

Torts

University of Oklahoma College of Law
Fall 2021

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Professor of Law

Section 1 (course/section 5144-600):
Wednesdays, Thursdays & Fridays 1:30 - 2:45 p.m.
Classroom 3

Section 4 (course/section 5144-603):
Wednesdays, Thursdays & Fridays 3:00 - 4:15 p.m.
Classroom 3

SYLLABUS

- 1. COVERAGE:** This class will be a comprehensive survey of the law that allows one party to sue another for harm suffered or dignitary interest invaded. If that sounds broad, it is. Torts is one of the most basic and ancient fields of law. In particular, we will cover negligence, strict liability, intentional torts, and a variety of other topics. See the Course Organization section at the end of this syllabus for specifics.
- 2. GOALS AND LEARNING OUTCOMES:** My primary goals for the Torts course are for you to become literate and conversant in the principal doctrines of tort law and to be able to thoroughly analyze torts problems, applying tort law to given facts. In addition, you should gain an appreciation of how tort law works in practice and how rhetoric, strategy, and values affect the law and the outcomes of cases. And you should end the semester being able to think constructively and critically about tort law within a historical, political, economic, and social context.

The following is a non-exclusive list of particular learning outcomes:

1. Broadly know and be able to apply the principal doctrines of tort law, including, specifically, those listed in the course outline at the end of this syllabus.
2. Have a basic level of literacy with tort law such that, with regard to tort law issues, you could productively and immediately step into a role as the general counsel of a small organization or as an attorney supporting the general counsel of an organization of any size.

3. Have the requisite level of knowledge such that you could immediately play the role of a productive and knowledgeable junior associate to an experienced outside counsel who practices primarily in tort cases.

In making reference to “tort law,” the above learning objectives are meant to refer to the subject matter of the Torts course, which includes a few things that are not strictly speaking tort doctrine, but which travel alongside – such as a few basic things about insurance and statutes of limitation.

3. CLASS WEBSITE: The central repository for class materials and information is the class website. It is not password protected. You can go to ericejohnson.com and find the link on the upper left. The direct URL is: http://www.ericejohnson.com/courses/torts_21/

4. MATERIALS:

4-1. Required Titles, Downloadable:

The main casebook for the course is an open-source/open-access (also known as “OER”) two-volume set available for free download from the web in PDF and DOCX formats:

Torts: Cases and Context, Volume One (Pylon Edition, Version 2.0)

by Eric E. Johnson

2019

Torts: Cases and Context, Volume Two (Pylon Edition, Version 2.0)

by Eric E. Johnson

2019

The webpage for the assigned “Pylon Edition” of the book is <http://ericejohnson.com/projects/tcc>. In addition, links are available from the class website. To make sure you are looking at the right edition/revision, look for the lime green safety cone on the cover.

Legally, because of the open-source copyright licenses of the above books, you can print them or have them printed for you any time you want. So you should think about what you want to do in terms of accessing the books. You have lots of options, for instance:

- You could print them yourself.
- You pay a service to print them for you.
- You could read them on your computer or tablet.
- You could purchase paperback-bound copies through [lulu.com](http://www.lulu.com). (Volume One: <http://www.lulu.com/shop/eric-e-johnson/torts-cases-and-context-volume-one-ylon-edition-version-20/paperback/product-24187730.html>. Volume Two: <https://www.lulu.com/en/en/shop/eric-e-johnson/torts-cases-and-context-volume-two-ylon-edition-version->

[20/paperback/product-1769ppg4.html](https://lulu.com/product/20/paperback/product-1769ppg4.html).) When I uploaded the books to lulu.com, I chose settings so that I will get zero revenue from the sales. So what you pay is just what lulu.com is charging for itself. (Note that as of August 25, 2021, the printing of Volume Two sold on lulu.com (version 2.01) contains three very minor typos that have been corrected on the most recent downloadable file (version 2.02). If you're curious, there's an online list of typo corrections.¹)

- You could get used copies from a student who took the course previously. (Older printings may have various minor typos that were later corrected. If you care, you can check the version/printing number inside the book and see the online list of typo corrections.¹)

One thing to keep in mind: Assuming we have a normal exam (i.e., putting aside potential covid pandemic contingencies), then you will want to have a printed copy by the end of the semester to use on the exam. So you might choose to start the semester with a printed copy (which you might mark-up and highlight). But you might instead choose to wait until the end of the semester to print out a copy (which perhaps you will have marked-up electronically over the semester). That's up to you.

4-2. Required Titles, Other:

You must have your own physical, printed copy of the following:

Four Trials by John Edwards with John Auchard
Published: 2004, Simon & Schuster
ISBN-10: 0743272048
ISBN-13: 978-0743272049

4-3. Technology Expectation:

Please bring an internet-connected/web-browsing-capable laptop, tablet, phone, or other portable general computing device to class for use in interactive polling. It is my hope is that all students will be able to do so without incurring any additional expense or buying anything new; if you don't already have such a device you can bring to class, please let me know and we can discuss it. (Note that an iClicker or other similar proprietary clicker device will not work for this course.)

4-4. Other: Beyond the required books, some other materials that will be part of the required reading will be made available via links from the course website – such as on the Chart of Assignments – and, at least in one case of a movie, placed on reserve in the library. I don't anticipate using Canvas to distribute materials, but if I end up doing that for some reason, I'll let you know by e-mail and/or by notation on the class website.

¹ A list of typo corrections is maintained here:
<http://ericejohnson.com/projects/tcc/priorprintings.html>.

4-5. Study Aids and Unassigned, Additional Reading: Beyond the required materials, you are encouraged to use any other materials you find helpful or interesting. There are lots for sale. And the OU Law Library may be able to point you to many resources in the library's collection, or for which the library has subscription access for students. Some professors discourage the use of commercial outlines or various study aids. I don't. The more you learn about tort law, I figure, the better. But a word of caution is in order.

First: In my experience, I have found that commercial outlines and other study aids are a great way of gaining a basic understanding of the blackletter law in a subject. But I think the best time to read such an unassigned secondary source is right at the beginning of the semester. That way, you may give yourself a better foundation of knowledge for learning the material presented in the cases and in class. Working with a study aid along the way might be helpful as well, as it may explain the material in a different voice.² On the other hand, I recommend extreme caution in reading a treatise, commercial outline, or other study aid on the subject *as exam preparation* for this class. I suspect it may be a waste of your time and mental energy because all such study aids will go into much more detail than we will about some things and will gloss over other things we will dig into deeply. But it's up to you, of course, to judge for yourself.

