

**PACE UNIVERSITY
SCHOOL OF LAW**

Torts, Sec. 306
Syllabus

Professor Doernberg
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INTRODUCTION

One of the things that bedevils first-year students is the law's vagueness. Most students arrive at law school with at least an unconscious idea that the law is fixed and certain. That is (not at all regrettably) not the case. If the law worked that way, we could simply feed the relevant data¹ into a computer; the computer would churn out the answer, and all of us would have to find something else to do with our lives. The law does not work that way, however, which is a good thing. If it did, it would quickly acquire a Procrustean rigidity that, while it might have the advantage of predictability, would often produce bad results—that is, results with which we as a society are uncomfortable. I certainly do not suggest that predictability is without value. It is, however, no more than a second-order value. The first-order value to which we all aspire is very hard to define, but it has something to do with amorphous concepts like “justice,” “fairness” and “procedural regularity.”

Remember that every case begins with a client with a problem. Law is our society's attempt to make possible the peaceful resolution of problems, and that often requires a fair amount of creativity. Largely for that reason, the law is not fixed and immutable; it is always a work in progress. When a new kind of problem surfaces, we try to devise a solution with which society can live. Sometimes legislatures address problems in the first instance, but often the courts do so through the common law. As time goes on and more cases arise, we may tinker with the solution to make it work better, or, in some circumstances, we may discard it completely and try something totally new.

In the first year of law school, you are undertaking two enormous jobs simultaneously. First, you are learning a whole new vocabulary and language. That can be a struggle, and you should get yourself a good law dictionary (Black's is the most widely used) and keep it handy. *Every time* you see an unfamiliar word or phrase, look it up.² Do not count on understanding the meaning simply from the context in which the term appears. After all of the years that I have been in the law, my dictionary still sits on my desk where I can reach it without having to get up. When you come to class, you should be able to explain what particular terms in the cases you have read mean. You will discover that even some words that are familiar to you colloquially take on different meanings when used as legal terms. “Convert” means several things in daily parlance (*e.g.* to change something, to acquire different (particularly religious) beliefs, or to score one or two points after a touchdown), but it has a very specialized meaning in Torts.

Second, you are learning an entirely new thinking system. Lawyers approach problems in very structured ways. Organization is critical. In the roughly one thousand years of Anglo-American legal history, we think we have learned some good ways to analyze legal problems. That time span is important. If it's taken us that long to develop sophisticated analysis (and we're still constantly working on it), don't be discouraged if it takes you more than a

¹ Even here one must make judgments, and a computer cannot make them. What *are* the relevant data? What makes a datum is relevant or not?

² Among other things, that avoids the uncomfortable silence that occurs when you are reciting and the teacher asks you to refresh the class's memory on the meaning of a term.

few days, weeks or months to assimilate it.

Either of these jobs would be challenging just standing alone. To undertake both at the same time requires a fair amount of dedication, discipline and self-tolerance. For the most part, pre-law-school education involves information acquisition. That is not our primary goal. Here you are acquiring and honing new mental processes. Like any form of training, it can be uncomfortable at times because you are (I hope) stretching yourselves to increase your capacity. View it as a training process, similar to training for a marathon. You will not “get it” all at once; no one does. (That includes your professors.) Be patient with yourselves and your colleagues. Let us reason together.

CLASS REQUIREMENTS

A. Class Attendance

You should plan to attend every class; that’s part of your job as a law student . Part of my job is to make the classes worth your time and effort . I will circulate a sign-in sheet at the beginning of every class. If the sheet doesn’t make it around to where you are sitting, please stop at the lectern on your way out of class to sign in. I will fill in the names of st udents who forget to sign in if I remember seeing them, but in a class as large as ours, I may certainly overlook some.

If you encounter difficulties such as ill ness or personal or family emergencies that make it impossible for you to attend on a particular day, please let me know, preferably in a dvance, whether by telephone, e-mail or a personal message, so that I don’t think you’re just blowing the class off. You are required to attend at least 80% of the classes, which tran slates to five absences. If you have a sixth unexcused absence, you will not be allowed take the final exami- nation. Let’s not go there.

