Welcome to Duke and to Torts. Here is a little background information to get you started.

**What we are studying:** The class has three sections. In each we will focus on a particular area of law, and on a particular set of practical skills and theoretical perspectives on the law. In the first section, we will cover intentional torts. We will also learn about methods of legal argument and the structure of legally protected interests. In the second section, we will study the law of negligence, while also learning about the history of tort law, its connection to economic change and to particular political ideas about progress, justice, entitlement and so on. In the third section we will cover the law of strict liability, focusing on products liability, and we will also concentrate on the economic analysis of the law, the ideological messages that different thinkers claim it conveys and on various proposals for tort reform. Over the course of the entire semester we will be considering the moral quandaries that tort law poses and the ethical issues that lawyers will face. I’ll be handing out reading assignments week by week as we go through the semester.

**How we study it:** The class will be generally taught through a modified Socratic dialogue, though we will also use a lot of other methods. You need to be in class, prepared, with all the relevant materials for that day. I have found that use of laptops in the classroom tends to be distracting to other students, (particularly if used for Solitaire, successful stock-picking, instant messaging etc.) and that it encourages verbatim note-taking which slows down class discussion. *This year, therefore, I am banning laptops from in-class use.* During the year, I will be providing periodic summaries and reviews of the material that we have covered. I will also give you a couple of exercises and a mock mid-term exam to hone your skills.

**What you read:** There are three main texts for the class. The *Epstein* casebook – seventh edition. *Tort Law in America: An Intellectual History,* by G. Edward White, and the photocopied materials.

My contact information and the assignments for the first few classes are on the next page. I’ll give more administrative details in class. I look forward to seeing you there.
Torts Fall 2003
Professor James Boyle

First Assignments
Section One -- Intentional Torts, Precedential and non-precedential arguments. The structure and ideology of legal distinctions. Introduction to Legally Protected Interests.


Class 1 – Thursday, August 21, 2003

Class 2 – Friday, August 22, 2003
What goals should a tort system have? Background -- read the Vetri and Huber excerpts from the photocopied materials. (PM pp. 1-19.)

Class 3 – Monday, August 25, 2003

Class 4 – Tuesday, August 26, 2003

Class 5 -- Wednesday, August 27, 2003
Torts -- Prof. Boyle
Assignments #2

Section One -- Intentional Torts, Precedential and non-precedential arguments. The structure and ideology of legal distinctions. Introduction to Legally Protected Interests.

Class 7 -- Friday August 29th.
Moore v. Regents of California PM pp.20-52

Class 8 -- Monday, Sept 1st

Epstein pp. 67-71 False Imprisonment, Bird v Jones,

Class 9-- Tuesday, September 2nd

Class 10-- Wednesday, September 3rd

Class 11-- Thursday, September 4th
Epstein pp.50-60 Necessity: Ploof v Putnam and Vincent v Lake Erie. Absolute and conditional privilege of necessity. (We will spend a fair amount of time on these 2 cases, so read them carefully.) Judith Jarvis Thompson, Killing and letting die -- Acts and non-acts in law and morality.

Class 12 -- Friday, September 5th
Epstein 1295-1312: PM 58-60 Economic Harm. Creation of Legally Protected Interests. The Structure of Competition. Everyone should make a one page list of arguments supporting the following positions. In Tuttle v Buck The court 1.) should not 2.) should create or recognize a legally protected interest in "business goodwill" or "freedom from unfair competition." Your list of arguments should include arguments based on the ease of judicial administration, institutional competence, morality, deterrence, and economics. I want you to skim Mogul using it mainly as background for the rest of our class discussion. As an in-class exercise, we will reargue INS v AP (E. p.1305) at the appellate level -- giving arguments on both sides. We will discuss the general issue of creation/recognition of legally protected interests, work our way through some of the strange doctrine surrounding economic harms and go through some simple argument exercises in class. Be ready to make oral precedential arguments using Tuttle v Buck as a precedent to decide the case of International News Service v Associated Press Imagine that you are reviewing the News case as an appellate court. First, confirm the News decision using Tuttle as precedent, and then reverse it, also using Tuttle as precedent.
Torts -- Prof. Boyle
Assignment #3