Second: Before you invest time or money in commercial outlines and/or other study aids, be aware that I am already supplying a great deal of explanatory material to you for free. The open-source/open-access casebook we are using is not merely a compilation of primary readings; it is a bona fide textbook that patiently explains legal concepts. And my website has a variety of other periodically updated resources.

If you do use study aids or other resources, I would be interested in hearing about your experience with them – whether good or bad. I'm always keen to know what is contributing to people's learning.

5. ASSIGNMENTS:

5-1. Posting: Readings will be posted to the Chart of Assignments, online. You'll find a link to the Chart of Assignments on the class webpage. Keep in mind that you may need to hit refresh or reload the page to see the most recent updates. Ordinarily, readings for any given week will be posted by the day after the last class of the preceding week. Thus, readings for Wednesday will generally be posted by the preceding Saturday.

5-2. Minimum Out-of-Class Workload Expectation: The vast majority of your law-school education is meant to take place outside of class. For this

² In previous years, I assigned as additional reading a slim student treatise, *Understanding Torts, Fifth Edition* by John L. Diamond, Lawrence C. Levine, Anita Bernstein. I no longer require that, but I thought highly of it. Like any other book, it will, in comparison to our class, be over-detailed in many areas and skimpy in others.

course, you should be doing out-of-class work that averages at least eight hours per week – roughly twice the amount of time you spend in class. This is in line with ABA standards.³ I have put together the assignments with this minimum expectation in mind. Note that this out-of-class workload expectation is an average across the semester. Some weeks might require less time than the average, others more. But when planning your semester in terms of employment, volunteer obligations, commuting, or other demands on your time, you should keep the minimum expectation in mind. And likewise, during the semester, you might keep this numerical expectation in mind when gauging whether you are devoting adequate time to preparing, studying, and reviewing.

5-3. Approach: My aim is to avoid making the raw amount of reading unduly burdensome. Given this, I ask that you do the reading conscientiously. What does that mean? You could, of course, brief the cases, use a highlighter, make margin notes, or do any of a number of other things. And, of course, you should do what works for you. But the most important thing is to read the material with interest. “With interest” means you should be having thoughts going through your head such as, “Mmmm, interesting!” “Ah ha! That makes sense!” or “What is wrong with this judge?!?”

More to the point, don’t waste the case merely looking for a rule to put in your outline or to commit to memory. If a rule were the only thing to get out of a case, I would just assign the rule. The point of reading cases and other assigned materials is to help you develop a lawyerly intuition about the law. The ideal is to be able to speak in sentences like, “I’m not aware of a case exactly on point, but my sense is that in a situation like this, a court would ... ”

One way to approach the reading, suggested by Professor Scott Brewer, is to be aware of “the literary drama of the law,” that is, to “be alert to the narratives of the hopes, aims, fears, aspirations and frustrations of the litigants ... ” Behind every case there is a real story. The more you allow yourself to be absorbed into that story, the more you will get out of the case.

Also, you should attempt to put yourself in the position of the judge. Force yourself to confront the challenge of trying to interpret the law in a way that is fair, unbiased, beneficial for society, and true to precedent and statute. Using this kind of viewpoint, you are bound to get something extra out of every case you read.

See §8-2(c), *infra*, for a list of specific questions about a given day’s reading that you should be to be prepared to answer in class, if called on.

³ The American Bar Association (ABA) is the accrediting body for American law schools. Regarding the out-of-class workload expectation, see Standard 310 at https://www.americanbar.org/content/dam/aba/administrative/legal_education_and_admissions_to_the_bar/standards/2021-2022/2021-2022-aba-standards-and-rules-of-procedure.pdf.

6. GRADING:

6-1. Overview: I care a great deal about fairness in grading, and I believe you will see the product of that thinking throughout the course. Here are the basics: Your grade for the course will be based on your exam performance, with class participation potentially raising or lowering your grade resulting from the exam. Grades may be further adjusted to fit College of Law policy on grade distributions, which sets outer boundaries. The end product is the course grade. Note that attendance (including tardiness) and academic misconduct/dishonesty can result in grading penalties, failing grades, and/or involuntary withdrawal.

6-2. Assigning of Exam Grades: When I have the raw point totals from the exam, I will use my discretion to draw grade cut-offs based on natural breaks and clumps that occur in the point totals and a developed sense of how a given letter grade corresponds to levels of performance and achievement.

6-3. Final Course Grades and Grade Distributions: The exam grade is the starting point for the course grade. Grades are then subject to adjustment for class participation (described below). After that, I will then adjust grades as necessary to fit requirements of College of Law policy on grade distributions.

6-4. Class Participation and Grading:

(a) In talking about class participation, I mean to refer to that part of the class that is not the exam. Thus class participation for grading purposes is mostly in-class discussion. But to the extent we would have anything along the lines of an in-class exercise or what have you, that would be embraced within class participation as well.

(b) Class participation will potentially count in calculating your final grade. I may add or subtract from some students' exam grades on a non-anonymous, discretionary basis, with the result forming the grade for the course. Such adjustment will ordinarily be no more than one step, such as from a B to a B+ or from an A to an A-. In extraordinary cases, which I anticipate to be rare, I may make an adjustment of two steps, such as from a C to a B- or from a B+ to a B-. (For instance, a student who was one of the best ever in class but who did extremely poorly on the exam might get a two-steps-up adjustment.)

(c) Class-participation evaluation is, of course, subjective. I make adjustments at the end of the semester with a view to the context of other students in the same class and my experience with other classes over time. Thus, assessing an upward or downward adjustment is largely a matter of determining whether a given student is a stand-out in a positive or negative sense. It also matters where a student's grade falls. I'm often more likely to bump up a student's grade if that student is at the top of her or his grading band. For instance, a student with strong in-class performance is more likely to be bumped up from a B+ to an A- if that student already has the highest score among the B+ grades. The requirements of the newly adopted College of Law policy on grade distributions may also play a role – perhaps spurring me to make adjustments

for class participation in order to get the class's overall grade distribution to fit within the policy.