B. Class Preparation

I expect you to be on time, thoroughly prepared, and ready to participate in class room discussion. (If you think about it, that’s probably pretty much what you expect from me.) If you are not prepared for a particular class (and it happens), you must notify me before the class begins. (I don’t necessarily need to know why; I don’t want to pry. I do however, want to avoid the embarrassment that accompanies being called on when one is unpr e- pared and the waste of class time that is an inevitable concomitant of that.) If you have not notified me in advance and are not prepared when called on, I will direct the Regis trar to reduce your score on the final examination by five points . There is no need to risk that, however; all it takes to avoid it is a simple notification . I have never had to deduct points from an examination as long as I have been teaching.

Thorough preparation is essential. On the other hand, it is *not* useful for you to “read ahead,” even if you feel that you have the time. It will make things harder rather than easier. That is because we are building a structure, and we need to have the foundation in place before beginning the first floor. If you are trying to read material before we have discussed the preceding material in class, you do not really have the foundati on. This leads to misassumptions and confusion rather than enlightenment.

I cannot emphasize too strongly the importance of doing your own brief for each ma jor case that we read. (Don’t try to brief all the note cases; you’ll go nuts.) Doing the brief is part of the process of learning to think like a lawyer, and there are no shortcuts that will not impair your chances of doing as well as you can in law school . Especially in the first few weeks of class, you will discover that our discussion follows the pattern of a good brief fairly closely. Having a good brief makes it much easier for you to participate in class discu ssion, which is one of the keys to doing well. (It also takes away a lot of the anxiety that inevitably comes with one’s first exposure to legal analysis.)

To be sure, there are lots of study aids out there, and they are seductive, because they make you think you really understand how something works when you really haven't done the hard work that produces deep understanding. That's not to say that you should never consult a secondary source; of course you should. It's a question of how to use those sources in a way that helps rather than hurts your development.

C. Class Participation

Class is not primarily a time for me to tell you about the law. It is a time for all of us to engage in discussion about the subject to help you learn to reason like a lawyer. It really is a joint undertaking involving everyone. You play a large part in educating yourselves and in educating one another. Practice making arguments for one side or another. See which side you think should prevail, and then construct the best argument you can for the *other* side. Try out your own theories to see whether they stand up to critical examination. Engage in argument with your colleagues, including me.

One of the banes of law school is the limited opportunity for feedback during the semester. Most of the classes are just too large to permit having more than a final examination at the end of the semester. (Unlike your instructors in college, we do not have graduate grading assistants.) You can, however, get constant feedback on how you're doing by participating regularly in class. Can you follow the discussion? Can you participate meaningfully? Can you take a position and then either defend it or modify it as we explore it? One of the best ways that I can help you is through class participation, and it's not just helpful for the individual to whom I'm directly speaking at the moment; it benefits everyone.

Your first efforts are almost guaranteed to be inarticulate or confused. That's natural, expected, and we all went through it. You will misunderstand many things. You will make errors. (So will I, and you will catch me, which is great.) There is nothing wrong with errors. Almost always they help us learn, because we can examine them, figure out where we went astray, and avoid similar mistakes in future. There's also nothing wrong with not knowing the answer to a question. A huge part of what we are trying to do in class is to learn how to figure out something when we're not sure. So take a chance. It's fine to answer when you are sure, but it's even more valuable to respond when you're not. That's how we make progress.

I do not grade for class participation in first-year classes. The first year, and the first semester particularly, comes with enough anxiety without me adding to it by giving you the feeling that every time you open your mouth you may be putting yourself in jeopardy. I hope that the absence of grade pressure in this respect will make you more comfortable about participating generally.

