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Indiana Law Journal

Volume 51 | Issue 1 Article 16

Fall 1975

The Torts Process

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Book Review

THE TORTS PROCESS. By James A. Henderson, Jr. and Richard N. Pearson. Boston, Massachusetts: Little, Brown and Company, 1975. Pp. xlix, 1008.

Few recent texts have challenged the conception that tort law is wholly embodied in a collection of appellate cases laying out substantive rules, their variations and exceptions. *The Torts Process* offers an alternative approach.

The authors view tort law as offering a vehicle by which the entire lawyerly process of interviewing, investigation, pleading, discovery, motion practice, damage assessment, negotiations, trial preparation, litigation, appeal, and even reform legislation can be understood by the beginning student. There are some difficulties, to be sure, in implementing this vision in a single, manageable book. Some lawyers' skills, for example, can best be learned later in the law school experience. Indeed, even with exposure to clinical programs, few of the litigation skills are mastered until several years after graduation. Thus, undue emphasis in the first semester of law school might be wasted. However, a torts course using this book would not be a surrogate for courses in trial practice, professional responsibility, civil procedure, or a clinical experience. Rather, the attempt is to give students new to the law a background which will aid them in mastering the application of the substantive rules which they are learning.

This approach has potential for enriching the torts course experience in at least four ways. First, the need for a separate (and often somewhat stultified) legal systems course is reduced and the vital information about trial procedure and appellate processes can be absorbed in a more interesting, integrated fashion. Second, the problem of pedagogical oversight should be reduced. Things which the instructor takes for granted—or else, would prefer not to discuss for fear a cynical presentation would disillusion the students—are presented in a sensitive, yet provocative fashion. This forces the student to identify the tensions that must be reconciled and the obstacles that must be overcome for the torts system to function optimally. No doubt students could graduate and practice law without this kind of an appreciation, but anyone in-

terested in procedural reform, social economics, and "making law" at the appellate level must surely need these insights.

Even for the less ambitious student, this approach helps to identify the trade-offs and problems involved in the litigation process. The authors, of course, cannot guarantee that the bench, bar, and jury will consistently follow their assigned roles, or invariably make principled decisions. Yet the very identification and articulation of these problems should help to alleviate the perplexed student's laments that tort law is "nebulous," and that tort law is formed by "unpredictable Gestalt reactions" from juries and the only slightly more predictable decisions of appellate courts which arbitrarily define the law.

The third way in which the "process" approach should benefit students of tort law is that it brings greater realism to the collection of appellate decisions. A student is given intriguing glimpses of the many steps that lead to the record on appeal and the formulation of issues and arguments in the appellate court. The function of a lawyer and the need for a lawyer's skills at every phase can be perceived readily. Problems are presented at each stage of the process and students are asked to participate, in a truncated fashion, in the lawyer's tasks. All of this is designed to stimulate the student's curiosity and enhance his interest in the activities of tort lawyers. This is an objective which, if obtained, is bound to facilitate the learning of the substantive law.

A fourth benefit from the "process" approach is the exposure to problems of professional ethics. In this post-Watergate era, faculty and students alike are concerned with the issue of how best to instill a strong legal ethic. Even in schools where the course method of teaching professional responsibility is employed, in contrast with the pervasive method, it is usually recognized that discussion of legal ethics should occur early in the legal education, *i.e.* from the earliest time the students begin to be "socialized" into their future role as attorneys.

The practice of tort law produces its share of ethical dilemmas. A process-oriented book offers a ready matrix for those who desire an early, integrated approach to professional responsibility. The authors have devised credible scenarios, and conflicting policies are often closely balanced. As with most ethical matters, the answers are seldom clearcut or decisive, but the problems will surely stimulate earnest and thoughtful discussion. Moreover, by putting the issues in scenarios, the sterility of memorizing lofty and abstract code sections is avoided.

Before turning to specifics in the book, a brief pedagogical note may be in order. As advantageous as the process approach appears to

be, the anxieties and insecurities of first year students must be taken into account. It is well known that beginning law students crave "learnable" materials and yearn for statements of black-letter law. Thus, a course like torts, with its reliance on "reasonable persons" and "policy," becomes an anxiety-producer for some students. The fact that these qualities give tort law a flexibility and dynamism which is one of the great strengths of the common law is appreciated—if at all—much later in the students' legal education. For these students, then, there is some danger that the "process" approach may become distracting and be viewed as an obstacle to "learning the law."

