

TORTS
COURSE SYLLABUS
FALL 2019
PROFESSOR MARK LATHAM

I. OVERVIEW

A. COURSE COVERAGE: This course provides an introduction to the law of torts, which offers individuals the potential to obtain compensation or *damages* for personal injury, wrongful death, or property damage. During the semester, we will explore five fundamental aspects of tort law: 1) intentional torts, including assault, battery, intentional infliction of emotional distress, and false imprisonment; 2) negligence, which imposes liability for the failure to use reasonable care in light of foreseeable risks; 3) professional malpractice where a professional (*e.g.*, a physician, attorney, or engineer) allegedly failed to adhere to an applicable standard of care; 4) strict liability, where liability is imposed even if the defendant may have acted reasonably to reduce the risk of harm; and 5) products liability where liability may be imposed upon those who sell products that are unreasonably dangerous because they were defectively designed, manufactured, or have inadequate warnings or instructions.

B. CASEBOOK & SUPPLEMENTAL MATERIALS: The required text for this course is Duncan, Turner & Badhadur *Torts: A Contemporary Approach* (3rd ed. West Academic Publishing 2018) (“Duncan”).

Numerous supplemental study aids for torts are also available but *not required*, and I’ve listed several of them below. I have not spent any significant amount of time with these supplements, and you should approach them with caution. First, to succeed in law school and especially law practice, you must develop an understanding of how to read primary materials such as statutes, regulations, and cases. Over reliance on supplemental materials can impeded your development in this area. Second, supplements reflect the author’s understanding of the law and may or may not be accurate. Third, supplements can be rather expensive and over the course of law school can add substantial costs to your legal education. Nevertheless, I have heard from a number of students that one or more of these were helpful to their understanding of the law of torts:

Anita Bernstein, *Questions & Answers: Torts* (4th ed. Carolina Academic Press)
Shubha Ghosh, *Acing Torts* (3rd ed. West Academic)
Joseph W. Glannon, *Examples and Explanations for the Law of Torts* (5th ed. Wolters Kluwer)
Richard L. Hasen, *The Glannon Guide to Torts* (3rd ed. Wolters Kluwer)
Edward J. Kionka, *Torts, Black Letter Outlines* (5th ed. West Academic)
J. Diamond, L. Levine & A. Bernstein, *Understanding Torts* (6th ed. Carolina Academic Press)

Please note that there may be later editions of these supplements that are available. Before purchasing any of these, I suggest that you review a copy in the Academic Support Program (ASP) offices or library.

For a comprehensive treatment of virtually any torts question that you are likely to encounter, I suggest that you review Dan B. Dobbs, *The Law of Torts, Hornbook Series* (West 2000), which is on

reserve in the library. A dated, but still very helpful, treatise written by two of the giants in the field of tort law that I found quite helpful in law school, and that I continue to use, is *Prosser and Keeton on Torts* (5th ed. 1984). It, too, is on reserve in the Cornell Library.

C. LEARNING OBJECTIVES: By the end of this course, as determined by your performance in class, the intentional torts writing assignment, and a comprehensive final written examination, students should be able to:

1. Articulate the goals of the tort law system, its shortcomings, and assess efforts at its reform;
2. Through the identification, synthesis, application, and analysis of the relevant cases and legal rules to varied factual situations:
 - a) Demonstrate knowledge of the elements of the intentional torts of assault, battery, false imprisonment and intentional infliction of emotional distress, along with the defenses of necessity, consent, and self-defense and defense of others;
 - b) Demonstrate knowledge of the elements of negligence, including duty, breach, causation, proximate cause (scope of liability), and the different types of damages that may be awarded to a successful plaintiff;
 - c) Demonstrate knowledge of frequently encountered defenses to negligence, including statutes of limitation, contributory negligence, comparative fault, assumption of the risk, and various immunities;
 - d) Demonstrate knowledge of the fundamentals of product liability law as they apply to defective products.

In addition to the above tort law specific learning objectives, by the end of the semester I also expect students to: 1) demonstrate in class a fundamental knowledge of the basic steps in the civil litigation process from the initiation of a lawsuit through appeal, including common pretrial, trial and post-trial motions; 2) have mastered the ability to cogently and competently summarize a case in class, specifically: a) the facts; b) the procedural history; c) the issues presented; d) the applicable rule of law; e) the holding; f) the court's reasoning; g) the sources of authority relied upon by the court; and h) the distinctions in reasoning between the majority and any concurrence or dissent; and 3) demonstrate the ability to synthesize case law, distill the applicable rule of law from cases, distinguish cases and critique the court's analysis.

