

# **TORTS (LAW15-A1 & LAW15-A2 – SPRING 2021)**

## **COURSE INFORMATION AND SYLLABUS**

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Class: T, Th: 10:10AM – 11:50AM (A1); 2:00PM – 3:40PM (A2)

Office Hours: T, Th: 4:00-5:00PM (and by appointment)

You can also email me directly ([aelmore@law.miami.edu](mailto:aelmore@law.miami.edu)) with quick questions anytime, which I will answer by the end of the following business day.

### **Welcome to Torts!**

At its heart, the tort system is a compensatory system. To evaluate its effectiveness, you need to know its rules, and a theory of what kinds of harms should be compensated and why.

At the end of the semester, a successful student in this course should be able to:

- Identify the basic elements of an intentional tort, a negligence action, and a strict liability action as well as common defenses to each action;
- Analyze these elements and defenses as they apply to fact patterns; and
- Use legal authority to support this analysis.

## **I. Required Course Materials**

1. Casebook: Cases and Materials on Torts, Epstein & Sharkey (**12<sup>th</sup> Edition**)
2. Reader: The Forms and Functions of Tort Law, Abraham (**5<sup>th</sup> Edition**)

*Additionally, I will post supplemental readings (**Supp**) on our course Blackboard site throughout the semester, where you will find additional course materials and tools, as well as links to our Zoom meeting room.*

The Casebook (CB) and Abraham reader (R) are available at the UM bookstore and online. I have chosen this edition of the CB because it has an electronic version with many features designed to assist your learning. The CB is expensive; there is also a less expensive e-book of the casebook available. You may also choose to purchase an older edition of the casebook, which is likely much less costly. If you purchase the e-book or an older edition you will be responsible for making sure that you are reading the correct pages. I will set up a discussion thread in the Discussions folder in Blackboard for you to work with your classmates to ensure you are reading the correct pages.

## **II. Attendance, Participation and Evaluation**

### **Attendance**

The ABA and the Law School require regular and punctual attendance to the extent you are able. Persistent and unexplained lapses in attendance may result in a lowered grade or disqualification from eligibility to take the final exam.

### **Preparation for Class**

Learning the law is in many ways a cooperative endeavor. You will read cases on your own but will only grasp their reasoning and implications after discussion. I hope that you will feel comfortable both engaging with the materials and being respectfully challenged on your interpretations of it. I therefore take class participation very seriously, and I have a specific and serious policy concerning class preparation. **If you are not fully prepared, you must let me know before class begins. This is best done via email at least an hour before class begins.**

I will call randomly on several students each class (including the first), who I expect to field questions about the basic information about the cases you've read and the underlying doctrine. When being called on, please don't worry about making mistakes. Mistakes are natural, even when you are prepared, and can help the class discussion. Volunteered answers in class are always welcome. I will commend students for distinguished classroom performance, which is judged not by quantity, but by thoughtful, respectful and helpful participation, by as much as a half grade improvement (no more). I also retain the option of lowering your grade by as much as a half grade (no more) for poor class attendance or participation/lack of preparation.

### **Examinations and Grades**

There will be a closed-book final examination at the end of the course. It will be composed substantially of essay questions with some multiple choice questions. You will also have an ungraded practice midterm, approximately midway through the course that is intended to provide a preview and early direction for success in exam-taking. Before the final exam I will hold a review session in which I will be available to answer questions about the material.

## **III. Class Policies**

### **Classroom Decorum:**

During this course we will discuss subjects on which people hold significantly divergent views. While passionately defending one's position is acceptable, it must always be done in a manner that is respectful of people and of opposing perspectives. Courtesy and respect for your colleagues is a classroom and professional requirement. Zoom backgrounds must be appropriate, and students are not to read e-mails, surf the Internet, play games, or send instant or text messages during class. Students should minimize any disturbances to the class. Please silence your devices. If you need to arrive late or leave early, let me know in advance of class.