Some of you may be very reticent about speaking in such a large group. I understand that in my gut because I lived it. It can be an awful feeling. Part of being a lawyer, though, is being able to function effectively when you are "on the spot," because you will often be there. Even if you never step into a courtroom other than to be admitted to the bar (which is what I was sure would be my career path), you will be a participant in client meetings, negotiations, brainstorming sessions and countless other situations that will require your participation. If this is an issue for you, please come see me, to give me the opportunity to help you with it. It's pretty painless. I guarantee that none of you will be more terrified of participating in class than I was as a first-year law student many years ago. It doesn't have to be that way, and over the years I think I have helped hundreds of students deal successfully with this issue. (Haven't lost one yet. Haven't even had a minor injury.) Working as a team we can accomplish a great deal.

D. Laptop Computer Policy

Last year I banned laptops from my first-year classes, and I want to explain why that was. First, I should say that I am as much of a technophile as any of you. Computers are

enormously useful tools, and I enjoy working with them and on them. Unfortunately, in the law school classroom they can be hindrances as much as they are useful tools. They can interfere with the learning process instead of aiding it. I am not talking now about obviously inappropriate use during class, such as surfing the web, IMing, *et cetera*. My assumption has always been that if students want to zone out, they will. Certainly I did as a student—more than I should have. I suppose laptops are in some way a double threat in that regard, because they not only offer an enormous range of options for zoning out, but also tend to distract students sitting behind the laptop user, or so I've repeatedly been told. That is not the matter about which I was most concerned. The person whose education the laptop in class may harm the most is the user.

Having a laptop is an almost irresistible invitation to become a stenographer, getting every word of the discussion (or, at least, all of the teacher's words) down. There are at least three problems with this approach. The first and largest problem is that being in a law school class requires very active listening and participation. One cannot do that and do stenographic transcription at the same time. Stenographers (including one famous example from the Watergate scandal of 1972-74—Sally Harmony) regularly report that they have no recollection or understanding of anything that they have "heard" when transcribing. Somehow the material flows from the ears to the fingers without stopping off at the brain. That is absolutely necessary for a successful stenographer, because stopping to think at all about the material interferes with stenography. Taking notes on a laptop subtly but insistently encourages you *not* to listen critically to the discussion, and then you miss a large part of what the class is about. Taking notes by hand, in part because it is so much slower for most of you than typing, is valuable precisely because of that fact. You cannot possibly get every word down, and that forces you to decide as the class goes forward what it is important to have in your notes. *That* is active listening, because you are engaged in a constant process of evaluation. Stenography discourages or prevents active listening because its basic premise is that every word is equally important.

The second problem is that one gets buried so deeply in stenographic mode that the most common response in law classes around the country these days is, "Could you repeat the question?" Students using laptops simply do not (and I strongly suspect cannot) focus on what is going on in class in a way that is useful to them. Worse, after the teacher restates the question, the laptop students all become busy in paging up, down and around to try to find the answer as though it will somehow magically appear. (As Professor David Cole of Georgetown has observed, "Who knows, with instant messaging, maybe it will.") Answers come through thought and analysis, and computers cannot do either of those; only you can.

Third, a transcript of a course's 42 (for three-credit courses) or 56 hours of class is essentially worthless as a study tool. It is far too much to work with effectively, and students waste too many hours looking for answers in their voluminous "notes" when the answers really are not there at all. The answers have to come from you.

Some felt and said that this was inappropriately paternalistic. In some sense, I pleaded guilty, pointing out, however, that any sort of structured teaching is inherently paternalistic; that is one of the advantages of it. We go to a teacher, presumably, because she is an expert who can help us to approach the materials in a usefully structured way. Students in classes that do not have published syllabi complain bitterly about the lack of guidance. You do not expect to be given a 1,200-page book and told simply that you are responsible for the material in it, to approach it in any sequence that looks appealing to you. There are many places in learning where we rely on the teacher's experience to guide us in what works well and what does not. That is all I was attempting to do. It is not so much the distracted student about whom I was concerned. I was concerned instead about the student who genuinely wants to do a professional job in class but unwittingly sabotages himself. In my experience, students who use laptops in class often are at a distinct disadvantage, and it is self-imposed. It is also

avoidable.