Last year, as I used a pre-publication version of *The Torts Process,* two of my students (out of a class of ninety) complained that "all this role playing and jurisprudence and ethics" impeded their ability to learn tort law which was "confusing enough as it is." One suspects that these same students, a year or so later, will be heard to present an ironic epilogue. In support of more clinical courses or freshman electives, they may characterize the first-year required courses as "strictly theoretical packages of abstract principles compartmentalized and detached from the actual functions of an attorney." The danger then is falling between the stools. By including problems, process notes, and ethical issues, will the authors distract the struggling students, yet not go far enough in their simulations to achieve the experiential benefits of a clinical program or externship?

The Torts Process cannot be charged with this shortcoming. Since mere learning of legal rules is by no means the only objective of a legal education, and is probably not even its most significant objective (although it may well be the most time-consuming under present formats), approaches such as Professors Henderson and Pearson have employed in their text are vitally necessary. Hopefully, those anxious students can be counseled to appreciate and reap the benefits of the broader approach. But students are, after all, taught to be pragmatists and skeptics in law school and they may well argue that the rewards system emphasizes learning law rather than the more comprehensive scheme in which the law operates. No doubt to a large extent this is presently true. However, as instructors gain experience with the book they should be able to fashion more creative examinations which will begin to reflect the broader learning potential available.

As a device for gaining exposure to the torts process, the authors have utilized a scheme of thematic, "continuing" notes. They have classified these themes under the following categories: "Mechanisms for

Resolving Disputes," "The Law/Fact Distinction," and "Law and Behavior." With only two exceptions, these notes are confined to the portion of the book that is likely to be covered in the first semester (or first two quarters) of the torts course.

The book opens with a chapter devoted to the tort of battery and the defenses to intentional torts. It is rather puzzling that the rest of the materials concerning intentional torts to persons is deferred until Chapter 11. Presumably, it is because the authors wish to focus on dignitary wrongs and the intentional infliction of mental distress, and are only passingly interested in assault, offensive touching, and false imprisonment. Certainly these four torts have in common an injurious impact upon the state of mind rather than upon the body; but then so does the negligent infliction of emotional distress, which is found toward the end of Chapter 6 ("Negligence"), and invasion of privacy, which is treated in Chapter 13.

The authors, in their teaching manual, apparently anticipate that many instructors will teach the intentional mental distress torts at the same time they teach battery at the beginning of the course.[1] If most instructors do present these coverages back-to-back, the organization may prove distressing to those students who resent "jumping around" in the book. Presumably, these students find reviewing facilitated, and find it easier to gain a sense of where the course is going, when the instructor progresses through the book from front to back.

One of the first notes on the law/fact distinction does a good job of explaining the purpose of and requirements for directing a verdict.[2] The first note on professional responsibility raises the timeless inquiry of whether a member of the Bar is merely a "hired gun" or whether he or she should offer objective counseling to the client in order to achieve or protect more transcendental societal needs.[3] The second problem illustrating the nuances of the privilege of self-defense requires the student to construct a closing argument on behalf of the plaintiff.[4] Depending on the time and space available, this problem can be dramatized quite effectively. A judge and jury can be added and a defense summation can be presented as well. Early in the course, such a device is quite stimulating and interesting to the students. As the weeks go by, how-

[1] J. HENDERSON & R. PEARSON, SUGGESTIONS FOR TEACHERS USING THE TORTS PROCESS 77 (1975).

[2] J. HENDERSON & R. PEARSON, THE TORTS PROCESS 32 (1975) [hereinafter cited as THE TORTS PROCESS].

[3] *Id.* at 36.

[4] *Id.* at 52–55.

ever, the dramatization device becomes less effective as only a small fraction of a typically large class can participate.

Another device employed in the book is the use of "Short Problems" to exemplify particularly close questions to be decided under the rules of the principal cases. After giving the facts and offering some provocative comments, the authors provide the solution by means of paraphrasing the actual case from which the problem was drawn. This format represents a compromise between rich detail and bludgeoning the students with excessive numbers of appellate decisions. Despite the ingenious camouflage, however, an appellate case is still an appellate case. My impression is that, after the novelty had worn off, most students did not really accept the challenge of the "problem," but immediately read on to the judicial solution. Nevertheless, there is a lot to be said for the variety and extra depth that has been added at only a slight cost.