II. EXPECTATIONS OF STUDENTS

A. PREPARATION: *I cannot stress enough the importance of class preparation.* I will prepare to the utmost of my ability for every class, and I fully expect each student in this course to do likewise. This means reading all of the assigned materials for each class, thinking about them, considering the questions that follow the cases, coming to class ready to discuss the materials assigned for the day and, by all means, if something is not clear from the readings or from class, you should raise your questions during class or schedule an appointment with me to discuss and clarify.

I stress preparation for several reasons. First, one of the hallmarks of every good lawyer is that he or she consistently puts in the time, effort and work necessary to zealously represent and provide competent counsel to their clients. Second, to become a highly competent, respected practitioner you must also be a self-directed learner to keep abreast of developments in the profession and in your chosen specialty area. The development of the skills required to do this as a future member of the legal profession begins here, during your first semester of law school, and will continue throughout your time at VLS. If you don't learn how to prepare in law school, it's not likely that you'll understand how to prepare when you begin practicing law and, as a result, you will not serve your clients well. Third, a lack of preparation is unfair to your fellow classmates who have prepared for class. Fourth, the failure to prepare is a waste of valuable class time because unprepared students can neither fully participate in class nor thoughtfully contribute to it. Finally, the failure to prepare will impair your ability to understand the course materials, and as discussed below in more detail, may have adverse consequences for your final grade and perhaps for your ability to pass the bar exam.

I am, however, a *reasonable person* (much more about this admittedly fictitious character later in the course) and, as such, fully realize that emergencies and unexpected situations can occur that may preclude you from adequately preparing for class. If you find yourself in this unfortunate predicament, please let me know if at all possible in advance of class and I will not call on you.

B. ATTENDANCE: In accordance with ABA accreditation standards and VLS academic regulations class attendance is mandatory, and I expect students to arrive on time for class. I will pass around a sign-in sheet for each class that is your responsibility to sign. I do understand that an emergency or illness may arise that may prevent you from attending class. If at all possible, you should notify me of absences in advance. If you cannot let me know in advance that you will miss class, please contact me as soon as possible thereafter, so I can determine if your absence should be excused. (Depending on the nature of your reason for missing class, I may require documentation.) Absences due to religious observance will be excused if notice is given to me or to the registrar within a reasonable time of the absence. Three (3) unexcused absences will result in a written warning and a downward adjustment of your final course grade; that is, for example, a grade of B will become a final grade of B- and so forth. If you have more than three (3) unexcused absences you will receive a grade of F-Wd. *See* Miscellaneous Academic Regulations X.A.1 (a) & (b) (2018).

C. CLASS PARTICIPATION: As I mentioned above, I expect that you will be prepared for class, and I will call on you at random to discuss the materials that are assigned for each class. Thus you must read thoroughly for each class the assigned materials and be prepared to

actively participate in meaningful discussion of the materials. Active participation includes engagement in the classroom discussion, offering comments, raising questions, and responding to hypotheticals. Classroom comments should be thoughtful, relevant – perhaps even controversial – but at all times must be civil, respectful of the views of others, and appropriate for professional graduate school-level discussion.

Please raise your hand to be called on, and please do not engage in side conversations during class and by all means do not denigrate the comments of your classmates even if you vehemently disagree with them. That is not to say that you cannot challenge a classmate’s position or refrain from offering a counterargument. The point here, as previously stated, is that you are expected to be civil to your classmates and professors inside and outside of the classroom.

III. MISCELLANEOUS

A. GRADING: Twenty percent of your final course grade will be based on a writing assignment that I will assign later in the term, after the completion of intentional torts. During the final exam period following the completion of the semester, there will be an in-class, four-hour closed-book examination that will account for the remaining 80 percent of your grade.

Pursuant to the VLS academic regulations, this course will be graded on a B curve. As part of the grading policy for this course, I may adjust a student’s final course grade upward by a half-grade for outstanding classroom participation that demonstrates a level of preparation and engagement above and beyond that which is expected at the professional graduate school level. Thus, especially good classroom participation will help your final grade. By contrast, for particularly dismal class participation throughout the semester, I will adjust your grade downward by a half-grade or more in the unlikely event that you are unprepared for class or have three unexcused absences. If you have, as noted above, more than three unexcused absences you will receive a grade of F-Wd.

