

In Praise of the Treatise Writer: Law's Special Knowledge

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A few months after I began my academic career, Chief Judge Richard Posner, in a speech delivered at my new academic home, asked the question: What is the real knowledge that law has? So, I was very fortunate to think about the knowledge that law has at precisely the same moment that I was asking myself: What is the real knowledge that *I* have? Even compared to Judge Posner's low appraisal of the law's knowledge,¹ my own self-estimation was worse, and a path toward acquiring some valuable erudition only began to appear as I taught my first torts course.

The casebook I used (then as now) is Dan Dobbs and Paul Hayden's *Torts and Compensation Systems*.² Dobbs, the author of the foremost treatise on tort law,³ and Hayden, the author of a number of thought provoking articles,⁴ have written a book with a clear structure—one that carefully and methodically elucidates the doctrinal framework of state tort law. The book also addresses problems in tort theory and practice and outlines major supplements and alternatives to existing tort remedies.

For many years, the idea that tort law had an articulable doctrinal structure would have been news to me. In my own legal education, my torts professor took a more theoretical view, never suggesting that negligence law had some formal internal structure, let alone that it might be useful in any particular way. In fact, I had not learned that

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1. Posner, *Professionalisms*, 40 ARIZ. L. REV. 1, 12 ("The root of the problem is that law is still striving to build a body of real knowledge of the kind that has enabled the other professions that I have discussed to move decisively in the direction of genuine professionalism.").

2. DAN B. DOBBS & PAUL T. HAYDEN, *TORTS AND COMPENSATION: PERSONAL ACCOUNTABILITY AND SOCIAL RESPONSIBILITY FOR INJURY* (4th ed. 2001).

3. DAN B. DOBBS, *THE LAW OF TORTS* (2000).

4. See, e.g., Paul T. Hayden, *Butterfield Rides Again: Plaintiff's Negligence as Superceding or Sole Proximate Cause in Systems of Pure Comparative Responsibility*, 33 LOY. L. REV. 887 (2000).

negligence had five elements—duty, breach, actual harm, actual cause, and proximate cause—until I opened a study guide shortly before my final exam.

Imagine my surprise then, when teaching tort law through a doctrinal framework, I found that I understood not only tort doctrine, but also tort theory better than I had before. Granted, I had a few advantages the second time around: it was my second time around, I was learning the materials as a professor rather than as a student, and I had several years of legal practice behind me. Still, for me, the difference in the substantive orientation of the materials also had an impact.

Though I no doubt benefited from the repeated comparisons and contrasts between strict liability and negligence in my own legal education and am still awed by the historical richness of that course, theoretical comparisons of negligence and strict liability only go so far. For me, the limitations of those comparisons stem from that debate's lack of contextual cues,⁵ its alienation from the contemporary culture in which political debates are as likely to be about negligence and something less as they are about negligence and something more,⁶ and its failure to seriously consider tort law's non-legal competitors for the resolution of injury related problems.⁷

If “predictions of what the courts will do is really all there is to law,”⁸ and what courts do is self grounding,⁹ then what could be more helpful to a student of law than to read materials prepared by ingenious authors who are exhaustively versed in the intricacies of what courts and legislatures are actually doing in current disputes (as Dobbs and Hayden undoubtedly are)?

5. See Edward L. Rubin, *The New Legal Process, the Synthesis of Discourse, and the Micro-analysis of Institutions*, 109 HARV. L. REV. 1393 (1996) (describing a synthesis of legal discourse around more contextual analysis).

6. See, e.g., TEX. CIV. PRAC. & REM. CODE ANN. § 33.001-.003 (2000) (dividing defendants' liability into mutually exclusive responsibility shares as a part of “tort reform”).

7. See STEPHEN SUGARMAN, *DOING AWAY WITH PERSONAL INJURY LAW* (1989); Posner, *supra* note 1 (asserting that Holmes' *The Path of the Law* “implies that law as Holmes knew it, and as we largely know it still, is merely a stage in human history”).

8. *Id.* at 14 (articulating Holmes' argument from *The Path of the Law*).

9. See Stanley Fish, Meeting at the Association of American Law Schools (Jan. 6, 2000):

[T]he first true proposition is that our convictions and practices can not be grounded in something independent of them, the second and false proposition is that therefore our convictions and practices are ungrounded . . . in fact our convictions and practices come equipped with their own grounds, grounds that have emerged in the course of the material history of a task's performance—a history complete with authoritative pronouncements, sacred texts, exemplary achievements, know patterns of reward, punishment, advancement, success, failure and so on.