The discussion of battery is concluded with a note on effectuating the policies of deterrence and compensation through tort law, and some penetrating questions are raised as to the pathways by which and the extent to which tort law influences behavior.[5]

The book next turns to the rules of cause in fact. This section contains an excellent problem which presents a situation where there is a high probability that one of a group of defendants is responsible for the injury, but where there is no way of demonstrating which individual is responsible (concurrent causes are ruled out). This problem is replete with summaries of interviews of various witnesses. The California cases of *Summers v. Tice*[6] and *Ybarra v. Spangard*[7] are offered as precedents in the mythical jurisdiction of Columbia where the problem is set. The package is completed with the ethical dilemma of how far a lawyer should go in preparing a witness to testify.[8]

Chapter 3 on vicarious liability is similar to Chapter 12 on defamation. Both chapters are almost entirely textual and are supplemented with problems rather than case readings. The condensation of the law of defamation into thirty-two pages is especially well done. Since the

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[5] *Id.* at 80–87.

[6] 33 Cal. 2d 80, 199 P.2d 1 (1948).

[7] 25 Cal. 2d 486, 154 P.2d 687 (1944). I was sorry not to see the groundbreaking case of Chance v. E. I. DePont de Nemours & Co., 345 F. Supp. 353 (E.D.N.Y. 1972) offered in the section on one-out-of-a-known-group causation. Admittedly, the "common standards" aspect of this case will seldom occur outside of a manufacturer's liability context, but the creative, unconventional approach of the court should be pedagogically worthwhile. Similarly, a case like Borel v. Fibreboard Paper Products Corp., 493 F.2d 1076 (5th Cir. 1973) would be very useful to launch a discussion of concurrent causation and unapportionable injury.

[8] THE TORTS PROCESS at 116–17.

first amendment immunities have come to dominate the common law of defamation, the authors contented themselves with presenting only the *New York Times*[9] and *Gertz*[10] cases as appellate opinions. These materials integrate well with a problem which requires the student to advise an outraged client who feels he has been libeled.[11]

Two of the substantive areas most frequently overlooked in torts books are vicarious liability and immunities. Both of these are expressly and ably (albeit briefly) covered in *The Torts Process*.[12] The short chapter on vicarious liability did fail, however, to discuss the liabilities of members of unincorporated associations.[13] Perhaps associations were not mentioned because there is a relative paucity of authority in this area. However, as hobby clubs, charitable groups and recreation associations proliferate, such questions are more and more often being asked of attorneys.[14]

An excellent treatment of damages is found in Chapter 4. Most casebooks and hornbooks give damages short shrift. Consistent with their philosophy that the entire process deserves study, the authors give cases on medical expenses, lost earnings, pain and suffering, wrongful death, and punitive damages. One of the problems presented in this chapter is particularly informative as it reproduces statements of witnesses and letters from treating and examining doctors. The authors have also included six pages from a medical treatise on back injuries.[15] A student is requested to do a damage workup on a lower-back injury. It is doubtful that this problem can be handled during a class period and the instructor may not care to grade written assignments, but even a "dry run" through the problem by the student is bound to be educational. The authors also discuss the ethical problems incurred in the settlement process and the contingent fee contract.[16] So long as coverage was devoted to damages, it is unfortunate that the fascinating issue of probable increased susceptibility to disease and the difficulties of quantifying this condition were not discussed.[17]

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[9] New York Times Co. v. Sullivan, 376 U.S. 254 (1964).

[10] Gertz v. Robert Welch, Inc., 418 U.S. 323 (1974).

[11] THE TORTS PROCESS at 854–57.

[12] *Id.* at 121–38 (vicarious liability) and 518–21 (immunities).

[13] Commercial joint ventures, automobile joint venture, and *respondeat superior* are treated. *Id.* at 121–38.

[14] *Compare* DeVillars v. Hessler, 363 Pa. 498, 70 A.2d 333 (1950) *with* White v. Cox, 17 Cal. App. 3d 824, 95 Cal. Rptr. 259 (1971). *Cf.* Wheatley v. Carl Halvorson, Inc., 213 Ore. 228, 323 P.2d 49 (1958) (applying partnership law to joint venturers).

[15] THE TORTS PROCESS at 175–89.

[16] *Id.* at 202–03.

[17] See Feist v. Sears, Roebuck & Co., 267 Ore. 402, 517 P.2d 675 (1973) for an articulate resolution of this problem.