(d) I cannot say in advance what effect class participation might have on grades in this class. I can say that in the past how many adjustments I have made has varied greatly with the class. I have found that the smaller a class is, the more adjustments I have tended to make. And I can say that in past classes I have made upward adjustments far more often than downward adjustments. There have been some classes where I made quite a few downward adjustments, but there have often been classes where I made no downward adjustments at all.

(e) Reasons for a positive effect of class participation on the course grade may include habitual preparedness and engagement, volunteering in discussions, excellence in contributions to discussions, and various conduct that contributes positively to the educational process.

(f) Reasons for a negative effect of class participation on the overall course grade may include exhibiting poor performance or visible disengagement in the classroom, being unprepared for class, disruptive behavior (including, but not limited to, a pattern of appearing distracted by a computer or phone), conduct contrary to the In-Class Conduct Rules (listed below), conduct contrary to other admonitions communicated in the syllabus or otherwise, and any conduct that detracts from the educational process. Tardiness and deficient attendance, if substantial enough, may also have a negative effect. (For more on attendance, see §9, *infra*.)

(g) Positive and negative effects may, of course, offset.

(h) Please keep in mind that, despite the fact that class participation may factor into grading, you should not worry unduly about the quality of your responses in class discussion. Law school, like all other educational environments, is a place to learn, and as far as I am concerned, that necessarily implies that it is a place to fumble and make mistakes. I do not ask questions or conduct discussion as a way of judging you; I do it as a way of challenging you and helping everyone to learn. So put aside your fears and engage in the conversation. Once you are a full-fledged lawyer, having a confident voice under pressure will be indispensable. Now is the time to find that voice. So, be bold.

6-5. Attendance and Grading: Attendance issues – including tardiness and absences – if substantial, can affect your grade. If attendance issues are severe enough, they can even result in a failing grade or involuntary withdrawal. See §9 on attendance, *infra*.

6-6. Academic Misconduct/Dishonesty and Grading: Cheating, dishonesty, and serious academic misconduct of any kind in this class will presumptively result in a failing grade (e.g., a letter grade of F) for the semester. To be clear, failing to follow final exam instructions in a way that might give a student an advantage – even if done without intent to gain such an advantage and even if inadvertent – constitutes, in my judgment, serious academic

misconduct, and it will presumptively result in a failing grade and a referral for discipline. It is your responsibility to treat exam instructions with diligence and care.

In any instance of misconduct, I reserve the right in my discretion to request involuntary withdrawal or award a lower grade other than a failing grade if I find there to be extraordinary mitigating circumstances. Despite my reservation of rights in this regard, however, do not expect leniency.

Please note that the awarding of a lower grade or a failing grade for misconduct is not to the exclusion of other sanctions, and I intend, in virtually all instances, to refer cheating and other serious academic misconduct to the College of Law and/or the administration of the University of Oklahoma for being dealt with under applicable policies, including the Code of Academic Responsibility.

7. COMMUNICATIONS AND OFFICE HOURS:

7-1. Invitation to Chat: At least once during the semester, I hope you will take advantage of office hours, an appointment, or some other opportunity to chat—even if you have no questions or nothing specific to discuss. That’s not a requirement, just a request. Ideally, I would like to spend some informal time with everyone.

7-2. Questions About the Exam: If you have any questions about the exam, please ask them in open class. In the aims of fairness, I do not discuss the exam on an *ex parte* basis.

7-3. Office and Office Hours: My office is on the third floor, room number 3034. My phone is 405-325-2273. I post open office hours on my website at ericejohnson.com. If office hours are not convenient, please do not hesitate to e-mail me to make an appointment to talk, and when you do, it helps if you include some suggested times that work for you. I am happy to meet with students after the completion of the course, either by appointment or during open office hours, for review and consultation, including reviewing exam results.

7-4. E-mail: My e-mail address is eric.e.johnson@ou.edu. Please note that I do not answer or discuss substantive questions through e-mail. Why not? The answer to a substantive question is almost always, “It depends ...”, and thus it becomes very difficult to draft satisfying written responses to substantive questions. Answering those questions live and in person is much easier, because I can ask clarifying questions and we can go back and forth until there’s an answer you find satisfactory. So please bring substantive questions to class or to office hours.

Please do not ask questions for which the answers are clearly found in this syllabus. And if you miss class, please ask other students what you may have missed.

Any e-mail communications you do have with me should be prepared in a professional manner, including the use of a meaningful subject line. Also please

note that, perhaps unlike many students, I do not read e-mail on a constant basis. So please be patient for a reply.

7-5. Lack of Confidentiality; Faculty Reporting Obligations; No Legal Advice:

(a) **Tell me nothing that is confidential.** It is important for students to understand that faculty are subject to various mandatory reporting obligations stemming from federal law, state law, and university policies adopted to make our community safer. Information a student shares with me that I may be obligated to report may include, but is not necessarily limited to, that which relates to sexual harassment; gender-based discrimination; sexual-orientation discrimination; other forms of discrimination; sexual assault; stalking, dating or domestic violence; child abuse or neglect; and various crimes. This might include third-hand accounts of claims or allegations of these things. Mandatory reporting obligations can cover things that happened in the past, on or off campus, involving university-affiliated persons or not. The requirements can be complex. More information can be found here: <http://www.ou.edu/eoo/reporting-responsibilities>. Moreover, I do not wish to take on any confidences from students, even to the extent I might be able to do so. Bottom line: **Assume that nothing you tell me will be kept in confidence.**

(b) Please do not ask me for legal advice. I am not licensed to practice law in Oklahoma, and I cannot be your attorney. It is my job to prepare you eventually to give legal advice to others, and I am obviously happy to talk through hypotheticals with you, as that is a key way of exploring and learning the law. But giving legal advice upon which someone should be able to rely generally takes working up an in-depth understanding of the facts and taking a careful appraisal of the client's interests – all of which calls for working in the context of a confidential relationship. It also often requires doing legal research. I'm not in a position to do any of that for you.

7-6. Letters of Recommendation, Serving as a Reference: It's important to me to do a good job as a reference for my students. If you might wish for me to serve as a reference for you or write a letter of recommendation for you in the future, it would be helpful if you let me know that on the last day of class with an e-mail that attaches your résumé. You might take a moment to put this on your calendar now. Such an e-mail will allow me to file away some notes about my recollections of you, and then I can use those notes in the future as a basis for writing a letter for you or taking a telephone call on your behalf. I also refer you to a memo I've written about references and recommendations: Find the link on the left side of my homepage.⁴ If you review that memo, you can help me to do the best possible job in helping you.