It was once said of Monet that he "is only an eye, but my God what an eye!"¹⁰ That critique, which was never a fair appraisal of Monet's immense creativity,¹¹ is sometimes the view that even admirers take of treatise writers: helpful but only descriptive.

But the term "descriptive" does not begin to account for the value of the casebook that Dobbs and Hayden have produced, which although it is not a treatise, undoubtedly benefits from the authors' extensive treatise related knowledge. Words like "comprehensive" and "current," while invariably true, need to be matched with other terms like "insightful" and "provocative." Let me first speak to the contribution that the Dobbs and Hayden book makes to teachers and then to its direct value to students.

In an earlier version of the *Seattle University Law Review's* casebook series, it was noted that a casebook not only teaches students, it teaches teachers.¹² As a teacher who is a student, let me say that Dobbs and Hayden's book, with its one thousand page teacher's manual and exhaustive yearly update letter, is unparalleled in the support that it provides to teachers. Dobbs and Hayden's teacher's manual provides an outline of the materials in the book, brief summaries of the cases, ideas for discussion, and sometimes materials and thoughts about every single question presented in the casebook (which ameliorated my fear that I might have had to say "I don't know" to every substantive tort law question that my students asked in my initial year of teaching). To assist professors with syllabus preparation, the teacher's manual notes cases or even whole sections that might be skipped if coverage time is tight, as well as cases that must be skipped if prior ones are not covered. For example, if you don't teach the section 1983 cause of action, you might want to skip the *DeShaney* case¹³ when you come to the nonfeasance section.

Since Torts was the first course that I ever taught from a casebook (I had previously taught a course in genetics and the law when all such course materials were homemade), I took for granted that casebooks came with such elaborate user's guides. It was not until I was asked to teach a new course only a few days before the term began that I realized to my shock and dismay that the garden variety teacher's

10. This quotation is attributed to Cezanne. MAURICE RAYNAL, *CEZANNE* 37 (1959); see also Royal Academy of Arts, London, England, at <http://www.royalacademy.org.uk/ex-ingres-08.htm>.

11. PAUL H. TUCKER, *MONET IN THE 90S* (1990).

12. Daniel B. Bogart, *A Casebook for Teaching Teachers: Jesse Dukeminier and James E. Krier, Property*, 22 SEATTLE U. L. REV. 921, 923 (1999) ("the single most important tool for teaching law professors is the casebook").

13. *DeShaney v. Winnebago County Dep't of Soc. Servs.*, 489 U.S. 189 (1989).

manual not only skips the hand holding that Dobbs and Hayden provide, but also foregoes any pretense of shared ideas between author and user.

Now that I have read the teacher's manual once from cover to cover, I must admit that I rarely look back at it. But who needs to? The casebook cites law review articles on nearly every class topic. Dobbs' new hornbook, which is the most exhaustive and thoughtful treatise on the subject, parallels the casebook materials.¹⁴ After that, if you still have questions, Dobbs himself is willing to answer them (though he may kill me for telling you this if he gets one hundred emails next week).

For students, Dobbs and Hayden's book is both comprehensive and current. It not only covers what is sometimes imagined to be the core of the torts course—negligently caused physical harms¹⁵—but also includes critical issues often marginalized as non-core matters, such as, cases concerning dignitary harms, relational and nonphysical interests, and damages.¹⁶ Indeed, far from ordaining negligence as the sole concern of tort law, Dobbs and Hayden include injury related issues beyond even the intentional negligence and strict liability framework of tort law. The book includes chapters on tort alternatives such as workers compensation, social security disability, and no-fault insurance—all of which provide a useful backdrop against which to test the claim that some form of tort law ought to occupy the central role of an injury prevention, compensation, or remediation program. Additionally, the book addresses key practical issues like apportionment of damages, which are as important as the “substantive” tort rules themselves once joint and several liability has been abolished and nonparty defendants have been included.¹⁷

This comprehensive number of subject areas is covered through interesting, thoughtfully selected, carefully organized, and tightly edited cases and readings. This tight editing allows readers to see patterns across a broad number of varied cases and has coaxed me away

14. DOBBS, *supra* note 3.

15. Thomas C. Grey, *Accidental Torts*, 54 VAND. L. REV. 1225, 1226 n.1 (2001) (describing an orthodox but controversial understanding of tort law which treats the problem of accidental injury as “the core of tort law”).