The remaining chapters of the book are grouped in Part III, which is titled "Substantive Bases of Liability." The opening chapter is a complete coverage of negligence law. Followers of Leon Green[18] may be disappointed to see a fairly brief discussion of the duty issue (treating only the duty to rescue) buried in a subsection entitled "Limitations on Liability." Similarly, the foreseeability analysis is handled under another subsection entitled, "Proximate Cause." Even for enthusiasts of the Green approach, however, this organization does not represent insurmountable difficulties. At most, it may require assigning certain portions of the chapter out of page-number order. The analysis of the breach issue is especially well developed. It begins with risk versus utility, and reasonable person, progresses through negligence *per se,* custom, and practice, technical expertise, and concludes with res ipsa loquitur. An especially good combination of cases, a note, and a problem are presented in the section on expert testimony.[19] A concise section utilizing the problem format and the leading case of *Rowland v. Christian*[20] illustrates the varying standards of care traditionally expected of occupiers of land.

The problem in the subsection on duty-to-rescue raises the difficult and sensitive problem of dealing with a lying client.[21] This problem was very effectively dramatized in our class by using an outsider to play the role of the client. Another interesting subsection deals with the negligent infliction of emotional distress as an instance of "non-liability for foreseeable consequences." The fascinating case of *Shurk v. Christison* is not discussed, possibly because its factual situation makes it too unusual.[22]

The three-page coverage of comparative negligence is obviously very superficial. The intricacies of comparative negligence, especially as it may relate to indemnification and contribution, can be quite difficult to present to a large class. Nevertheless, a major torts casebook should at least attempt to identify the principal problems involved.[23]

The chapter on products liability is divided between cases concerning flawed products and those concerning products which are defectively

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[18] *See, e.g.,* Green, *The Duty Problem in Negligence Cases,* 28 COLUM. L. REV. 1014 (1928), 29 COLUM. L. REV. 255 (1929); Green, *Foreseeability in Negligence Law,* 61 COLUM. L. REV. 1401 (1961).

[19] THE TORTS PROCESS at 340–54.

[20] 69 Cal. 2d 108, 70 Cal. Rptr. 97 (1968).

[21] THE TORTS PROCESS at 401–02, 406–11.

[22] 80 Wash. 652, 497 P.2d 937 (1972) (emotional distress of parents upon learning daughter sexually molested by son of defendants hired as babysitter).

[23] *See, e.g.,* Kohr v. Allegheny Airlines, 504 F.2d 400 (7th Cir. 1974); Dole v. Dow Chemical Corp., 30 N.Y.2d 143, 331 N.Y.S.2d 382 (1972). *See generally,* V. SCHWARTZ, COMPARATIVE NEGLIGENCE (1974).

designed or marketed. The *Cintrone, Seely* and *Rostocki* cases are used to illustrate the problems of the scope of the strict liability remedy with regard to rented products, economic losses and hybrid sales of services and products, respectively.[24] *Cronin v. J. B. E. Olson Corp.*[25] provides a starting point for a discussion of the element of defectiveness. One of the few shortcomings of this chapter is that there is very little interstitial text. The debate on the need to show defectiveness and how it can be shown (including the circumstantial evidence problem in non-specific defect cases) is not treated at all in text.[26] Nor is the problem of applying strict liability to the sale of used goods presented.[27]

The section on the liability of manufacturers for design defects and failure-to-warn is appropriately tailored around Professor Henderson's excellent article.[28] Development of this section is more detailed and more cases are used to illustrate the incremental gropings of courts for doctrinal support in this area. The strong negligence overtones of defective design cases are noted, as is the ability to mitigate the hazard of a limited design through adequate warnings and instructions as to its use. As the authors suggest, however, this is the beginning—not the end of the problem. In the case of inadvertent design defects, it is somewhat elliptical to speak of warnings, since the manufacturer is hardly in a position to warn against something it doesn't realize itself. As to conscious-design decisions, the polycentricity which is inherent in assessing the "reasonableness" of any given design is seen by Professor Henderson as precluding courts and juries from making principled decisions.[29] Although the *Rostocki* case[30] has a passing reference to the problem of unavoidable defects (Comment k to Restatement § 402(a)), the problem of uncorrectable and unknowable defects[31] is not directly

[24] Cintrone v. Hertz Truck Leasing & Rental Service, 45 N.J. 434, 212 A.2d 769 (1965); Seely v. White Motor Co., 63 Cal. 2d 9, 45 Cal. Rptr. 17 (1965); Rostocki v. Southwest Florida Blood Bank, Inc., 276 So. 2d 475 (Fla. 1973).

