

Torts – James Boyle

Fall 2003

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Section One -- Intentional Torts, Precedential and non-precedential arguments.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.

Texts: Epstein, Cases and Materials (7th ed.) Photocopied Materials (PM) G.E. White, History of Tort Law in America.

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Class 1 –Thursday, August 21, 2003

Try to find one newspaper article on Torts from the last few weeks – you don't need to bring it to class. Just be ready to discuss it. Read **Epstein** pp. 3-12 and the three cases given on p.53 (**PM**). Topics: Battery, Vosburg v. Putney, "intentional act." Eggshell skull. Act/ no act, Garratt v. Dailey. Smith v. Stone, Gilbert v. Stone, The Eliza Lines. Non-Precedential or Policy Arguments: an introduction.

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

Epstein pp. 12-21.(omitting *Canterbury v. Spence*) **PM** pp.54-57.

Topics: Act/no act continued PM *Southern Counties*, *Hurley v. Eddingfield*. Defenses -- consent. *Mohr v. Williams*. Emergency consent, substitute consent. **Precedential Arguments:** Generating broad and narrow holdings from cases. Distinguishing cases. **Policy Arguments:** Moral, economic and deterrence arguments explored.

Class 4 - Tuesday, August 26, 2003

Epstein pp. 22-28,

Hudson v. Craft. Battery -- Consensual Defenses and Paternalism. when to be paternalist? Deterrence, punishment, social control, using consent.

Class 5 -- Wednesday, August 27, 2003

Epstein 61-67. Assault, *I de S. and Wife*, *Turberville v. Savage*. Emotional Distress: Offensive Battery, *Alcorn v Mitchell*.

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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

Topics: The intersection of tort, contract and property. Commodification. Creation of legally protected interests. Owning your body. Informed consent. Battery. Conversion. Genetic Information. Etc. Etc.

Class 8 -- Monday, Sept 1st

Moore cont'd. Topics: The intersection of tort, contract and property. Commodification.

Creation of legally protected interests. Owning your body. Informed consent. Battery.

Conversion. Genetic Information. Etc. Etc.

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

Class 9-- Tuesday, September 2nd

Epstein pp. 71-84 Defenses to Intentional Torts *Coblyn v Kennedy's Intentional Infliction of*

Emotional Distress. *Wilkinson v. Downton*, *Bouillon v Laclede*. *George v Jordan Marsh*. Creation of

LPI's. Institutional Competence, formal realisability, floodgates. Sexual Harassment and Title VII.

Hustler v Falwell Constitutional Defenses. **Policy Arguments:** when to be paternalist? Deterrence,

punishment, social control, using consent. **Precedential Arguments:** Purposive and formalist

readings of a rule. Introduction to the strategy and rhetoric of legal development. Finishing up

material from class 7

Class 10-- Wednesday, September 3rd

Epstein pp 30-40, **Defenses:** *McGuire v Almy* insanity. *Courvoisier v Raymond* -- self-defense, "subjective" and "objective" standards.

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.

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Assignment #3

Section Two -- Negligence. History, Ideology and Structure of the Law.

Economic Analysis. More arguments. Anatomy of a torts case.

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 LPI'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

Epstein pp. 85-95, 102-116. Introduction to Negligence and Strict Liability. *Weaver v. Ward*. Basic arguments for and against negligence and strict liability. Influence of the Forms of Action. *Brown v. Kendall*, The rise of negligence as a universal principle. Economic subsidy or ideological necessity? *Rylands v. Fletcher*, the first instalment.

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. *Hammtree v. Jenner* -- loss spreading and equal protection.

Class 19 -- Tuesday September 16th,

Finishing up material from class 18

Class 20 -- Wednesday September 17th

Epstein 153-178. 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. No.1, Reasonable Person**. Subjective or Objective? *Vaughan v. Menlove* Idiots and Haystacks. More Holmes. *Roberts v. Ring* and the reasonable child, or retiree. Sudden emergencies. *Daniels v. Evans*-- children and the infant activity rule. *Breunig v. American Family* Batman, God and the strange case of Erma Veith. Wealth and poverty.

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Assignment #4

Section Two -- Negligence. History, Ideology and Structure of the Law. Economic Analysis. More arguments. Anatomy of a torts case. **Background G. Edward White, Tort Law in America pp. 20-37.**

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?