B. COMPUTERS & OTHER ELECTRONIC DEVICES IN CLASS: The use of technology, including laptops, smart phones, and tablets, can enhance the learning process. Such technological marvels are also an important part of law practice.

The use of these devices for activities that are unrelated to a classroom or a course purpose, however, is strictly forbidden during class. Please silence your cell phone, smart watch, and all other electronic communication devices. Please refrain from checking email, playing games, updating Facebook, shopping, and other computer activities that are unrelated to your course work.

The use of such devices for non-classroom purposes is not only unprofessional and distracts other students, but numerous studies have shown that “multitasking” – the belief that you can pay attention in class while surfing the web, responding to emails, sending tweets, updating your Facebook page or checking the news online – negatively impacts academic performance (for a summary of several studies examining multitasking’s adverse impact on academic performance *see* <http://biz.colostate.edu/mti/tips/pages/Students-Think-They-Can-Multitask---Here's-Proof-They-Can't.aspx>).

Moreover, you might want to seriously consider handwriting your class notes instead of using a laptop to take notes. According to a recent study, students who took handwritten notes performed better in response to “conceptual-application” questions, such as, “How do Japan and Sweden

differ in their approaches to equality within their societies?” The laptop users, somewhat surprisingly, did “significantly worse.” See *Attention, Students: Put Your Laptops Away*, NPR, (April 17, 2016), available at <http://www.npr.org/2016/04/17/474525392/attention-students-put-your-laptops-away>

If unauthorized use of computers becomes widespread I will ban all computers from the classroom for the duration of the semester.

C. EMAIL: I may periodically communicate with the class through your VLS email account. Thus I expect you to check your VLS email at least daily. I do strongly prefer to meet in person rather than email if you have anything other than brief questions about the course or course materials. Consequently, I ask that you please do not email me a lengthy series of questions about the course and, instead, please make an appointment to see me. In the event that you do decide to send me an email, please be patient; it may take me a day or two to respond. I expect that any email to me or to your classmates related to this course will be appropriate and professionally written.

D. OFFICE HOURS: I will have office throughout the semester on Mondays and Thursdays beginning at 2:00 P.M. until 3:30 P.M. or if you prefer to schedule a time to meet (which I suggest you do), please contact my assistant Ashley Ziai at aziai@vermontlaw.edu and she can schedule a mutually convenient time to meet. My office is on the second floor of Debevoise Hall in the Environmental Law Center, and my office phone number is 802-831-1226. Ashley’s office is located on the third floor of Debevoise Hall and her phone number is 802-831-1327.

E. TEACHING ASSISTANTS: We’re fortunate to have two wonderful teaching assistants, Ashli Taylor and Lucas Waggoner, for this course. Both Ashli and Lucas are 2L students who were in my torts class last year. They are phenomenal individuals and we will work together to present review sessions, respond to your substantive questions, offer study tips, and Ashli and Lucas will share their perspective on how to successfully master tort law and how to approach the intentional torts writing assignment and the final exam.

F. ACADEMIC SUCCESS PROGRAM: This fall our tremendously capable Academic Success Program (ASP) team, led by Professor Joe Brennan and Professor Richard Sala, and assisted by ASP Program Manager Katrina Munyon, will present several workshops targeted to provide and reinforce the skills required to succeed in law school. The workshop schedule is set forth at the end of this section. In addition, Professor Brennan and Professor Sala will attend our class early in the semester to discuss how to read and brief cases and offer advice on effective note taking.

I urge you to take advantage of the full-range of services offered by ASP, which has several resources to help you succeed. You are introduced to new material in law school on a daily basis, so it is important to stay on pace. ASP can help you create a schedule, find efficient and effective ways to digest material, provide you with supplements to assist in areas where you struggle, teach you to create helpful outlines, and offers practice exams. ASP Director Professor Joe Brennan (jbrennan@vermontlaw.edu) and Assistant Director Professor Richard Sala (rsala@vermontlaw.edu) are happy to schedule one-on-one meetings with you. Additionally, ASP Mentors who were in torts just a year or two ago are available to meet and help you determine what steps you can take to do as well as possible in torts and in all your other classes as well. Katrina Munyon

(kmunyon@vermontlaw.edu) is also a great resource and, among other things, can help you schedule a meeting.