⁴ The direct URL is http://ericejohnson.com/docs/Memo_to_Students_re_References.pdf.

8. IN CLASS:

8-1. In-Class Conduct Rules:

In general:

- (a) Avoid behavior that might disrupt class or distract your fellow students.

Some specifics:

- (b) Do not eat in class. Do not chew gum audibly or with your mouth open.
- (c) Refrain from any use of a digital device where such use could reasonably disrupt class or distract fellow students. All digital devices must be operated without audio volume. Screens must not display any distracting content, including, but not limited to, distracting images, indecent content, moving images (video), and animation or flashing graphics (including GIFs and display ads with movement that are common on sites like Facebook, the New York Times, etc.). If you are being distracted by a classmate's digital device usage, please let me know! If you are being distracted, it is almost certain multiple people are being distracted at the same time. Once I know about this, I can then communicate with that student about issue – which I will seek to do tactfully, without causing anyone any embarrassment.
- (d) You may use digital devices (including, without limitation, computers, phones, and tablets) in class; however, from the time of class's scheduled beginning until class ends: (1) You may not engage in any digitally enabled network communications with anyone else in class, including, but not limited to, e-mail, text messaging, IM'ing, etc. (2) No posting to social media. You may not engage in any digitally enabled network communications that effect a publication, uploading to, or updating of any public or group-delimited platforms or channels, including, but not limited to, Twitter, Discord (private or public channels), Facebook (including, but not limited to, Facebook groups), Reddit, Instagram, the web, and so forth. The prohibitions of this subparagraph (d) are not limited by context and apply without regard to whether the activity in question can be characterized as disruptive or distracting. Any violation of the policy in this subparagraph (d) will presumptively result in a lowered course grade and may also be referred for disciplinary action. The prohibitions of this subparagraph (d) do not apply if and when you are absent from class and not on campus, nor do they apply to communications with OU information-technology staff for technical-support

purposes. Bottom line: Keep the discussion in class, where it is productive and beneficial for all.

Zoom contingencies – if we end up conducting part of class via Zoom or a similar online arrangement, then please mind the following:

- (e) Keep your video on.
- (f) Avoid distractions on video. If you eat, eat discretely. Dress appropriately.
- (g) Remember to stay muted when you're not talking.
- (h) You can use artificial backgrounds, but avoid distracting content.

8-2. In-Class Participation:

(a) **Appropriate levels of voluntary participation:** Your participation in in-class discussion should be meaningful and appropriate. Raise your hand to have a say in discussion when you have a comment that will contribute to the experience of the class as a whole, or when you have a question, the clarification of which will benefit the entire class. On occasion there are students who raise their hand too often and take up too much of the class's time. And in nearly every class, there are people who sit passively and almost never contribute to classroom discussion. Aim to avoid either extreme.

(b) **Getting called on:** Even if you don't volunteer, I'll expect you to be ready to participate meaningfully if called on.

(c) **Questions to always be prepared to answer:** Here are questions you should always be ready to answer about primary-source readings (cases, for example):

- What does this teach us? What lesson can we take away from this?
- Do you agree with the argument being made and the conclusion being drawn?
- What is a strength in the analysis or presentation?
- What is a potential weak point in the analysis or presentation?
- What jumped out at you as interesting?

I'd suggest you use these questions as a checklist to make sure you are reading deeply.

(d) **If you aren't prepared:** If you cannot participate fully for a particular class, for whatever reason (and there's no need to tell me why), please tell me before class – preferably in person. That way I can avoid calling on you. If I missed a message you sent me or if I forget that you told me in person and call on you anyway, please politely remind me that you requested not to be called on.

8-3. How to Think About Class Time:

Class time should be about deepening understanding, not trying to create a verbatim transcript of what is said.

I intentionally structure the course so that the written materials are the source of the “information” or “content,” as it were. I believe in committing need-to-know information to writing. To begin with, there’s the book, which is designed to lay out all of the concepts and material in a clear, straightforward way. Then there will often be slides, but you don’t need to transcribe the words on those, because I will post them after class. I also provide content in other written forms, which I post online. (If you are skeptical of my commitment to putting need-to-know material in writing, check the length of this syllabus!)

So if all the need-to-know material is already written down for you, what is the use of class? Class is about making the content/information come alive, exploring it, providing context, answering questions, checking your understanding, making connections, etc. That can even involve going down some dead-end paths.

So I urge you to avoid transcribing what is said. Instead, relax your mind and try to engage intellectually.

8-4. Audio Recordings and Video:

No one (other than me) is permitted to make an audio or video recording of class, nor make any transmission (e.g., livestream) of class, or any reproduction of any class recordings. Any exception – which I do not anticipate making – would require my express, written permission.

The OU College of Law has provided the following language for inclusion in syllabi. This language is applicable to this course.

Sessions of this course may be recorded or live streamed by the professor. These recordings are the intellectual property of the individual faculty member and may not be shared or reproduced without the explicit, written consent of the faculty member. Students may not share any course recordings with individuals not enrolled in the class or upload them to any other online environment.

A key part of class is letting students feel free to stumble and attempt to push past their competency – often with difficult, emotional subject matter. Student recordings of class time would impede that.

Note I may record class sessions myself, for my own use. It has often been helpful for me in improving my teaching. (For example, if I feel I’ve done something particularly well, I can go back and listen to it the following year to try to replicate it.) But to the extent I do make recordings, please don’t ask me for a copy. My distribution of recordings that capture students voices would significantly hamper students’ sense of classroom discussion as being a safe

space. And, at any rate, focusing on the verbatim of what was said in class is the wrong study strategy – see §8-3, *supra*. If I do record a class, you'll be aware, because I will use a clip-on mic or otherwise let you know.

9. ATTENDANCE:

9-1 Communications About Attendance: There is generally no need for you to e-mail me if you are or anticipate being absent. Moreover, there is generally no need for you to explain to me why you have been absent. The only reason I imagine that I would need to know why you are absent is if attendance is approaching a severely deficient level (discussed below) and it becomes necessary to discuss extenuating circumstances, or if your absence is excusable under university or college policy and you wish to have it excused.

9-2. In General: My view is that punctual, regular attendance in class is an essential component of the educational experience. Superior performance on an examination is not enough if you haven't shown up. Moreover, OU College of Law policy states that "students are expected to attend all classes in those courses for which they are enrolled."

