

**NORTHEASTERN UNIVERSITY  
SCHOOL OF LAW**

**TORTS**

**PROFESSOR JAMES HACKNEY  
FALL 2010**

**COURSE OUTLINE AND SYLLABUS**

**COURSE MATERIALS:**

**1) REQUIRED**

1. Casebook (CB): Franklin & Rabin, TORT LAW AND ALTERNATIVES: CASES AND MATERIALS (8<sup>th</sup> ED. 2006) [NU BOOKSTORE]
2. Supplement (Supp.) (page references at the *bottom* of the page) [TWEN]

**2) RECOMMENDED**

1. Tort Law Summary [TWEN].
2. Robert L. Rabin & Stephen D. Sugarman, TORTS STORIES (2003) [NU BOOKSTORE]
3. Concise Restatement of Torts, Bublick (2010) [NU Bookstore]

(Copies of all materials can be acquired at the [bracketed] locations. Copies are also available in NUSL library reserve. )

**I. COURSE INTRODUCTION**

- A. General introduction to tort law; goals of tort law; fault-based liability vs. no-fault liability; the role of insurance; the nature of legal argument; the “holding” of a case
  1. Background and Hammontree case, CB 1-6  
CB 6-9 (notes 1, 6, 9)  
Epilepsy and driving, Supp.1  
The litigation process and the parties, CB 9-17 (not to be discussed in class)  
The Idea of the Holding of a Case, Supp. 7
  2. Conventions in Legal Argument, Supp. 8  
Preliminary Menu of Standard Legal Arguments, Supp. 9-16  
Bierman, Supp. 17  
Bierman appeal, Supp. 19

## II. AN INTRODUCTION TO NEGLIGENCE

- A. The idea of the “prima facie case;” the fault principle; historical background; the duty of due care

Memo, Prima Facie Case, Supp. 20

Chart, Negligence PFC, Supp. 21

Brown, CB 35-38, CB 38-39 (through note 4)

Losee, CB 512-513 (note 3)

Adams, CB 39 (bottom)-43 (through note 5)

EXERCISE: (do this before reading next item) Write out two sentences

stating, respectively, narrow and broad versions of the holding of Adams

Holding of Adams, Supp. 22

## III. ESTABLISHING THE ELEMENT OF REASONABLENESS IN NEGLIGENCE

- A. The Reasonable Person

The Reasonable Person, Bethel, CB 50-60 (through note 12)

Cordas, Supp. 23

Hasseneyer, Supp. 26

Bender, *A Lawyer's Primer on Feminist Theory and Tort*, Supp. 29

- B. Cost/benefit analysis, the Carroll Towing or Learned Hand formula; introduction to the concepts of “enterprise liability” and “market deterrence;” the role of punitive damages

CB 44-46 (through note 1)

TORT STORIES, 11-39 (Optional)

CB 7 (note 2)

CB 48-49 (note 7)

CB 46 (note 3) – 47 (note 4)

Gregory excerpt, *Trespass to Negligence*, Supp. 34

Allocation vs. Distribution, Supp. 35

Grimshaw, Supp. 49

Posner excerpt, Supp. 59

Optional Reading: Epidemiology and the Probability of Injury, Supp. 38  
(not to be covered in class)

- C. Custom: The Locality Rule

Trimarco, CB 69-73 (through note 5)

CB 74-75 (notes 7 and 8)

Sheeley, CB 110-117 (through note 7)

#### D. Negligence Per Se

Martin, Tedla, CB 75-86 (through note 10)  
The Role of Statutes, Supp. 60  
Negligence Per Se, Supp. 65  
Legal Arguments in Tedla, Supp. 66

#### E. Res Ipsa Loquitur

CB 86-87 (1st two paragraphs, Section D)  
Byrne, CB 92-94 (through note 1)  
Review Bierman appeal, Supp. 19  
Memo, Evidence and Proof in Civil Actions, Supp. 67-70  
Memo, Res Ipsa Loquitur, Supp. 71-73  
Chart, Evidentiary Effect of Proofs of Negligence, Supp. 74  
Ybarra, CB 102-110 (through note 8)  
CB 100 (note 7)

### IV. CAUSATION

#### A. Causation-in-fact: the “but-for” test; the “substantial factor” test; causal uncertainty; introduction to mass torts and toxic torts

Review PFC of negligence, Supp. 21  
CB 339-340 (just introductory material)  
Grimstad, Supp. 75  
Stubbs, CB 340-347 (through note 9)  
Stubbs and the Conquest of Typhoid, Supp. 76  
Allen excerpt, Supp. 83  
Memo, Causation in Fact, Supp. 92  
Special Case of Toxic Harms, CB 392-400  
Memo, Categories of Causal Uncertainty Problems, Supp. 94