### **Recordings and Academic Integrity:**

Students are expressly prohibited from recording any part of this course. Meetings of this course might be recorded by the University. Any recordings will be available to students registered for this class as they are intended to supplement the classroom experience. Students are expected to follow appropriate University policies and maintain the security of passwords used to access recorded lectures. Recordings may not be reproduced, shared with those not enrolled in the class, or uploaded to other online environments. If the instructor or a University of Miami office plans any other uses for the recordings beyond this class, students identifiable in the recordings will be notified to request consent prior to such use.

### **Disability & Accommodations:**

If a student has a disability, or suspects that he or she may have a disability, please contact Jessie Howell, Director of Accessibility, for information about available opportunities, resources, and services. Her phone number is 305-284-4551, and her email address is [access@law.miami.edu](mailto:access@law.miami.edu).

### **Title IX:**

The University of Miami seeks to maintain a safe learning, living, and working environment free from all types of sexual misconduct including but not limited to: Dating Violence, Domestic Violence, Sex- or Gender-Based Discrimination, Sexual Assault (including Sexual Battery), Sexual Exploitation, Sexual Harassment, and Stalking. For additional information about the University's efforts to prevent, stop, and address sexual misconduct, including resources and reporting options, please visit [www.miami.edu/titleix](http://www.miami.edu/titleix) or contact the University's Title IX Office at [titleixcoordinator@miami.edu](mailto:titleixcoordinator@miami.edu).

### **Intellectual Property:**

The course professor is the copyright owner of the courseware. Specifically, pursuant to the University's Policy on Inventions, Intellectual Property, and Technology Transfer, "courseware" includes: course syllabi, assignments, assessments, and/or other materials that are first created and made available to students as part of the educational curriculum at the University.

### **A Note about COVID-19:**

These are unprecedented times, and none of us would have chosen this—a pandemic, social distancing, health and economic uncertainty—given the choice. But it is our present reality, and given that reality, the humane option is the best option (and, really, always is). We will prioritize supporting each other as humans, remaining as flexible and accommodating as possible while still fostering intellectual growth and connection. If you are encountering challenges that make it difficult to attend class, please reach out to me, or Director of Professional Development and Leadership Initiatives Vanessa Kuljis, who will be working with students in section A, or the Dean of Students.

## **IV. Syllabus:**

### **Reading Assignments:**

Readings are listed on the syllabus first from the Epstein & Sharkey casebook (**CB**), and second from the Abraham reader (**R**). There are a handful of supplemental readings, marked as (**Supp**), which will be posted on the course Blackboard site. All assignments are required. For notes following cases in the CB, read all notes on the assigned pages, unless otherwise indicated below.

The syllabus notes the weeks and class dates for all unit topics and assignments through the first half of the semester. I will update the syllabus periodically to provide calendar dates for the remaining classes, and may revise the syllabus to add or remove material, as the course progresses. I will give notice of any changes to the assigned material in the syllabus at least the week before the class, unless unavoidable.

For the first class on Tuesday, January 26, 2021, please read this course information and syllabus, as well as the first class reading assignment, which will be posted as pdfs on the course Blackboard site. As a general rule, there are three units per week, and aside from the first week, we will cover the first two topics on Tuesdays, and the last on Thursdays. You should be prepared to cover the assignments associated with each class by date; if we end class in the middle of one topic, we will finish that topic, along with each day's assigned topic(s), unless I tell you otherwise.

**Outline of Class**

<b>I. Intentional Torts</b>
<b>II. Negligence</b>
A. Duty/Breach
B. Plaintiff's Conduct & Defenses
C. Causation
<b>III. Strict Liability</b>
<b>IV. Products Liability</b>
<b>V. Damages</b>