Notwithstanding the expectation that you will attend all classes, I expect that students may have occasional, isolated absences. But how does one draw the distinction between the well-meaning student who missed some classes with good reason and the student who is not making attendance a priority? It's not easy. Thus, I am providing this detailed attendance policy. I regret that it is so long. Nonetheless, seriously deficient attendance must incur serious consequences; therefore, I've erred on the side of particularity.

9-3. Specifics Concerning Effects of Absence from Class:

(a) **Late Arrivals and Early Departures:** For purposes of determining the appropriateness of penalties discussed below, a late arrival or early departure will presumptively count as half of a whole absence. In my discretion, however, a very late arrival or a very early departure may be counted as a whole absence. (For recordation of late arrivals and early departures, see §9-4, *infra*.)

(b) **Comings and Goings; Intraclass Absences:** I understand that you may have an urgent need to leave class for a short time. Bear in mind that leaving and re-entering may be counted as a whole or half absence. It also tends to be disruptive, so please leave class only when necessary.

(c) **Attendance's Effect on Class-Participation Grading Component:** Attendance will be considered in the class-participation component of grading, and absences and tardiness can have a negative effect on your overall course grade. The negative effect may occur either as a drop in your final grade or a decision not to grant a bump up in your grade. The class-participation grading component is discretionary and subjective, and attendance is only one among many factors in determining class-participation grading. In keeping with that, there is no set numerical formula by which absences and partial absences (i.e.,

late arrivals, early departures, intraclass absences) will be deemed deficient and thus deserving of negative treatment in the class-participation grading component. Factors that will be considered include the number of absences and partial absences, the student's attendance record in comparison with the attendance records of others, courteousness and professionalism in dealing with attendance issues, and extenuating circumstances.

(d) **Automatic Reduction in Grade for Severely Deficient**

Attendance: Independent of and cumulative with any effects of attendance on the class-participation grading component, a student's grade will be automatically reduced as follows: **twelve (12)** or more absences will result in the dropping of a student's final grade by one step (e.g., from a B to a B-); **thirteen (13)** or more absences will result in the dropping of a student's final grade by one additional step (e.g., from a B- at 12 absences down to a C+); **fourteen (14)** or more absences will result in the dropping of a student's final grade by yet another additional step (e.g., from a C+ at 13 absences down to a C). So for a student that started with a B but has 14 absences, the automatic grade reduction is three steps (e.g., from B, to B-, to C+, to C) Note that if a student's grade is reduced from a D-, that results in an F.

Special pandemic/context note: Previously (e.g., in Fall 2019), my absence policy provided for automatic reductions at eight, nine, and 10 absences instead of, as provided above, 12, 13, and 14. Thus, I have already added in a large amount of forgiveness for absences on account of the coronavirus pandemic.

(e) **Involuntary Withdrawal or Failing Grade for Profoundly**

Deficient Attendance: For a student with a profoundly deficient attendance record, I will presumptively have the student involuntarily withdrawn from the course without credit and with a grade of F, have the student involuntarily withdrawn from the course without credit and with some other grade that may be appropriate under university or college policy, or award a failing grade at the end of the semester. For these purposes, I will presumptively regard as profoundly deficient attendance fifteen (15) or more absences. Recall that partial absences (i.e., late arrivals, early departures) presumptively will count as half an absence and may, in my discretion, be construed to constitute a whole absence. **It is your responsibility to keep track of your own absences, including with regard to the presumptive involuntary withdrawal or failing grade.** Thus, do not ask me to calculate your attendance record so that you can weigh whether to miss an additional class. And do not expect to get independent notice that you are approaching the threshold for failing or being involuntarily withdrawn. **This syllabus provision is your notice.**

Special pandemic/context note: Before the pandemic (e.g., in Fall 2019), my absence policy provided for involuntary withdrawal or failing grade at 11 absences instead of, as provided above, 15. Thus, again, I have already added in a large amount of forgiveness for absences on account of the coronavirus pandemic.

(f) **Special Extenuating Circumstances:** I may take account of special extenuating circumstances in deciding whether to drop a grade, award a failing grade, and/or request involuntary withdrawal. Special extenuating circumstances can include weather emergencies, personal illness, illness of a close family member, bereavement, etc. Extracurricular activities, job interviews, court appearances, or the like can be considered in this vein as well. (For absences caused by religious observances, see §9.3(g), *infra*.)

Notwithstanding the foregoing, it is expected that under almost all circumstances students will be able to keep absences within the numerical thresholds identified above – including absences caused by illness, storms, job interviews, etc., and even the coronavirus pandemic. Giving students special dispensation on the issue of attendance will only be done if appropriate under the totality of the circumstances. As an example, suppose a student was absent from class a number of times because the student wanted to sleep in; then, at the end of the semester, the student was absent one additional time because of an out-of-town job interview. In such a case, if the job-interview absence takes the student over the threshold for an automatic reduction in grade, then the grade reduction is appropriate. If the student had been generally conscientious about attendance from the beginning, the student would not have created any issue with missing class for the job interview.

If you wish for me to consider any special extenuating circumstances with regard to your attendance, then you must file an End-of-Semester Attendance Mitigation Statement, as discussed in §9-6. (I suggest you calendar the filing of that statement now, so you'll remember to do it if you need to. See §9-6.)

Note that you should not feel compelled to discuss with me reasons for absences or extenuating circumstances if your attendance is not approaching a severely deficient level.

(g) **Absences Resulting from Religious Observances:** In accordance with University of Oklahoma policy, I will excuse absences that result from religious observances. To have an absence excused on the basis of a religious observance, **you must file an End-of-Semester Attendance Mitigation Statement**, as discussed in §9-6. (Calendar the filing of that statement now if you think you might have an excusable absence this semester because of a religious observance or holiday. See §9-6.) You should also separately contact me as appropriate or useful during the course of the semester in regard to such absences.

9-4. Attendance Record: To avoid being distracted in class by constantly noting things like late arrivals and early departures, I generally require students to log their own attendance. Thus, it is of paramount importance that you deal with all attendance issues with utmost honesty, integrity, and care. Inaccuracies in marking an attendance log or late slip will presumptively be treated as academic misconduct and will presumptively result

in a lowered grade or a failing grade. If an inaccuracy is inadvertent, prompt self-disclosure is encouraged and will be considered ameliorative.