#### B. Causal uncertainty continued; loss of a chance; joint causation;

Zuchowitz, CB 347-356 (through note 2)  
CB 358-359 (notes 8, 9)  
Alberts, CB 360-366 (top)  
Summers, CB 375-379 (through note 7)  
Memo, Joint or Multiple Causation Analysis, Supp. 95  
Malone excerpt, Supp. 98

C. Causal uncertainty continued: the DES cases

Memo on DES, Supp. 102  
Glance at FRCP Rule 23 (from civil procedure materials)  
Hymowitz, CB 379-392  
TORTS STORIES pp. 151-178 (more on Hymowitz: optional)  
Epidemiology and causation, Supp. 106 (optional)  
Excerpt from Brown, Supp. 113

D. Proximate Cause; Polemis; Palsgraf

The ‘speeding to the accident’ problem, CB 414-415 (note 11)  
Review definition of causation-in-fact, Supp. 92  
The Polemis directness test, CB 406-408  
The reasonable foreseeability test:  
    Wagon Mound, CB 409-412 (through note 1)  
    CB 414 (note 9-10)  
    More on Wagon Mound (TORTS STORIES, 129-150, optional)  
“Scope of the risk”  
    Palsgraf, CB 425-434 (through note 1)  
    More on Palsgraf (TORTS STORIES, 2 (last para.)–8, optional)

E. Proximate Cause continued; recurring or stereotyped cases

Larrimore, Supp. 118  
Review Negligence per se, Supp. 67  
Recurring or stereotyped cases:  
    Rescue, Time, Distance, CB 434-436 (note 10a,b,c); CB 487 (note 7)  
    The New York fire rule, CB 437 (note 10d)  
    “Fire Cases,” CB 781-782 (first part of note 5)  
    Dangerous conduct by third parties, CB 192-3 (note 7)  
    Hines, CB 423 (note 4)  
    Suicide, CB 404-405 (note 6)  
    Memo, The Eggshell Skull Rule, Supp. 122  
    The Kinsman test, CB 437 bottom-439  
    Memo, The Steps of Causation Analysis, Supp. 123

**V. DUTY**

- A. Introduction to duty; general conception of duty of care (Heaven v. Pender) vs. specialized categories of no duty, diminished duty or enhanced duty; nonfeasance vs. misfeasance; the privity doctrine; duty to rescue?; exceptions to the no-duty categories

Review PFC of negligence, Supp. 21  
CB 132-133 (Section A)  
MacPherson, CB 550-555 (through note 8)  
More on MacPherson (TORTS STORIES, 41-71, optional)  
Hurley, Supp. 124  
Childs, Supp. 125  
Memo, Analyzing Duty Problems, Supp. 134  
Harper, CB 134-140 (through note 4)  
Farwell, CB 140-145 (through note 6)

- B. Premises Liability; duties of possessors of land; the traditional status distinctions – trespasser, licensee, invitee; child trespassers; attractive nuisance; the breakdown of the status distinctions and move to a general duty of care (Rowland)

Carter, CB 195-201 (through note 9)  
Heins, CB 201-208 (through note 9)  
Posecai, CB 211-218 top (through note 6)  
Gipson, Supp. 128  
More on Rowland, (TORTS STORIES, 73-97, optional)  
Memo, Premises Liability I, Supp. 136  
Memo, Premises Liability II, Supp. 140

- C. Special Duty problems; police and other governmental entities; distinguishing no-duty doctrine from questions of immunity; introduction to constitutional torts

CB 229-230, Governmental Entities, Introduction  
Riss, CB 230-240 (through note 8)  
Lauer, CB 240-246 (through note 9)  
Cope, CB 252-263 (Federal Tort Claims Act)

## **VI. LEGAL INJURY**

- A. Negligent infliction of emotional harm; the physical impact rule; “direct” infliction

Review PFC of negligence, Supp. 21  
Study Guide on NIED, Supp. 142  
Mitchell, Supp. 149  
Falzone, CB 264-273 (through note 10)  
Metro-North, CB 273-281 top (through note 7)  
Gammon, CB 281-284 (through note 6)

- B. “Indirect” Infliction of Emotional Harm: witness recovery  
Portee, CB 286-293 (through note 9)

- C. Indirect Infliction of Emotional Harm: Children, Partners, Property and Pets  
    Johnson, CB 295-301 (through note 9)  
    CB 301-305, negligent interference with consortium