**Syllabus**

<b>Class</b>	<b>Topic/ Outline</b>	<b>Assignment #s for CB and R</b>	<b>Particular Focus</b>
<b>I. Intentional Torts</b>			
We will begin with an introduction to torts with an examination of intentional torts, or harms that require a finding by the court of intent on the part of the defendant, and available defenses. We will also introduce the theories of tort liability, including corrective justice and deterrence.			
<b>1/26</b>	<ul style="list-style-type: none"> <li>• Introduction</li> <li>• Battery</li> </ul>	<b>CB:</b> 3-11 <b>R:</b> 16-23 <b>Supp.</b> (class syllabus and policies)	<i>Vosburg v. Putney; Garratt v. Dailey; White v. Univ. Idaho</i>
<b>1/28</b>	<ul style="list-style-type: none"> <li>• Emotional Harm</li> </ul>	<b>CB:</b> 55-60; 60-65 (N.1, 3); 63-71 (N. 1, 2)	<i>I. de S. v. W. de S.; Tuberville v. Savage; Alcorn v. Mitchell; Coblyn v. Kennedy's; Wilkinson v. Downton</i>
<b>1/28</b>	<ul style="list-style-type: none"> <li>• Trespass to Land</li> <li><b>Defenses:</b></li> <li>• Necessity</li> </ul>	<b>CB:</b> 11-14 (N.1-3); 44-50 (N.1)	<i>Dougherty v. Stepp; Ploof v. Putnam; Vincent v. Lake Erie</i>

<b>Class</b>	<b>Topic/ Outline</b>	<b>Assignment #s for CB and R</b>	<b>Particular Focus</b>
2/2	• Consent	<b>CB:</b> 23-29; 15-23 (N.1-3, 5) <b>R:</b> 5-16	<i>Hudson v. Craft; Hackbart v. Cincinnati Bengals; Mohr v. Williams</i>
2/2	• Defense to Land • Self-Defense	<b>CB:</b> 37-43 (N.2, 3); 33-37	<i>Bird v. Holbrook; Courvoisier v. Raymond</i>

## II. Negligence

We will next examine liability for negligence for accidents, and the features of modern negligence law. We will consider what it means to determine someone is “negligent” and how such determinations implicate important social values in establishing the contours of duty and breach. This chapter also allows us to begin exploring the notion of *risk*. Tort law seeks to discover how much safety precaution is “worth it,” implying that a certain amount of risk is worthwhile, even if it will inevitably cause injuries and deaths.

2/4	• Introduction to Negligence	<b>CB:</b> 137-41 (N.2); 143-45	<i>Hammontree v. Jenner; “Hot Coffee” documentary</i>
<b>A. Duty/Breach</b>			
2/9	• Reasonable Person	<b>CB:</b> 119-26 (N); 164-65 152-54 <b>R:</b> 68-76	<i>Holmes, The Common Law; Fletcher v. City of Aberdeen; Roberts v. Ring</i>
2/9	• Reasonable Person (con’d)	<b>CB:</b> 155-58 (N.1,3); 159-63 (N.1-3)	<i>Daniels v. Evans Breunig v. Am. Fam. Ins.</i>
2/11	• Hand Formula	<b>CB:</b> 168-71; 177-83 (N.1-5); 186-88 (N) <b>R:</b> 77-85	<i>Eckert v. Long Island RR (as discussed by Terry &amp; Seavey); US v. Carroll Towing; Andrews v. United Airlines</i>
2/16	• Custom	<b>CB:</b> 188-208 <b>R:</b> 85-89	<i>Titus v. Bradford; Mayhew v. Sullivan The TJ Hooper; Lama v. Borrás</i>
2/16	• Informed Consent	<b>CB:</b> 214-26 (N.1-4, 7) <b>R:</b> 89-99	<i>Canterbury v. Spence</i>
2/18	• Statutes/Regs	<b>CB:</b> 226-28 (N.1); 229-32 (N.1-3); 235-40 <b>R:</b> 99-103	<i>Osborne v. McMasters; Stimpson v. Wellington Service; Gorris v. Scott; Martin v. Herzog; Tedla v. Ellman</i>

