doors to the Records Office.)

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*, 13th 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 21, please read units 1 and 2.

1. Battery.

Pp. 1-7. Vosburg. Garratt. White. Eichenwald. Talmage.

2. Trespass to land.

Pp. 7-10 end n.4. Dougherty, Brown, Cleveland Park Club, Van Wyk, Netflix.

Supp. 1-7. Pegg v Gray, Malouf, Golden Press.

3. Trespass to chattels and conversion.

Pp. 451-52. RST § 218 cmt. e, Blondell.

Pp. 458-61 end n.2. Poggi. Fouldes. Maye.

Supp. 8-10. RST § 218, Wetherbee.

4. Emergency assistance, and consent.

Pp. 11-16 end n.4. Mohr, Kennedy, Hoofnel, Schloendorff, Cooper, Allore.

Supp. 11-12. Desnick.

5. Preemption for public health measures.

Supp. 13-20. Hypo, Crosswhite v. Barnes, VA Code §§ 32.1-43 & -.48, Sayers v. Bullar.

6. Consent rendered void as being against public policy.

Pp. 19-24. Hudson, Hart, Barton, the sports cases nn. 3-4.

7. Mental disability.

Pp. 24-27. McGuire.

8. Self-defense.

Pp. 27-31. Courvoisier, Morris, Boston.

9. Defense of Property, Recapture of Chattels

Pp. 31-36. Bird, M'Ilvoy, Kirby.

Supp. 21-24. Restatement (Second) Torts § 260; Drone hypothetical; Chasan, "Texas mom arrested" article.

(In class, we'll start with RTT § 260 and the drone hypo, then study M'Ilvoy, and only then turn to Bird and the lemonade case. In other words, spend more time on M'Ilvoy and the drone hypo even though they're short materials, and spend less time than normal on Bird even though it's the lead case in the relevant section of the casebook.)

In the Chasan article, Rossi was arrested for a crime. Did she commit civil battery prima facie, and if so, did she have a defense?

10. Necessity.

Pp. 37-38 end n. 1, pp. 39-41. Ploof and the note about self-help and affirmative duties. Vincent. (But no other notes besides 38 n.1.)

Pp. 44-46. The trolley problem.

11. Assault, offensive battery.

Pp. 46-50. I. de S., Tuberville, Allen, Brower, Alcorn.

Supp. 25-27. Yahr, story on the Mueller v. Swift suit.

12. Emotional distress.

Pp. 55-60 end n. 2. Wilkinson, Bouillon, Siliznoff, George, Rockhill, Patterson.

13. Negligence and strict liability: historical background.

P. 63, Section A.

P. 69-70 n.2, the discussion of Gibbons v. Pepper only.

Pp. 77-91 end n. 1. Brown v. Kendall, the Rylands litigation, Brown v. Collins, the reception (or not) of Rylands into American common law.

14. Negligence and strict liability: Theories of tort.

P. xxviii (bottom, paragraph starting “For the past five or six decades, ...” to p. xxx (end of the first full paragraph, ending with “... plaintiff has otherwise made out a good cause of action.”).

Pp. 100-05. Bolton, and the discussions of corrective justice and economic efficiency in the following notes.

Pp. 141-42 nn. 7-8. Notes on efficiency and the choice between negligence and strict liability.

Supp. 28-45. Excerpts from Shavell, Economic Analysis of Accident Law; Aristotle, Nicomachean Ethics; Blackstone, Commentaries on the Laws of England; Coleman, “The Economic Structure of Tort Law.”

15. Strict liability: Animals.

Pp. 468-473 end n. 3. Gehrts, Baker, Kennedy, Rubenstein.

16. Strict liability: Ultrahazardous activities.

Pp. 474-82 end n.3. Spano, RST §§ 519-20, RTT § 20, Hanford Litigation, Schuck, Koos.

Pp. 487-89 n.4. Madsen, Yukon Equipment.

17. Strict liability: Nuisance (1).

Pp. 492-93 nn.1-2. Cal. Civ. Code § 3479, materials on reasonability in nuisance.

Supp. 46-54. Pestey v. Cushman; Gilbert v. Showerman.