## **VII. NEGLIGENCE: THE AFFIRMATIVE DEFENSES**

- A. Contributory negligence; last clear chance; imputed negligence; avoidable consequences; comparative fault; the Uniform Comparative Fault Act

Contributory Negligence-CB 440-443 (end of (b))  
Harper James and Gray, excerpt, Supp. 151  
Restatement Second of Torts, §§ 479, 480  
CB 443-445 ((c) and (d))  
Memo, Undermining Contributory Negligence, Supp.153  
Comparative Negligence CB 445-450 (through note 1)  
CB 455-456 (note 10, imputed negligence)  
Avoidable Consequences, CB 463-466

- B. Assumption of risk: express and implied

Dalury, CB 467-474 (through note 12)  
Memo, Tickets, Receipts & Similar Documents, Supp. 154  
Murphy, CB 475-482 (through note 6)  
More on Murphy, (OPTIONAL: TORTS STORIES, 179-206)  
Weinstein, Supp. 156  
Davenport, CB 482-488 (through note 9)

## **VIII. AN INTRODUCTION TO THE INTENTIONAL TORTS: BATTERY AND THE INTENTIONAL INFLICTION OF EMOTIONAL DISTRESS**

- A. PFC of the tort of battery; the legally protected interest; meaning of ‘the person;’ intent; injury  
    Background, Garratt, CB 884-887  
    PFC of the tort of battery, Supp. 158  
    Memo, Intent in the Law of Torts, Supp. 159  
    Vosburg, Supp. 162  
    Assault and Battery, Picard, CB 891-894  
    Fisher, Supp. 165  
    Barbara A., Supp. 168

B. Affirmative defenses; consent; self defense and defense of property; mistaken self defense

Introduction to consent, Hart, CB 931-934

O'Brien, Supp. 173

Self-Defense, Courvoisier, CB 934-937

Memo, Mistaken Self-Defense, The Arguments, Supp. 171

Kelly, Supp. 175

Protection of Property, Katko, CB 937-941

Private Necessity, Vincent, CB 943-947 (note 7)

C. Intentional Infliction of Emotional Distress; harassment; abusive speech; constitutional considerations

Womak, CB 908-918 (through note 10)

Agis, Supp. 188

Irving, Supp. 179

Logan, Supp. 181

Wiggs, and notes, Supp. 184-187

## **IX. THE TRADITIONAL 'LAND TORTS:' TRESPASS AND ADA LIABILITY**

A. The Rylands doctrine: ultrahazardous or abnormally dangerous activity liability

Rylands, CB 506-514

Sullivan, CB 514-519

Restatement Second, Sections 519—524A

Indiana Harbor Belt, CB 519-529 top (note 8)

## **X. ENTERPRISE LIABILITY: THEORETICAL UNDERPINNINGS**

A. Enterprise liability, cost-spreading, and market deterrence; market failure; externalities

CB 529-540, Strict Liability: Theoretical Perspectives

Statement of Coase Theorem, Supp. 193

Leroy Fibre, Supp. 195

Memo, Justifications for 'Enterprise' (Strict) Liability, Supp. 194

Harper, James & Grey, Social Insurance, Supp. 199

## **XI. STRICT PRODUCTS LIABILITY**

- A. Doctrinal beginnings; Rest. Section 402A and the basic elements of plaintiff's SPL case; eligible defendants; causation; defect; manufacturing defect; design defect; risk/benefit test
  - Escola, CB 556-567 (through note 9)
  - Memo, Basic Framework, Supp. 202
  - CB 566-567, The Restatements
  - Restatement Second, Section 402A, Comments g,h,i,l, and m
  - Restatement Third, Products Liability, Sections 1—4 (with comments)
  - Manufacturing Defects, CB 567 (bottom)-569
  - Design Defects, CB 569-572 (through note 14)
  
- B. Risk/Benefit test, continued; warning defect
  - Camacho, CB 584-592 (include 1<sup>st</sup> ¶ of note 8)
  - Design Defect, Supp. 218
  - Restatement Section 402A, Comment j
  - Castro, Supp. 206 - 212
  - Safety Instructions and Warnings, Hood, CB 595-603 (note 7)
  - Edwards, Vassallo, CB 607-614
  - Restatement Third, Products Liability, Section 6 (with comments)
  
- C. Defenses to SPL; comparative fault,
  - Defenses, GM Corporation CB 620-624
  - Hawk Aviation, Supp. 203
  - Restatement Third, Products Liability, Sections 17, 18
  - Haglund, Supp. 213