16. See Martha Chamallas, *Vanished from the First Year: Lost Torts and Deep Structures in Tort Law* 106 (lamenting the loss of discussion of relational and nonphysical interests from Torts courses), in J.M. BALKIN & SANFORD LEVINSON, *LEGAL CANONS* (2000).

17. See, e.g., *Brandon v. County of Richardson*, 624 N.W.2d 604 (Neb. 2001) (murder victim's recovery from negligent county, which failed to protect victim from rapists who had threatened to kill her, would have been reduced by 85% if apportionment between defendants' intentional and negligent fault had been permitted).

from a three-case-a-day habit to a stronger analytical organization of the day's materials.

The cases are current. Topics covered include cases on fear of cancer, HIV blood contamination, medical malpractice reform, and elder abuse. A brief review of the Fourth Edition's new section on the *Third Restatement of Products Liability* reveals that the liability of ammunition and cigarette manufacturers is also included in that edition. Dobbs and Hayden's yearly update letter, which includes short notes on hundreds of new cases, suggests further contemporary tort topics. For example, traditional actions such as trespass to chattels can be taught in the context of the computer cases that Dobbs and Hayden cite—a somewhat more interesting application of the doctrine for students.¹⁸

Additionally, the casebook covers, and is sensitive to, issues of race, ethnicity, and gender. Duty-to-warn materials include questions about duties to provide Spanish language warnings when companies advertise in Spanish. The loss of consortium section raises the question of claims brought by unmarried cohabitants. In addition, the harms section includes prenatal injuries.

In my view, the comprehensive and current coverage is not an indulgent luxury, but central to the academic enterprise of engaging students in analysis.¹⁹ Still, the Dobbs and Hayden casebook does not sacrifice other pedagogical objectives in order to achieve these ends (a feat which seems only possible because of the sheer volume of cases the authors have read).

Throughout this coverage, insights abound. For example, the Dobbs and Hayden book structures the negligence section around the assumption that people generally owe a duty of reasonable care for the safety of others, and then circles back to cover special categories of cases in which defendants may be under no duty or limited duties of care—a structure that establishes the basic rule before the exceptions and that foreshadows a similar approach taken by the draft *Restatement Third of Torts: General Principles*.²⁰

Within that framework, cases are thoughtfully selected and arranged. For example, the risk-utility materials in the breach section include a case that implicitly looks at the BPL factors under Hand's

18. See, e.g., Letter from Dan B. Dobbs & Paul T. Hayden to Teachers, at 1 (1998) (citing *CompuServ Inc. v. Cyber Promotions, Inc.*, 962 F. Supp. 1015 (S.D. Ohio 1997)).

19. Craig Anthony Arnold, *How Do Law Students Really Learn? Problem Solving, Modern Pragmatism, and Property Law*, 22 SEATTLE U. L. REV. 891, 894–896 (1999) (discussing evidence that students “must engage with and use the material[s]” in order to learn).

20. RESTATEMENT OF TORTS: GENERAL PRINCIPLES, DISCUSSION DRAFT (Apr. 5, 1999).

test without any such labels, and then includes *Carol Towing* with notes about Judge Posner's theory of the economic meaning of negligence—a treatment that reveals less-structured and more-structured approaches to cost-benefit balancing.²¹ The actual harm section first establishes “but for” causation. Then provides variations on the characterization of the harm that is actually caused, for example, loss of life versus lost chance of recovery, revealing the vital relationship between actual cause and both the negligence and actual harm elements.²² With respect to proximate cause, the casebook includes a set of application cases that reveal how difficult the formal type of harm and extent of harm classification task really is in proximate cause analysis.²³ These application cases highlight the importance of levels of generality in tort law.²⁴

Special mention should be made of the case notes, which are clear, direct, and packed with helpful information. In case after case, the note questions raise critical issues in both a contextual and broader frame. For example, one note asks the reader to consider whether the transferred intent doctrine is sound when the defendant, although acting intentionally with respect to one party, was merely negligent toward the plaintiff? Other notes ask whether there is any justification for holding a company liable to its workers under workers' compensation, but not liable to third parties under general tort rules (as when the company is not at fault)? What is fault? Is a fault based rule just or socially desirable? How does intent differ from negligence? When I prepared my first course with the Dobbs and Hayden book, I was both humbled and reassured to find that nearly every brilliant question I could think of for class discussion had already been included in some portion of the case notes.