(a) **Means of Taking Attendance:** Attendance may be taken by means of a paper log (paper sheet or card) for students to fill out during class, by roll call, by reference to the seating chart, or by some other method.

(b) **Indicating Attendance:** If attendance is taken by means of a paper log, then when the attendance log comes around to you, fill it out as instructed, indicating your attendance for the instant date. ("Instant date" means the current date as you are looking at the log.) Indicating your attendance this way is your responsibility: If the attendance log does not come around to you, simply come up to me immediately after class and ask to fill it in. If you omit to fill in the log during class or immediately afterward and before I leave the room, you will be counted as absent.

This is very important: You may only fill out the attendance log on behalf of yourself and for the instant date. You may not mark the log on behalf of another person, even if that person is in attendance, and you may not permit another person to mark the log on your behalf. You may not make any mark indicating your attendance for any other date other than the instant date, even if you were or will be in attendance on that other date.

(c) **Self-Reporting Partial Attendance:** If an attendance log is used, and if you will need to depart class early and not return, then you must make an appropriate notation of that on the attendance log. Alternatively, if you have a change of plans requiring you to leave early despite not having indicated that in advance on the attendance log, then you must inform me by e-mail as soon as reasonably possible afterward to correct the record.

(d) **Filling Out of Late Arrival Slips:** If you arrive late to class, you must legibly and completely fill out a late arrival slip before you sit down. If a blank late arrival slip is not available for you, then before you take your seat you must leave on the podium (or with me if I am seated at a table, as in a seminar class) a letter-size sheet of paper providing your name, the name of the class, the full date, the day of the week, and the time of your arrival.

(e) **Unrecorded Absences:** At my discretion, I may announce that for a particular class meeting I will not record attendance and that absences from such a class meeting will not count for purposes of the attendance policy. Situations in which I might deem this appropriate are: (1) if it is necessary to hold a make-up class at an irregular time or (2) if there is the occurrence of a disaster that implicates issues of safety or public necessity. It is also possible that I may omit to record attendance for a class. That being said, recordation of an absence is a distinct issue from the existence of an absence. And for the purposes of self-disclosures of profoundly deficient attendance under §9-5, *infra*, a student's self-disclosure obligation is not relieved by the fact that one or more absences (including partial absences) may be unrecorded. Toward the end of encouraging

candor, I will exercise discretion with unrecorded-but-disclosed absences and may choose not to count them for purposes of grade penalties and administrative withdrawal. So err on the side of disclosure.

9-5. Mandatory Immediate Self-Disclosure Statement of Accumulated Absences in Cases of Profoundly Deficient Attendance: I do not add up and calculate accumulated absences on an ongoing basis during the semester. As mentioned previously, it is each student's responsibility to keep track of her or his own absences. In keeping with that: **Upon a student's accumulation of a record of profoundly deficient attendance (see §9-3(e), *supra*), that student is required to disclose such accumulation immediately in writing to me.** The disclosure must be made to me by e-mail (eric.e.johnson@ou.edu) with a paper copy handed to me in person, or, if in-person delivery is not practicable, to a faculty administrative assistant with an explicit explanation of the nature and urgency of the communication. The subject line of the disclosure e-mail must be "Self-Disclosure Statement of Accumulated Absences."

If the student hopes to avoid involuntary withdrawal or the awarding of a failing grade for the course, then the statement must explain the reasons for the student's absences, or at least a portion of the absences sufficient to avoid the profoundly deficient attendance, and must provide a rationale for why the student should be allowed to continue in the course notwithstanding the accumulated absences. Any supporting backup documentation that is to be considered must be provided with the statement, or, if this is not immediately possible, then the student must provide what she or he can with the statement and explain in the statement the nature of the delay and when the remaining documentation will be forthcoming. To this end, the student is referred to §9-3(f), *supra*, regarding special extenuating circumstances.

If a student has already submitted a disclosure under this section and then subsequently accumulates another absence (including a partial absence in the form of a late arrival or early departure), the student must submit a supplemental disclosure, like the original disclosure in form and substance.

For counting absences to determine the necessity of submitting a disclosure under this section, where there are any interpretive questions, a student is instructed to err on the side of inclusiveness. That is, a student who is unsure of whether a given instance will count as an absence or partial absence should err on the side inclusion of that absence or partial absence in the quantification of deficient attendance. A student is advised to note such interpretive questions and the fact of the student's erring on the side of inclusiveness in the statement. Further to this regard, refer to §9-4(e), *supra*.

9-6. End-of-Semester Attendance Mitigation Statement: In order for me to consider absence excuses and extenuating circumstances, I must be aware of them. It is crucial that this information is readily accessible to me at the moment I am putting together grades at the end of the semester! To make sure that I don't miss anything, I require that students provide this information to me

in a particular way: To the extent a student wishes to make a claim of extenuating circumstances for any reason or claim any excuse (e.g., based on religious observance), then the student must file an End-of-Semester Attendance Mitigation Statement not earlier than the last day of class, nor later than the day after the last scheduled day of final exams for the College of Law for the semester. Take a moment now to calendar this – so you will remember when the time comes at the end of the semester.

The statement must be sent to me by e-mail (eric.e.johnson@ou.edu) with the subject line, “End-of-Semester Attendance Mitigation Statement.” I also suggest providing a paper copy to a faculty administrative assistant with the request that it be given to me. File just one statement – that is, just one e-mail with attachments, and if you are handing in a physical copy, just one stapled packet of papers. By your putting everything together, we can avoid any possibility of my overlooking anything relevant. If you want me to consider any previously sent e-mails in a claim for special extenuating circumstances, then please include copies of those e-mails within the one communication.

There is no prescribed format for the statement; substance is what matters. Regarding what might qualify as extenuating circumstances or excuse, see §9-3(f) & (g), *supra*.

If you have already filed a mandatory disclosure for profoundly deficient attendance under §9-5, *supra*, then you should additionally file an End-of-Semester Attendance Mitigation statement, which can include copies of any previously filed disclosures made pursuant to §9-5.