<b>2/23</b>	<ul style="list-style-type: none"> <li>Judge vs. Jury</li> <li>Res Ipsa Loquitur</li> </ul>	<b>CB:</b> 247-49 (Holmes) 253-58 (N.3-5); 258-64; 265-69 (N.1); 273-78 (N.1)	<i>Byrne v. Boadle</i> ; <i>Prosser Restatements (2<sup>nd</sup> &amp; 3<sup>rd</sup>)</i> ; <i>Colmenares v. Sun Alliance</i> ; <i>Ybarra v. Spangard</i>
<b>2/23</b>	<ul style="list-style-type: none"> <li>No Duty Rules (&amp; Duty to Rescue)</li> </ul>	<b>CB:</b> 481-96 (N.1,3,4); 499-500 (N.2)	<i>Buch v. Armory Mfg Co.</i> ; <i>Hurley v. Eddingfield</i>
<b>2/25</b>	<ul style="list-style-type: none"> <li>Affirmative Duties (Owners &amp; Occupiers of Land)</li> </ul>	<b>CB:</b> 501-09 (N.1,3-5), 509-16 (N.1) <b>R:</b> 266-69	<i>Robert Addie &amp; Sons (Collieries), Ltd. v. Dumbreck</i> ; <i>Rowland v. Christian</i>
<b>3/2</b>	<ul style="list-style-type: none"> <li>Affirmative Duties (Special Relationships)</li> </ul>	<b>CB:</b> 533-34 (RST § 315); 534-43; 543-51 (N.1)	<i>Kline v. 1500 Mass. Ave. Apt. Corp.</i> ; <i>Tarasoff v. Regents</i>

### B. Plaintiff's Conduct & Defenses

In a negligence action, even if a plaintiff has demonstrated duty, breach, causation, and damages, a defendant can escape liability by showing, for example, "assumption of risk" or comparative negligence by a plaintiff. This material surveys the variety of available affirmative defenses to liability. We will examine the functions these defenses perform and their appropriate scope, in light of these functions.

<b>3/2</b>	<ul style="list-style-type: none"> <li>Contributory Negligence</li> <li>Assumption of Risk</li> </ul>	<b>CB:</b> 300-04 (N); 308-12; 315-19; 319-26 (N.1,2,4,5)	<i>LeRoy Fibre Co. v. Chicago</i> <i>Lamson v. American Axe</i> <i>Murphy v. Steeplechase</i> <i>Meistrich v. Casino Arena Attractions</i>
<b>3/4</b>	<ul style="list-style-type: none"> <li>Comparative Negligence</li> </ul>	<b>CB:</b> 328-332 (N.1); 334-49 (N.1,2[a,b,c], 4,5); 349-52 (N.2,3)	<i>Dalury v. S-K-I, Ltd.</i> <i>Li v. Yellow Cab</i> <i>Knight v. Jewett</i>
<b>Class 19</b>	<i>Practice midterm</i>		

### C. Causation

In any tort (intentional, negligence or strict liability), the plaintiff must prove causation in order to recover damages. Here, we first examine the "but-for" test (where an injury would not have occurred "but-for" defendant's act or omission) and the exceptions to it. We will also explore instances where the law of torts limits the scope of liability (also called "proximate cause") even for unreasonably dangerous conduct that is a but-for cause of plaintiff's injury. This material addresses the reasons for placing limitations on liability under these circumstances.

<b>Class 20</b>	<ul style="list-style-type: none"> <li>Cause in Fact</li> </ul>	<b>CB:</b> 353-59 (N.1-3) 360-65 <b>R:</b> 125-30	<i>NY Central RR v. Grimstad</i> <i>Zuchowicz v. US</i> ; <i>Haft v. Lone Palm Hotel</i>
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(21)	<ul style="list-style-type: none"> <li>• Joint &amp; Several Liability</li> <li>• Multiple Causes</li> <li>• Alternative Liability</li> </ul>	<b>CB:</b> 365-75 (N.1, 2) 379-84 (N.2,3) 385-88 (N & RST §28) <b>Supp.</b>	<i>Union Stock Yards; Cal. Civ. P. Code; AMA v. Superior Court; Kingston v. Chicago &amp; NW Ry. Summers v. Tice</i>
(22)	<i>Midterm Review</i>	<i>Bring midterm to class</i>	<b>Note: also read for next class!</b>
(23)	<ul style="list-style-type: none"> <li>• Market Share Liability</li> <li>• Loss of Chance</li> </ul>	<b>CB:</b> 388-98 (N.1-3) 399-404 (N.1,2)	<i>Sindell v. Abbott Labs. Hymowitz v. Eli Lilly Skipworth v. Lead Indus. Herskovits v. Group Health Coop.</i>
(24)	<ul style="list-style-type: none"> <li>• Scope of Liability (Proximate Cause) I</li> </ul>	<b>CB:</b> 353-55 (re-read) 415-19 (N.1,2) 424-30 (N.2,3) 430-36 <b>R:</b> 149-70	<i>Ryan v. NY Central RR Brower v. N.Y. Central; Restatements (RST §§431, 438, 449; RTT §34) Wagner v. International Ry. In re Polemis</i>
(25)	<ul style="list-style-type: none"> <li>• Scope of Liability (Proximate Cause) II</li> </ul>	<b>CB:</b> 436-57 (N.1-3)	<i>Wagon Mound (Nos.1 &amp; 2) Palsgraf v. Long Island RR</i>
(26)	<ul style="list-style-type: none"> <li>• Scope of Liability (Proximate Cause) III</li> </ul>	<b>CB:</b> 464-75 (N.1-3)	<i>Mitchell v. Rochester Rwy Dillon v. Legg</i>