[25] Cronin v. J.B.E. Olson Corp., 8 Cal. 3d 121, 104 Cal. Rptr. 433 (1972).

[26] *See, e.g.,* Brown v. Western Farmers Assoc., 268 Ore. 470, 521 P.2d 537 (1974) (chicken feed causes hens to stop laying marketable eggs); Markle v. Mulholland's, Inc., 265 Ore. 259, 509 P.2d 529 (1973) (blow-out in recapped tire after 5,000 miles of use); Alaman Bros. Farm & Feed Mill v. Diamond Laboratories, Inc., 437 F.2d 1295 (5th Cir. 1971) (non-specific defect).

[27] *See, e.g.,* Cornelius v. Bay Motors, Inc., 258 Ore. 564, 484 P.2d 299 (1971) (hydraulic seals on brakes of used car driven 50,000 miles); Markle v. Mulholland's, Inc., 265 Ore. 259, 509 P.2d 529 (1973) (recapped tires); Raritan Trucking v. Aero Commander, Inc., 458 F.2d 1106 (3rd Cir. 1972) (replacement part sold and installed in plane by defendant).

[28] Henderson, *Judicial Review of Manufacturer's Conscious Design Choices: The Limits of Adjudication,* 73 COLUM. L. REV. 1531 (1973).

[29] THE TORTS PROCESS at 650–54.

[30] Rostocki v. Southwest Florida Blood Bank, Inc., 276 So. 2d 475 (Fla. 1973).

[31] *See* Schwartz, *Products Liability and Judicial Wealth Redistribution,* 51 IND. L.J. —— (1976) [forthcoming] for a discussion of the redistributional effects of liability for losses resulting from unknowable risks.

treated. As products become more sophisticated, and as more obscure side effects come to light, both bench and bar must give attention to this problem.[32]

The book has chapters on workmen's compensation, no-fault automobile schemes, and the commercial torts of misrepresentation and unfair competition.[33] Chapter 10 is devoted to trespass, nuisance, and a discussion of legal methods for protecting the environment. This chapter begins with an excellent summary of the substantive law of trespass and nuisance, using the 1971 and 1972 revisions of the Restatement of Torts to highlight the various tests employed. The cases in the subsection that follows include such landmarks as *Martin v. Reynolds Metal Co.*[34] and *Boomer v. Atlantic Cement*,[35] as well as the controversial case of *Crushed Stone Co. v. Moore*.[36] The subsection concludes with a fairly complex problem designed to force the student to think about the admissibility of various types of evidence and about which issues should be allowed to reach the jury.[37] The final subsection of the chapter deals with private actions to protect the public interest in the environment. This section draws heavily on readings from the literature and stimulates discussion of fundamental matters such as growth versus no-growth, the public trust doctrine, and effluent permit schemes, as well as some procedural problems dealing with class actions.[38]

Professors Henderson and Pearson have carefully constructed a casebook which addresses itself to all the major problems of tort law and which, at the same time, exposes the student to the torts process. Integrating substantive rules with jurisprudential, procedural, and practical concepts is no easy task. Nor is it easy to design problems which are realistic and challenging but which do not unduly impede orderly progress through the subject matter. In both of these efforts, I think the authors have been remarkably succesful. The addition of sections on damages, vicarious liability, and nuisance is useful to the instructor in the first year curriculum. The cases and textual comments are current and stimulating. The authors' style is sensitive and lucid. It strikes

[32] At least one court has attempted to fashion a prototypical instruction which will allow an inadvertent design error case to reach a jury by using the concept of imputed knowledge of the risk of danger (assuming the risk is "knowable" under the present state of scientific knowledge) coupled with a "reasonableness" test. *See* Phillips v. Kimwood Machine Co., —— Ore. ——, 525 P.2d 1033 (1974). *Cf.* Green v. American Tobacco Co., 391 F.2d 97 (1968), 409 F.2d 1166 (5th Cir. 1969).

[33] THE TORTS PROCESS at 683–739, 901–96 (Chapters 9 & 14).

[34] 221 Ore. 86, 342 P.2d 790 (1959).

[35] 26 N.Y.2d 219, 257 N.E.2d 870 (1970).

[36] 369 P.2d 811 (Okla. 1962).

[37] THE TORTS PROCESS at 778–80.

[38] *Id.* at 780–98.

the proper balance between detailed nuances and brief, manageable assertions of principle. Torts teachers should welcome the appearance of this excellent casebook.

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