I certainly would never take the position that the computer has no value to you as a student. Transcribing notes shortly after class, fleshing them out while your memory is still fresh, can be a wonderful way of recapitulating what went on in class in a manner that will help to cement the material you have covered. I encourage you to do that. In the process, you will find yourself sifting and evaluating the material. It will also help you to identify areas in which you are not clear, or where you may have missed something. Then you can ask classmates or me, before the class fades into something that you did weeks or months ago.

I now think, however, that I was shortsighted in banning laptops entirely. You all have grown up digitally, and, for better or worse, computers are an important part of all of our lives and of our profession. Part of the challenge of that is learning to use them correctly, in ways that help rather than hinder what we are trying to do. Accordingly, you may use laptops in class, subject to two *caveats*. First, if I find that folks are having to ask me to repeat questions unreasonably often and that stenography seems to be the culprit, then the laptops will have to go. Second, if I receive complaints from class members that others are using laptops inappropriately in ways that are seriously distracting, then we will need to make an adjustment. I don't anticipate either of these things happening, and it's entirely in your control whether they do or not. I do have to report to you that many of my students from last year reported to me (unsolicited) that they were more tuned in to the class discussion without their laptops, so be alert to that possibility.

THE MATERIALS

You will notice that our casebook masses 1,200 pages. Here's a news flash: we're not going to read them all. We're not even going to try. We have four credits in one semester, and it is your first semester, which makes it extra challenging. I am not attempting to teach a six-credit course masquerading as a four. When we are done, you will have an overview of our tort law system, the principles that underlie it and the considerations that have led us to the system we have today. We are not going to rush through the materials, and there will be no "balloon" at the end of the course.

Page references are to VICTOR E. SCHWARTZ, KATHRYN KELLY & DAVID F. PARTLETT, PROSSER, WADE AND SCHWARTZ'S TORTS (11th ed. 2005). "W/T" means that the materials will be available both from my web page (<http://www.pace.edu/lawschool/dld>) and from TWEN@. The assignments for each week will also be available on the web page (and through TWEN@, which will direct you to the same place), and you can send e-mail either to our listserv (tortsdld-L@list.pace.edu) or to me directly from either location.

Please note that the pages listed for each case include the notes following them in the casebook unless otherwise specifically indicated. Make sure that you read the notes thoroughly. We will not discuss materials preceded and followed by asterisks or non-case textual material from the casebook at length (if at all) in class.

Before each class, you need to be thoroughly familiar with the cases that the day's assignment concerns. ***You should be able to recite the basic facts without checking your case briefs.*** We won't be doing very many cases each day, particularly at the beginning of the course, and learning to hold the facts of the cases in your heads so that you need not read them from your briefs is a valuable part of the training in which we are engaged.

I have set the course up electronically on West's TWEN®, and you should each register for it. The syllabus, the assignments for each week, and the supplemental materials are available there. TWEN® will also host a listserv, an electronic discussion group in which I hope all of you will participate. There are a number of advantages to having a listserv, not least of which is that it enables me to be more available to you than I could be otherwise. If you have a question or comment that you are not comfortable posting directly to the listserv, please send it to

me privately (at DLD@Law.pace.edu). I may post it with a response if I think it raises an important point, but I will strip off all the information identifying you before doing so.

One of the things that I have found helpful over the years, particularly with students in their first semester, is getting regular feedback on how things are going. I invite you to leave with me after class a small slip of paper telling me a) the part of class that seemed to you the clearest, and b) the point that seemed to you the most muddled. If enough folks do that, I can get a pretty good sense of where things are, and I can use our listserv to try to clear things up. You need not identify yourself (although it can be helpful if you are hung up on something that I can clear up pretty easily in a short conversation); it's entirely up to you.

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