### III. Strict Liability

Unlike negligence, strict liability does not require a finding of fault. Although liability for negligence remains the predominant standard of care in personal injury and property damage cases, strict liability plays an important role in a subset of these cases. Our concern in studying this material is both to isolate these kinds of cases and to inquire into the appropriate division between negligence and strict liability.

(27)	<ul style="list-style-type: none"> <li>• Strict Liability vs. Negligence</li> <li>• Abnormally Dangerous Activities</li> </ul>	<b>CB:</b> 588-95 (N.1,3,4) 595-603 <b>R:</b> 197-205	<i>Restatements (RST §§519-20; RTT §20) Indiana Harbor Belt R.R.</i>
(28)	<ul style="list-style-type: none"> <li>• Trespass to Chattels</li> <li>• Conversion</li> </ul>	<b>CB:</b> 554-62 (N.1, 2); 563-66 (N.1); 567-76	<i>Intel Corp. v. Hamidi; Poggi v. Scott; Moore v. Regents of Cal.; Kremen v. Cohen</i>
(29)	<ul style="list-style-type: none"> <li>• Nuisance</li> </ul>	<b>CB:</b> 607-10 (N.1-3) 614-19 (N.1, 4) 628-37 (N.4-7)	<i>Fontainebleau Hotel Corp. v. Forty-Five; Boomer v. Atlantic Cement Co.; Spur Industries v. Del E. Webb Dev.</i>

(30)	• Vicarious Liability	CB: 649-56 (N.1-4, 6) 657-66	<i>Ira S. Bushey &amp; Sons v. US; Saleem v. Corp. Trans'n Gp.; Petrovich v. Share Health Plan</i>
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#### IV. Products Liability

Modern products liability has precursors in both negligence and strict liability. In examining liability for defective products, we consider whether and to what extent these bodies of law can be comfortably applied in this field.

(31)	• Manufacturing & Design Defects	CB: 683-93 (N.1,4-5) 693-99 699-705 (N.1,2) R: 215-224	<i>Escola v. Coca Cola; Greenman v. Yuba Power Products; Casa Clara Condo. Ass'n Restatements (RST §402A; RTT §§1-2);</i>
(32)	• Manufacturing & Design Defects (cont'd)	CB: 713-18; 718-20; 728-36; 736-41	<i>Speller v. Sears, Roebuck Barker v. Lull Engineering Co.</i>
(33)	• Warnings • Regulatory Compliance	CB: 742-52 755-60 R: 225-234	<i>MacDonald v. Ortho Pharm. Hood v. Ryobi Liriano v. Hobart Corp</i>

#### V. Damages

Damages are the key to the corrective justice function of tort liability and they tend to promote safe conduct. Both of these goals, however, depend upon the effectiveness of tort damages. We will examine methods for awarding damages and the categories of available damages.

##### A. Compensatory Damages

(34)	• Compensatory Damages	CB: 793-802;805-07 (N.1-2); 817-24	<i>McDougald v. Garber Migdal v. Abu-Hana McMillan v. City of New York</i>
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##### B. Punitive Damages

(35)	• Punitive Damages	CB: 824-31 (N.1, 2, 4); 831-40	<i>Kemezy v. Peters State Farm v. Campbell Mathias v. Accor</i>
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(36)	Final Exam Review Q & A		
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