ASP Workshops – Fall 2019

Intro to outlining	Tues., Sept. 17, 2019	12:45 - 2:00 PM	Oakes 110
Intro to outlining	Thurs, Sept. 19, 2019	3:35 - 4:50 PM	Oakes 110
IRAC and multiple choice strategies	Mon, Sept. 30, 2019	3:35 - 4:50 PM	Oakes 110
IRAC and multiple choice strategies	Thurs, Oct. 3, 2019	12:45 - 2:00 PM	Oakes 110
Outlining and preparing for finals	Mon, Nov. 4, 2019	3:35 - 4:50 PM	Oakes 110
Outlining and preparing for finals	Thurs, Nov. 14, 2019	12:45 - 2:00 PM	Oakes 110
Mock Exams	Tues, Dec. 3, 2019	1:00- 4:00 PM	Cornell Seminar Room
Mock Exams	Thurs, Dec. 5, 2019	10:00 - 2:00 PM	Cornell Seminar Room

- Note: Workshop dates subject to change. Please confirm workshop date/time/location on 1L/Master 's Academic Success TWEN site.

G. STRESS REDUCTION: You are on the cusp of entering a profession that can be extraordinarily stressful. Unfortunately, the stress associated with law practice means that lawyers (and law students) are at high risk for depression, suicide, substance abuse, and other serious health problems. Thus it is imperative that, despite the press of course assignments and looming due dates, you devote some time each day to your own health and wellbeing. I urge you to spend at least some time every day away from the study of law to focus on your physical and mental wellbeing. There is a wonderful fitness center on campus, and I encourage all of you to use it regularly at least several times a week. There is no question that regular exercise is one of the best ways to keep stress at a manageable level. Regular physical activity is good for the soul and rejuvenates us like nothing else. (Well, almost like nothing else!)

Moreover, regular exercise just might improve your memory and hence your academic performance. See *Regular Exercise Changes the Brain to Improve Memory, Thinking Skills*, Harvard Health Blog, (April 9, 2014), available at <http://www.health.harvard.edu/blog/regular-exercise-changes-brain-improve-memory-thinking-skills-201404097110>. Indeed several studies have determined that regular exercise does improve academic performance. See *Active Education: Growing Evidence on Physical Activity and Academic Performance*, (Jan. 2015), available at http://activelivingresearch.org/sites/default/files/ALR_Brief_ActiveEducation_Jan2015.pdf and *Fit to Study: The Effects of Exercise on the Brain*, (Dec. 4, 2014), available at <https://thinkneuroscience.wordpress.com/2014/12/04/fit-to-study-the-effects-of-exercise-on-the-brain/>

If you find that you are in a struggle mentally, feel overwhelmed, or really “stressed out,” you should seek help. VLS offers, through the Clara Martin Center, ten short-term confidential counseling

sessions on campus to students each year, with five visits per semester. For consultations, evaluations, or referrals call the Clara Martin Center at 802-728-4466. Clara Martin Center also operates a 24-hour emergency service, which can be reached at 800-639-6360.

VLS also has a formal Mental Health Committee that focuses on the well being of students and the other members of the VLS community. There is also a student-led support group, Swan Support, that meets weekly and where students, staff, and faculty can share in a supportive and confidential setting their concerns about law school and life in general, and seek support and advice.

If you have questions about our counseling and other mental health services, please contact Ashley Ziai, who in addition to other major roles on campus serves as the manager of mental health services at VLS.

Finally, if for any reason, I can be of assistance to you as you begin your exploration of the field of law, please do not hesitate to ask. I wish each of you the best as you start your remarkable journey down the path to the practice of law.

Professor Mark Latham

AKA “The King of Torts” or “The Queen of Soul”
(With apologies to Melvin and Aretha!)

South Royalton, VT
August 2019

IV. COURSE READING ASSIGNMENTS

Aug. 27, 2019

1. Duncan Ch. 1 p. 5 to bottom of p. 10 and Orin S. Kerr, *How to Read a Legal Opinion*, 11 *The Green Bag*, 2D 51 (Autumn 2007) available on the course TWEN site. Also please review and bring the course syllabus to class since I will also discuss portions of it during class.