Please note! The End-of-Semester Attendance Mitigation Statement and the requirements above are not intended to be retributive or to deter students from making use of valid excuses or calling my attention to extenuating circumstances. Rather, the point is to make sure I have the relevant information at the time I count up attendance for grading purposes and so no one is needlessly given a reduced grade! ☺

9-7. No Waiver: No provision of this attendance policy can be waived by me orally. (See §12, *infra*). If you think I said something that relieved you of an obligation under this attendance policy, you then misunderstood me. Also, I can't imagine a circumstance under which I would grant a written waiver: The policy is already built to be fair and to take into account varied circumstances. It must apply to everyone equally.

10. EXAMINATION:

10-1. General Points:

(a) **Ex Parte Communications:** I will not discuss the exam on an *ex parte* basis. (See §7-2, *supra*.)

(b) **Anonymity:** Each exam will be “blind graded,” so that I will not know the identity of the student as I am grading her or his exam. You may not

waive anonymity. Do not include your name in your exam response, and do not write your name on any exam materials. Self-identification on the exam or otherwise compromising anonymity will presumptively result in a deduction from your exam grade and a referral for disciplinary action.

(c) **Obeying Exam Requirements and Instructions:** A failure to follow exam requirements or instructions is an academic misconduct issue, and violations will be treated as such, even if inadvertent. (See §6-6, *supra*.)

10-2. Your Responsibility With Regard to Handling and Returning Exam Materials and Using Your Exam Identification Number: You bear the burden of properly, legibly, and correctly marking exam materials with your exam identification number. (Your examination identification number, of course, means your examination number for this semester – not one from a prior semester.) You must also obey instructions on the handling and non-mutilation of examination materials. Do not omit to do what you are asked in this regard. Any omissions, even if inadvertent, will be treated harshly, including resulting in a failing grade and a referral for discipline. Once we set a format for the exam, I may say more about this.

10-3. Decorum: *Assuming we have a live, in-person exam administration,* then during the administration of the exam you must refrain from conduct which could reasonably be distracting to the students sharing the room with you, including by generating noise and smells. (Yes, there have been problems in the past.) Here's the thing: exams are stressful. Some of the things some students hope will be useful in lowering their stress can actually intensify the stress of others. One recurrent problem in this regard has been food and beverage use during exams. Thus, you will be allowed to have food and drink with you during the exam only under the following conditions:

- Drinks must be open and drinkable before the exam starts. No popping cans or opening soda bottles during the examination period.
- Food and beverages cannot smell. Nothing creating an odor stronger than a cup of unflavored coffee is permitted. So, to be crystal clear, no sandwiches, condiments, salads, etc.
- Food cannot be noisy. No chips, carrots, or granola. In addition, food in wrappers must be unwrapped before the exam begins. For example, if you bring a package of M&Ms into the examination, the candy should be removed from the wrapper and poured onto a paper towel before the exam starts.
- Chew with your mouth closed.
- Do not allow examination materials to be contaminated with food. (Yes – this has happened. ☹)

In addition:

- Don't wear perfume or cologne.
- No essential oils. No candles, potpourri sachets, or anything that is infused with scents.

Be aware that I may issue further specific instructions in this regard at some point later on.

10-4. Format:

The format of the exam is in part dependent on how it is administered. At the time of writing this syllabus, I do not know how the exam will be administered. Exam administration has been in flux for the past few semesters because of the ongoing coronavirus pandemic.

(a) Here's what I can say about the exam for now:

The exam will have at least a portion that is essay-based, consisting

At least part of the exam will consist of one or more open-ended questions calling for a written essay response delivering legal analysis for a hypothetical fact pattern. At least part of the essay portion will be administered on an open-book basis. **Expect that allowed materials for the open-book portion may be limited to paper-based notes and books.** And expect that the device you use to type your response may be required to be locked down with software that prevents access to the internet and to locally stored electronic files. You might consider how this factors into your choices over the semester about how you read, how you outline, etc.

In addition, the exam might also include a multiple-choice portion, which may be closed-book.

I will provide more detail about the exam at a later time.

(b) Here's more on what's likely to hold for an in-person exam administration:

In the past, with normal in-person exam administrations, I have provided that no electronic, digital, or interactive resources may be used or referenced, with a few exceptions:

These are devices I have allowed students to have and use:

- (A) the device being used to type the response (e.g., a laptop running appropriate exam software in accordance with applicable policies),
- (B) a watch with no other functions than timekeeping.

The following are some specifics I've provided in answer to questions I've gotten in the past about the open-book nature of the essay portion. This would apply to us if we have a normal in-person exam administration:

- (i) Binders holding paper sheets and tabs in paper sheets are fine. For instance, if your outline is in a binder, that's fine.
- (ii) No phones.
- (iii) No smart watches or other watches with functions other than timekeeping. Nothing that looks like a smart watch.
- (iv) A digital watch that has an alarm function and a stop watch in addition to providing the time of day is permitted. But under no circumstances may your watch beep or emit noise.
- (v) No accessing the internet, e-mail, text messaging, etc.
- (vi) If you want to access a textbook or dictionary, you'll need to have it on paper. You cannot, for instance, access an e-book using an iPad or other tablet.
- (vii) With regard to the device you use to type your exam, you may not venture outside the confines of the exam software to access files, etc.

10-5. Exam Prospectus: Toward the end of the semester, I anticipate releasing a document called the "Exam Prospectus," posted to the class website, providing more detailed information about the exam and how I recommend preparing.

10-6. Useful study materials: Regardless of what format we end up using for the exam this semester, materials set aside in my Exam Archive should be quite useful to you in studying for your exam. The Exam Archive is publicly accessible online. There is a link on ericejohnson.com, or you can use the direct URL: http://ericejohnson.com/exam_archive/. Note that I anticipate making some updates and additions to those materials over the semester – so you might want to check back.

11. ACCOMMODATIONS AND INFORMATION IN CONNECTION WITH UNIVERSITY POLICIES:

Disability Accommodation: Students requiring academic accommodation should contact the Disability Resource Center for assistance at 405-325-3852 or TDD: 405-325-4173. I encourage students to do this early in the semester. For more information please see the Disability Resource Center website <https://www.ou.edu/adrc>. The OU Faculty Handbook §5.4 states that the Disability Resource Center "is the central point of contact to receive all requests for reasonable accommodation and all documentation required to determine disability status under law. This center will then make a recommendation concerning accommodation to the appropriate administrative unit." In general, students are not required or encouraged to disclose disabilities to instructors – which is as it should be. But if you are not getting the help you feel you need from the Disability Resource Center, and if you would like to talk to me about it, then I invite you to do so. As part of my pursuit of effective teaching and the best educational outcomes for my students, I consider it to be in my interest to

advocate for students with disabilities to get the accommodations they need to succeed. I also am interested in making changes – whether required or not – to make my materials and my classroom more accessible for people with a variety of impairments. And I am grateful to students with disabilities in the past who have helped me make improvements in that regard.