Review: to review the material we have just covered please read PM 62-84, 109-115. This section from my article is a simplified account of legal argument. It also bears distinct marks revealing the age of its author. If I were writing it today, I would add a lot of qualifiers. Having said that, I think you may find it a valuable summary of the arguments you are expected to learn in your first semester. It should also give you a model for argument over both the creation and the interpretation of LPT's. Try practicing these argument techniques on cases from your other classes. Over the next week also read Mensch PM pp. 117-129. As background reading, you should read Edward White, Tort Law in America pp. 3-19

Class 16 -- Thursday, September 11th

Class 17 -- Friday, September 12th
**Epstein** pp. 116-130. *Rylands* continued. We will be trying to extract different rationales (and limiting principles) for strict liability from this material. *Brown v. Collins*' reception of *Rylands*. *Powell v Fall* loss spreading and the circular arguments about the internalisation of costs.

Class 18 -- Monday September 15th
**Epstein** 130-152 (For class 18 & 19)
**Holmes** -- the search for a unified theory of liability. We will be reading the Holmes excerpt carefully -- i.e. line by line -- both as a foundational document in tort theory and as an example of the deconstruction of complicated legal texts. Final perspectives on negligence. What does White (Tort Law in America 3-19) have to add to the discussion? *Stone v Bolton* and *Bolton v. Stone* -- theories of corrective justice meet cricket. Cricket wins. Economic Analysis: Introduction to Pareto optimality. *Hammontree v Jenner* -- loss spreading and equal protection.

Class 19 -- Tuesday September 16th,
Finishing up material from class 18

Class 20 -- Wednesday September 17th
Torts -- Prof. Boyle
Assignment #4


Class 22 -- Friday September 19th

**Epstein pp 177-191**

Negligence -- Elements are **Duty, Breach, Cause, Harm.** We start with the question -- what is the extent of the duty?/ when has the duty been breached? **Ways to define the extent of the duty of care #1, Reasonable Person.** *Fletcher v City of Aberdeen -- The Role of Wealth Robinson v. Pioche, Denver & Rio Grande.* Negligence -- Ways to define the duty of care #2. **Calculus of Risk Blyth v. Birmingham, Eckert v. Long Island Cooley v Public Service, U.S. V. Carroll Towing** The Learned Hand test. How do we determine the various values involved?

Class 23 -- Monday September 22nd

**Epstein pp 191-201**

Negligence -- Ways to define the duty of care #2. **Calculus of Risk.** Who does this favour? Would strict liability be as, or more, efficient? What is the Reverse Learned Hand? Does Efficiency require negligence? *Andrews v. United Airlines*

Class 24 -- Tuesday, September 24th

**Epstein pp 201-209**

Ways to Define the Duty of Care #3. **Custom.** *Titus v Bradford Mayhew v Sullivan Mining The T.J. Hooper #1 & T.J. Hooper #2.** What is significant about the decision in T.J. Hooper #2? What view of markets? Of judges? Of the role of law?

Class 25 -- Wednesday, September 25th

**Epstein pp 209-225**


Class 26 -- Thursday, September 26th

**Epstein pp 225-242**

Ways to Define the Duty of Care #3. **Custom.** Further discussion of medical malpractice *Canterbury v Spence.* Informed Consent & Duty to disclose. In studying *Canterbury*, make an outline of the various questions presented to the court and the tests established to answer each question. How would you argue *Canterbury* for the plaintiff if you could not use negligence? Pay especial attention to the empirical data mentioned on pp241-2

Class 27 -- Friday, September 27th

**Epstein pp 242-251**


**NO CLASS ON MONDAY SEPTEMBER 29th.** No office hours on Sept 30th.
Torts -- Prof. Boyle
Assignment #5

More arguments. Anatomy of a torts case. As background read White 37-62
NO CLASS ON MONDAY. NO OFFICE HOURS TUESDAY AM.