Aug. 29, 2019

2. Duncan Ch. 2 p. 25-44 (Intent)

Aug. 30, 2019

3. Duncan p. 45 to middle of p. 63 (Assault & battery)

Sept. 3, 2019

4. Duncan middle of p. 63-77 (False imprisonment)

Sept. 5, 2019

5. Duncan bottom of p. 112-132 (Intentional infliction of emotional distress or *IIED*)

Sept. 6, 2019

6. Duncan Ch. 3 p. 133 to top of p. 156 (Defenses to intentional torts: consent, self-defense, and defense of others)

Sept. 10, 2019

7. Duncan top of p. 156-169 (Defense of real property)

Sept. 12, 2019

8. Duncan p. 170 to end of chapter (Necessity & review of intentional torts & defenses)

Sept. 13, 2019

9. Duncan Ch. 13 p. 959 to middle of p. 975 (Vicarious liability)

Sept. 17, 2019

10. Duncan Ch. 4 p. 181 to middle of p. 205 (Introduction to negligence)

Sept. 19, 2019

11. Duncan middle of p. 205 to top of p. 225 (The standard of care & the reasonably prudent person)

Sept. 20, 2019

12. Duncan top of p. 225-244 (Standard of care in professional malpractice cases)

Sept. 24, 2019

13. Duncan p. 245 to middle of p. 262 (Doctrine of informed consent)

Sept. 26, 2019

14. Duncan Ch. 7 middle of p. 620-653 (Wrongful birth & wrongful life)

Sept. 27, 2019

15. Duncan p. 277 to top of p. 304 (Use of statutes to establish standard of care)

Oct. 1, 2019

16. Duncan top of p. 304 to end of chapter (Proving negligence)

Oct. 3, 2019

17. Duncan Ch. 5 p. 327 to middle of p. 341 (Causation)

Oct. 4, 2019

18. Duncan middle of p. 341-359 (Causation cont.)

Oct. 8, 2019

19. Duncan p. 360 to top of p. 374 (Market share liability)

Oct. 10, 2019

20. Duncan top of p. 374 to top of 401 (Proximate cause)

Oct. 11, 2019

21. Duncan top of p. 401 to bottom of p. 429 (Proximate cause cont.)

Oct. 17, 2019

22. Duncan bottom of p. 429 to bottom of p. 444 (Intervening causes)

Oct. 18, 2019

23. Duncan bottom of p. 444 to end of chapter (Causation cont.)

Oct. 22, 2019

24. Duncan Ch. 7 p. 560-585 (Duty owed to third parties)

Oct. 24, 2019

25. Duncan Ch. 6 p. 461 to bottom of p. 481 (Defenses to negligence)

Oct. 25, 2019

26. Duncan bottom of p. 481 to bottom of p. 492 (Defenses cont.)

Oct. 29, 2019

27. Duncan bottom of p. 492-519 (Defenses cont.)

Oct. 31, 2019

28. Duncan p. 520 to end of chapter (Defenses cont.)

Nov. 1, 2019

29. Duncan Ch. 7 p. 654-674 (Premises liability)

Nov. 5, 2019

30. Duncan p. 675 to end of chapter (Premises liability cont.)

Nov. 7, 2019

31. Duncan Ch. 9 p. 586 to middle of p. 599 & Ch. 9 p. 723-736 (Introduction to damages)

Nov. 8, 2019

32. Duncan p. 737-761 (Damages cont.)

Nov. 12, 2019

33. Duncan p. 762 to end of chapter (Damages cont.)

Nov. 14, 2019

34. Reading materials TBD (Tort law as a remedy to address climate change)

Nov. 15, 2019

35. Note for this class we will meet at the Hood Museum on the campus of Dartmouth College from 2:00-3:30.

Reading materials TBD

Nov. 19, 2019

36. Duncan Ch. 8 p. 697 to end of chapter (Strict liability)

Nov. 21, 2019

37. Duncan Ch. 7 p. 547 to middle of p. 556 & Ch. 15 p. 1039-1058 (Introduction to products liability)

Nov. 22, 2019

38. Duncan p. 1059 to bottom of p. 1077 (Products liability cont.)

Nov. 26, 2019

39. Duncan bottom of p. 1077-1101 (Products liability cont.)

Dec. 3, 2019

40. Duncan p. 1102 to bottom of p. 1128 (Products liability cont.)

Dec. 5, 2019

41. Duncan p. 1129 to end of chapter (Defenses to products liability)

Dec. 6, 2019 (Last day of class)

42. The future of tort law