Language Accommodation: Students desiring language accommodations for the exam or otherwise where there is not an issue of disability should talk to me during office hours or by appointment early in the semester. So, for instance, if you are not a native English speaker and you feel you might need an English-to-foreign-language dictionary on a closed-book portion of the exam, you should pursue a language accommodation. Any language accommodation must be authorized by me in writing. Please get this taken care of as soon as possible – at least by the fourth week of classes. I may decline requests that are otherwise reasonable on the basis of being dilatory.

Religious Holidays/Observances: The OU Faculty Handbook §3.13.2 states: “It is the policy of the University to excuse the absences of students that result from religious observances and to provide without penalty for the rescheduling of examinations and additional required classwork that may fall on religious holidays.” Note that religion-based absence excuses, like other excuses, need to get in front of me for me to treat them appropriately. So note the relevant portions of the attendance policy above, including §9-3 through §9-7. In particular, see §9-3(g).

Title IX Resources and Reporting Requirement: For any concerns regarding gender-based discrimination, sexual harassment, sexual assault, dating/domestic violence, or stalking, the University offers a variety of resources. To learn more, including how to report an incident, please visit <http://www.ou.edu/eoo.html>. Also, please be advised that professors are required to report instances of sexual harassment, sexual assault, and discrimination to appropriate campus authorities. (See §7-5, *supra*, in this regard.)

Adjustments for Pregnancy/Childbirth Related Issues: Should you need modifications or adjustments to your course requirements because of pregnancy-related or childbirth-related issues, please contact the Disability Resource Center as soon as possible. Also see <https://www.ou.edu/eoo/faqs/pregnancy-faqs> for answers to commonly asked questions.

Mental Health Support Services: If you are experiencing any mental health issues that are impacting your academic performance, counseling is available through the University Counseling Center (UCC). You can call 405-325-2911 to make a counseling appointment. The Center is located on the second floor of the Goddard Health Center on the corner of Brooks Street and Elm Avenue, at 620 Elm Avenue, room 201, Norman, Oklahoma 73019. For more information please visit <http://www.ou.edu/ucc>.

University Policies and Recommendations Regarding Covid: Please be apprised of university policies and recommendations regarding the ongoing coronavirus pandemic. Adhere to the policies and take recommendations strongly into account. **I recommend that all of my students follow the university's and law school's recommendations to reduce the spread of covid, including, as applicable, wearing a mask.**

12. REVISIONS TO THIS SYLLABUS, WAIVERS OF STUDENT OBLIGATIONS: This syllabus may be amended or revised, and if it is, the most recent syllabus and any amendments or addenda thereto will be posted to the class website. No student obligation under this syllabus can be waived by me orally. If you think I said something that allows you different treatment under this syllabus, you must have misunderstood me. The syllabus needs to apply to everyone equally. (See also §9-7, *supra*, regarding attendance.)

13. COURSE ORGANIZATION: The planned organization of the Torts course is below. "TC&C" refers to *Torts: Cases & Context, Pylon Edition, Version 2.0*. Chapters 1-12 are in Volume One. Chapters 13 and beyond are in Volume Two. When the reading assignments say to skip a case, also skip that case's appended notes and questions, unless specified otherwise. If the reading includes questions or problems, you should prepare answers to those ahead of class. Note that the list below is just the topics. The reading assignments are on the [Chart of Assignments](#), which is updated on an ongoing basis with the exact assignments for the immediate future and a long-range (but subject-to-change) projection of reading for the entire semester.

PART I: Preliminaries

1. Welcome, Class Parameters
2. The Place of Torts and a Model Tort
3. Blackletter Overview
4. Procedural Context for Torts

PART II: The Prima Facie Case for Negligence

SUBPART A: The Duty Element

5. When and to Whom a Duty of Care is Owed

SUBPART B: The Breach Element

6. Determining Breach, in General
7. The Reasonable Person Standard of Care
8. Negligence Per Se
9. The Role of Custom or Standard Practices
10. Res Ipsa Loquitor
11. Special Rules for Land Conditions and Bailments

SUBPART C: The Actual Causation Element

12. Actual Causation Basics

13. Proving Actual Causation
14. Actual Causation Multiplicity Issues

SUBPART D: The Proximate Causation Element

15. Proximate Causation Basics
16. Various Tests for Proximate Causation

SUBPART E: The Damages Element

17. Existence of an Injury

PART III: Affirmative Defenses to Negligence

18. Plaintiff's Negligence (Contributory and Comparative)
19. Assumption of Risk, Waivers, and Releases

PART IV: Liability Relating to Medical Care

20. Professional Negligence /Medical Malpractice and Medical Battery
21. Informed Consent Actions

PART V: Dealing with Accidents Outside of Negligence

22. Strict Liability
23. Products Liability

PART VI: Intentional Torts

24. Introduction to Intentional Torts
25. Battery and Assault
26. False Imprisonment
27. Intentional Infliction of Emotional Distress (Outrage)
28. Trespass to Land
29. Trespass to Chattels and Conversion
30. Defenses to Intentional Torts

PART VII: Remedies and Issues Concerning Parties

31. General Issues in Remedies
32. Damages
33. Multiple Tortfeasors
34. Enforcing Judgments
35. Immunities and Tort Liability of the Government*
36. Thresholds of Life

PART VIII: Some Practical Pitfalls

37. Insurance*

* This topic will probably be covered out of order and will be inserted into a class period where time permits.

38. Statutes of Limitation and Repose*

PART IX: Oblique Torts

39. Defamation

40. Privacy Torts

41. Right of Publicity[◇]

42. Transactional Torts[◇]

PART IX: Theory and Policy

43. Theoretical Perspectives on Torts[◇]

44. Tort Reform[◇]

14. **FEEDBACK:** If you have feedback for me – suggestions, ideas, commendations, or criticisms – please do not hesitate to tell me in person or by e-mail. If sending something to me anonymously would make you feel more comfortable, then I invite you to do just that. I hope you enjoy the course!

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[◇] Expect that this may not be covered, depending on time.