Class 28 -- Tuesday September 30th

**Epstein pp 225-242 (originally for Thurs 26th)**
Ways to Define the Duty of Care #3. Custom. Further discussion of medical malpractice
*Canterbury v Spence.* Informed Consent & Duty to disclose. In studying *Canterbury,* make an
outline of the various questions presented to the court and the tests established to answer each
question. How would you argue *Canterbury* for the plaintiff if you could not use negligence? Pay
especial attention to the empirical data mentioned on pp241-2

Class 29 -- Wednesday Oct 1st

**Epstein pp 242-265 (most of assignment originally for Fri 27th)**
Ways to define the extent of the duty of care #4. Criminal Statutes. Given your experience with
reasonable person, calculus of risk, and custom, what themes would you expect to find in this
section? Thayer -- analyse the arguments. *Osborne v McMasters.* Defective and outmoded statutes.

Class 30 -- Thursday Oct 2nd

**Epstein pp 265-282**
Anatomy of a negligence case -- Judge and Jury. (The excerpt from White may be
particularly helpful here.) Connection between procedure and substance. Holmes on the
formulation of standards. *Baltimore & Ohio RR v Goodman, Pokora v Wabash Ry, Wilkerson
v. McCarthy.* (We will move quickly though this material) **Proof of Negligence** -- (Proving that
the duty of care was breached) Res Ipsa Loquitur – an introduction. *Byrne v. Boadle*

Class 31 -- Friday Oct 3rd

**Epstein pp 282-306**
**Proof of Negligence** -- (Proving that the duty of care was breached). **Res Ipsa Loquitur.**
Different formulations. *Prosser. Restatement.* Effect of R.I.L -- reach the jury. Switch the
burden of proof? Directed verdict? **Colemenares Vivas v. Sun Alliance** 2nd prong of R.I.L.

Class 32 -- Monday Oct 6th

**Epstein pp 306-322 Defenses to Negligence -- Contributory Negligence** - *Butterfield v Forrester and Beems v. Chicago.* What do you think of the arguments in the Schwartz excerpt
on p. 322? *Gyerman v U.S. Lines.* Relevant factors in failure to report. Causation in
Contributory negligence.

Class 33 -- Tuesday Oct 7th

**Epstein pp 322-331** Breach of statute. *LeRoy Fibre Co. v. Chicago, Milwaukee & St. Paul*
Think hard about this case. Difference between majority and dissent? Economic Arguments?
Reciprocal Causation and joint activities. What would a libertarian think? Relevance to
property law? *Derheim v. N. Fiorito* and the Seatbelt Defense
Torts -- Prof. Boyle

Assignment #6


READ WHITE, 63-102. This historical background to the causation debates will be particularly important.

Class 35 -- Thursday, October 9th

Epstein pp. 322-331, 341-344 (includes some of assignment originally for last class)

Defenses to Negligence: Contributory Negligence Derheim v. N. Fiorito and the Seatbelt Defense.

Assumption of Risk -- Lamson v American Axe. What view of consent? Link to contract law? The fellow servant rule and freedom of contract. (Find a poem on the fellow servant rule?)

Class 36 -- Friday, October 10th

Epstein pp. 344-362 Defenses to Negligence: Assumption of Risk Murphy v Steeplechase Amusement. Cardozo is not amused. Obstetrics and Gynecologists v Pepper Contracts of adhesion and arbitration contracts. The war between tort and contract. What assumptions are being made by both sides?

Comparative Negligence -- Li v Yellow Cab. Knight v Jewett What's the difference between assumption of risk and contributory/comparative negligence?

Optional Practice midterm handed out. You have lots of time, so you do NOT have to do this over Fall break. I will be going over it on Monday October 27th

Class 37 -- Monday October 20th

Epstein pp. 362-371, 433-442

Defenses to Negligence: Comparative Negligence -- Li v Yellow Cab. What's the difference between assumption of risk and contributory/comparative negligence?

Causation -- (Third Element of Negligence)


Class 38 -- Tuesday October 21st

Epstein pp. 442-468

I. Cause in Fact

General Electric Expert and lay opinion. The scientific boundaries of proof Herskovits – loss of a chance of cure? Kingston Ry contributory causes and liability for fire

Class 39 -- Wednesday October 22nd

Epstein 463- 471, 479-486

Cause in Fact – Joint causation Summers v. Tice


Class 40 -- Thursday October 23rd

Epstein 486-501

Causation II. Proximate Cause. Brower v. NY Central – intervention by third parties. Where have we seen this issue before? Wagner v. International Rwy Danger invites rescue. In Re Polemis Direct causation or foreseeability? What would Holmes say?