Pp. 496-97 nn.3-4. The “live and let live” norm, and Bamford, and the locality rule.

18. Strict liability: Nuisance (2); rights, and economic analysis.

Supp. 55-64. Sturges v. Bridgman, Bryant v. Lefever.

Pp. 506-08 nn. 1-3. Notes on coming to the nuisance (relevant to Sturges).

Reread p. 497 n.3, on Coase, “Social Cost.”

Supp. 65-80. Excerpts from Coase, “The Problem of Social Cost”; Claeys, *Natural Property Rights*.

19. Strict liability: vicarious liability.

Pp. 530-42 end n.3. Bushey & Sons, Search, Saleem, Razak, Petrovich.

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

Pp. 109-18. Vaughan, Roberts, excerpts from Holmes, The Common Law.

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

Pp. 119-28. Daniels, Breunig, Fletcher, Denver.

22. Negligence: risk calculus (1).

Pp. 128-34, 136-39. Carroll Towing is the lead case, but then also Blyth, excerpts by Seavey and Terry, Osborne.

23. Negligence: risk calculus (2).

Pp. 134-36. Cooley.

Pp. 140-41 nn. 4-6. Notes on problems applying the Hand formula.

Pp. 143-46. Andrews, Ross excerpt.

Please also prepare these two problems. Note: The problems may *not* give you all of the information you need to analyze the legal arguments made. To “answer” the problems, you’ll need to articulate “known unknowns” and any possible “unknown unknowns.”

Problem 1. Glaucoma is an eye disease. When people suffer from it, pressure builds up in their eyes. The pressure often diminishes victims’ ability to see—permanently—and it can also cause blindness. Assume that 1/25000 people over the age of 50 contract glaucoma. Assume that a test reliably diagnoses glaucoma and that it costs \$100. Abel is a 55-year-old patient of eye doctor Morris. Morris does not administer a glaucoma test to Abel. Abel has glaucoma, and by the time the symptoms manifest themselves clearly it is too late and Abel goes blind. Was Morris negligent?

Problem 2. Q-Vee is a retail store that operates out of a building designed as a warehouse. Q-Vee keeps a lot of goods that others stores would keep in storage on the uppermost shelves of the aisles. Boxes occasionally fall off of those shelves. A box falls off of a top shelf and hits customer Hale. Hale suffers \$200,000 in damages, from medical bills and from lost earnings, and Hale’s injury seems typical for the injuries likely to be caused by a box falling off of a high shelf.

Hale sues Q-Vee in negligence. Experts agree that the odds of a box falling and hitting a Q-Vee customer are 1/10000. Hale argues that Q-Vee could have and should have installed heavy nylon cargo nets over the walking space in aisles and just beneath the top shelves. Such a net would catch falling boxes and give store employees time to put them back on the shelves. Such a net would cost \$2,000 to install. Was Q-Vee negligent?

24. Negligence: custom.

Pp. 146-55 end n.4. Titus, Mayhew, Trimarco.

25. Negligence: Breaches of protective statutes and regulations.

Pp. 176-82 end n.4. Thayer excerpt, Osborne, Clinkscales, Stimpson, Gorris, licensing materials in n.4.

26. Negligence: res ipsa loquitur.

Pp. 199-208 end n.2. Byrne, Larson, Connolly, legal formulations of res ipsa. Colmenares, McGriff, Miles.

27. Plaintiff's conduct: contributory negligence.

Pp. 219-28 end n.3. Butterfield, Beems, Schwartz excerpts, Gyerman.

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

Pp. 231-37. LeRoy Fibre, Derheim, Coase's discussion of externalities and reciprocal duties.

29. Plaintiff's conduct: Last clear chance, imputed contributory negligence.

Pp. 237-42. Fuller, Kumkumian, note on imputed contributory negligence.

30. Plaintiff's conduct: Assumption of risk.

Pp. 242-43, 252-58 end n.6 (but skip 254-55 n.2). Lamson, Murphy, assumption of risk in sports, Marshall v. Ranne.

Pp. 259-62. Dalury, Chepkevich. (You may also want to review unit 6, on consent rendered void as against public policy.)