Class23 -- 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

Ways to Define the Duty of Care **#3. Custom.** Safety Codes. Medical Malpractice *Lama v. Boras*. Other evidence of custom – the PDR. *Morlino*. The locality rule. *Brune v. Belinkoff*. How do we define the relevant community? *Helling v. Carey*. Explain the relative advantages of reasonable person. Learned Hand and custom as definitions of the duty of care in negligence.

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

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. Subsequent legislation. Protected groups. Purpose of statute. *Martin v. Herzog*. Negligence *per se*.

NO CLASS ON MONDAY SEPTEMBER 29th. No office hours on Sept 30th.

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Assignment #5

Section Two -- Negligence. History, Ideology and Structure of the Law. Economic Analysis.
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.
Subsequent legislation. Protected groups. Purpose of statute. *Martin v. Herzog*. Negligence *per se*.
Brown v. Shyne -- be prepared to argue this case. *Ross v. Hartman*. Key statutes. *Vesely v. Sager*

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? *Colemanares Vivas v. Sun Alliance* 2nd prong of R.I.L.
Exclusive control. *Ybarra v Spangard* -- R.I.L. and the conspiracy of silence.

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

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Assignment #6

Section Two -- Negligence. History, Ideology and Structure of the Law. Economic Analysis. More arguments. Anatomy of a torts case.

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)

I. Cause in Fact *New York Central RR v Grimstead*. Read the notes on *Haft v. Lone Palm* carefully. Is cause in fact a "factual" question? What issues do these rules decide? *Zuchowitz*.

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*

II. Proximate Cause. *Ryan v. NY Central*. What is the difference between proximate cause and cause in fact? *Berry v. The Borough of Sugar Notch*. "But for" causation and its limits.

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.

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Assignment #7

Section Two -- Negligence. History, Ideology and Structure of the Law. Economic Analysis. More arguments. Anatomy of a torts case. **Section Three**--Strict Liability. Nuisance and Product Liability. Non-reciprocal imposition of risk, socialisation of risk and loss. The ideology of the economic analysis of law. The intersection of contract and tort. The debate over "tort reform."
Read White 102-139

Class 44 – Friday October 31st

Epstein 501-520 Causation (Third Element of Negligence) II. Proximate Cause:
Palsgraf v Long Island -- Study this case, both majority and dissent, with the greatest of care. How many elements in Cardozo's theory of negligence? Why look at it this way? Does it favour plaintiffs or defendants? How would you describe Andrews? ? *Marshall v. Nugent*
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:**
Buch v. Amory Epstein, Ames, Bender. Make a quick four line summary of the arguments put forward by each writer. *Montgomery v. National Convoy*. Distinguish *Buch* and *Montgomery*

Class 46 – Tuesday, November 4th

Epstein 629-630, 647-669
Strict Liability Traditional Forms of Strict Liability: Ultrahazardous Activities: *Spano v. Perini* and Liability for Blasting. Restatement 519-520, 522-524. *Indiana Harbor Belt*. How do these rules compare to Holmes's argument in the Common Law? To *Rylands v. Fletcher*? To intentional torts? What reasons for imposing strict liability? What do we mean by strict liability.

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:.
Rodgers v. Elliott – Extrasensitive Plaintiffs *Ensign v. Walls*. Coming to the Nuisance.
Boomer v. Atlantic Cement. (This is a key case)

NO CLASS ON FRIDAY NOV 7th.

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Assignment #8

Section Three--Strict Liability. Nuisance and Product Liability. Non-reciprocal imposition of risk, socialisation of risk and loss. The ideology of the economic analysis of law. The intersection of contract and tort. The debate over "tort reform. Read White 139-179

Class 52 – Thursday November 13th

Epstein 699-706

Strict Liability Traditional Forms of Strict Liability: Nuisance:.
Finishing Nuisance

Class 53 – Friday November 14th

Epstein 715-728

Introduction to Product Liability: The rise and Fall of Privity Winterbottom v Wright and McPherson v. Buick.

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?

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Assignment #9

Section Three--Strict Liability. Nuisance and Product Liability. Non-reciprocal imposition of risk, socialisation of risk and loss. The ideology of the economic analysis of law. The intersection of contract and tort. The debate over "tort reform. 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

Types of "Defect"-- Duty to warn *Vasallo v. Baxter Healthcare*. Extent of duty. Comment k. Unavoidably dangerous products and the necessary warnings.

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>