No class on Friday October 24th.
Torts -- Prof. Boyle
Assignment #7

Read White 102-139

Class 44 – Friday October 31st
Epstein 501-520 Causation (Third Element of Negligence) II. Proximate Cause:
Torts in the bosom of time. Wagon Mound #1&2 Direct, natural, foreseeable or none of the above?

Class 45 – Monday, November 3rd
Epstein 521-530, 548-565 Causation (Third Element of Negligence) II. Proximate Cause:
Union Pump v. Allbritton (We will skim this case) Affirmative Duties: The Duty to Rescue:

Class 46 – Tuesday, November 4th
Epstein 629-630, 647-669

Class 47 – Wednesday November 5th
Epstein 669-683
Strict Liability Traditional Forms of Strict Liability: Nuisance: Private Nuisance. Vogt Can voltage invade your land? Section 826-827 of the Restatement. Fontainebleau Hotel Corp. Legally Protected Interests in Light? What are the links between this discussion and our discussion in Moore v. Regents or in the freedom from unfair competition and Tuttle v. Buck

Class 48 – Thursday November 6th
Epstein 683-699

Strict Liability Traditional Forms of Strict Liability: Nuisance:
Boomer v. Atlantic Cement. (This is a key case)

NO CLASS ON FRIDAY NOV 7th.
Torts -- Prof. Boyle
Assignment #8

Read White 139-179

Class 52 – Thursday November 13th
Epstein 699-706
Strict Liability

Finishing Nuisance

Class 53 – Friday November 14th
Epstein 715-728

Class 54 – Monday November 17th
Epstein 728-739
Introduction to Product Liability: Rationales. Contract and Warranty Escola v Coca Cola -- introduction to the rationales for product liability. McCabe v Ligget. Warranties #2-314-5 and #2-318 of the UCC. Study the UCC sections with great care

Class 55 – Tuesday November 18th
Epstein pp 739-748
Introduction to Product Liability: Tort or Contract. The Restatement (2nd) #402A. In general, you should review the UCC material from last class and the 402A material carefully-- reading all of the material carefully, including comments and note cases. Be prepared for an in-class set of questions on your knowledge -- particularly your knowledge of 402A

Class 56 – Wednesday November 19th
Epstein pp. 748-764
Tort or Contract cont’d. The Restatement (Third) sections 1& 2 Casa Clara. Why have different rules? When is a sale not a sale? Physical and Economic Harm. Statutes of Limitations Cafazzo Who is a proper defendant? -- goods and services.

Class 57 – Thursday November 20th
Epstein pp 764-779
Product Liability -- Types of "Defect" 402(A). What's a defect? 1 Construction defects Pouncey v Ford. Is this a strict liability action? The experts battle it out. 2 Design Defects -- Volkswagen v Young. Are cars designed to be crashed?

Class 58 – Friday November 21st
Epstein pp 779-792
Product Liability -- Types of "Defect" --2. Design Defect Continued Linegar Barker v Lull -- is negligence the test for whether a product is defective? What happened to strict liability? What's the rule in Barker? Does this remind you of anything? State of the art? What's the baseline?
Torts -- Prof. Boyle
Assignment #9

Read White 179-210

Class 59 – Monday November 24th
Epstein pp 779-812
Read the notes on the Barker factors. Potter v. Chicago Pneumatic. Pay special attention to the notes on guns, page 803-805. Types of "Defect"-- Duty to warn McDonald v Ortho Pharmaceutical Assumptions about doctor/patient contact. Information costs and the learned intermediary. Preemption.

Class 60 – Tuesday November 25th
Epstein pp 812-831

Class 61 – Monday December 1st
Epstein 1018-1026 The New Zealand Plan. PM 1-12 (reread) 159-213
Photocopied Materials (Reread Huber 1-12 which you read for the first day) Read 159-213 -- Galanter, “Real World Torts” Hager, A Response to Huber

Class 62 – Tuesday December 2nd
Review the Material from Class 61
How should we reform the tort system, if at all?
End – Thanks for a great class.

For sample exams and answers go to
http://www.law.duke.edu/boylesite/tortlaw.html