31. Plaintiff's conduct: Comparative negligence; its emergence.

Pp. 264-74 end n.3. Li, materials on introduction of comparative negligence.

Also, when you read 271-74 n.2, read also 254-55 n.2, on primary and secondary assumption of risk.

32. Plaintiff's conduct: Comparative negligence in legislation.

Pp. 276-79. Please be prepared to discuss the problems on p. 278.

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

Pp. 289-98. Grimstad, Zuchowicz, Haft.

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

Pp. 325-38. Herskovitz, Joiner, the Bendectin litigation, Rest. (Third): LPEH § 26.

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

NOTE: Expect you might get called on (only) for Kingston and Summers. I’ll lecture about the other materials.

Pp. 299-301. Merryweather, Union Stock Yards.

Pp. 347-48. Restatement (Second) Torts § 431.

Reread p. 328, summarizing Rest. (Third): Liability for Physical and Emotional Harm § 26.

Pp. 310-14. Kingston. Restatement (Third) Torts: Liability for Physical and Emotional Harm § 27, Rest. (2d) Torts § 433A.

Supp. 82-83. Rest. (Third) Torts: Apportionment §§ 10-12, 15-17, 26.

Pp. 314-17. Summers.

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

Pp. 301-10. Cal Civ. Proc. Code §§ 875-877.5; American Motorcycle Association.

37. Causation: Market share liability.

Pp. 317-25. Sindell, Skipworth, Thomas.

38. Causation: Proximate cause I.

Pp. 338-45. Ryan, Berry, Smith, City of Lincoln, Tuttle, Price, Hines, Dillon, Horton.

39. Causation: Proximate cause II.

P. 230 n.7. Smithwick, Mahoney.

Pp. 345-51. Brower, Wagner.

40. Causation: Palsgraf and proximate cause.

Pp. 360-71. Palsgraf and its effects.

41. Causation: Modern proximate cause doctrine.

Pp. 371-76. Marshall, Virden, Hebert.

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

Pp. 389-401 end n.4. Buch, Hurley, the Good Samaritan parable, and the scholarly perspectives on the duty to rescue, statutory responses to the duty to rescue, and empirical data about rescue attempts.

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

Pp. 401-05. Montgomery, Newton, Scruggs, Zelenko, Soldano.

44. Affirmative duties: Duties of owners and occupiers, and Rowland.

Pp. 405-07. Addie & Sons,.

Pp. 412-20. Rowland, Mallet, Koenig, Ward, statutory responses.

45. Affirmative duties: Gratuitous undertakings.

Pp. 420-31. Coggs, Erie R.R. Co., Moch.

46. Affirmative duties: Special relationships.

P. 432 n. Weirum.

Pp. 441-49. Tarasoff.

47. Products liability: background.

Pp. 545-62 end n.2. Context for products' suits, Winterbottom, Huset, Kuelling, MacPherson, Escola.

Supp. 82-83. Excerpts from Prosser, "Assault on the Citadel."

48. Products liability: "sellers"/proper defendants; manufacturing defects.

Pp. 575-81. Loomis and associated materials.

Pp. 581-84. Speller and associated materials.

P. 565. Find the provisions and comments in RST § 402A governing in manufacturing defect cases.

P. 569. Restatement (Third) of Torts: Products Liability § 2(a).

49. Products liability: design defects I; basics

P. 565. Find the provisions and comments in RST § 402A governing in design defect cases.

P. 569. Restatement (Third) of Torts: Products Liability § 2(a).

Pp. 585-93. VW.

50. Products liability: design defects II; consumer expectations and risk utility

Pp. 593-603. Barker and related materials.

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

P. 565. Find the provisions and comments in RST § 402A governing in duty-to-warn defect cases.

P. 569. Restatement (Third) of Torts: Products Liability § 2(c).

Pp. 611-22. Hood, Vassallo, deVries.

52. Products liability: defective in virtue of a breach of the duty to warn II.

Pp. 603-11. MacDonald and associated materials.

53. Products liability: plaintiffs-side conduct.

Pp. 622-28. Daly and associated materials.