Even a book with all of these strengths reveals a few spots that might be improved.²⁵ In some places, I would like to see more varied textual support for developing the practical and theoretical answers to the provocative questions that the text raises. Taking an ecumenical approach, Dobbs and Hayden cite an innumerable number of articles, but do not develop many of these beyond case notes. When students and teachers look at provisional answers to questions about the justice,

21. DAN B. DOBBS & PAUL T. HAYDEN, *TORTS AND COMPENSATION: PERSONAL ACCOUNTABILITY AND SOCIAL RESPONSIBILITY FOR INJURY* 133–142 (3d ed. 1997).

22. *Id.* at 180–202.

23. *Id.* at 218–222.

24. Cf. Laurence H. Tribe & Michael C. Dorf, *Levels of Generality in the Definition of Rights*, 57 U. CHI. L. REV. 1057 (1990).

25. Students sometimes criticize punctuation problems that a careful proofreader at the publishing house could easily resolve.

desirability, or (for law and economics folks) optimality of given legal rules, professors may want to add many of their own supporting texts, whether broader philosophical readings on the appropriate frame of tort law, more context-specific studies of the policy effects of legal liability in particular areas, or even fuller versions of the case law.

Still, I cannot get too concerned about this weakness. After all the hand holding and help the casebook and supporting materials give teachers, developing some supplementary materials seems like an appropriate vehicle for individual professors to express their own style and interests using the exhaustive citations in the book as a guide.

Each year, I do develop supplementary materials followed always by resolutions to change my plan the following year. (After I read the contributions to this symposium, I am quite sure that I will make new changes once again.) For now, I try to talk about how tort law moves in a cultural context.²⁶ So, for example, I have had students read an excerpt about stock stories²⁷ and identify some of the stock tort stories that illuminate and limit comprehension.²⁸ We talk about common understandings of the McDonald's coffee case²⁹ as well as available data on the prevalence of tort litigation.³⁰ To facilitate cross-cultural comparison, I have given students testimony from a tort case before the Crow Nation that examines the value of a deceased tribal member's life.³¹ In addition, I have worked with a student from the Nakota to compare a standard state tort law approach to compensation for a particular injury with the more relational response of the Nakota to that same injury.

I also try to help students analyze questions about desirable rules in a small number of concrete settings with more context specific information. I generally use examples in my own areas of scholarship,

26. Marshall S. Shapo, *Millennial Torts*, 33 GA. L. REV. 1021 (1999) (discussing tort law as a social synthesis).

27. Gerald P. Lopez, *Lay Lawyering*, 32 UCLA L. REV. 1 (1985).

28. See, e.g., David M. Engel, *The Oven Bird's Song: Insiders, Outsiders, and Personal Injuries in an American Community*, 18 LAW & SOC'Y REV. 551 (1984) (examining the myth of litigiousness in one county and the cultural tensions underlying it).

29. *Halowaty v. McDonalds Corp.*, 10 F. Supp. 2d 1078 (D. Minn. 1998).

30. These assumption challenging materials were generously shared by Professor Richard Wright at Chicago-Kent College of Law, Illinois Institute of Technology.

31. The documents include an affidavit prepared by the railroad defendant's accountant and the deposition testimony from the plaintiff's tribal expert. See February 22, 1996 Affidavit of Louis L. Wilde, Burlington N. R.R. Co. v. Red Wolf, 196 F.3d 1059 (9th Cir. 1999) (Nos. 98-35502, 98-35539, 98-35541), *cert. denied*, 529 U.S. 1110 (2000); February 2, 1996 Deposition Testimony of Janine Pease Prettyyontop at 191-225, *Red Wolf* (Nos. 98-35502, 98-35539, 98-35541). The jury verdict in the case for \$250 million dollars was disregarded by United States federal courts. *Red Wolf* enjoined execution or enforcement of judgment awarded in personal injury action brought by heirs of Crow tribal members whose car was struck by a train on the reservation.

where I am more likely to be a competent guide.³² But at times, I have used current national or local problems to frame these questions. For example, on the national level, we have addressed problems surrounding gun injuries.³³ On the local level, we have discussed the liability of state actors to a Tucson girl who was mauled by a bear.³⁴ When possible, I try to let students select topics that interest them as a group to elicit more active engagement,³⁵ and to introduce them to tangible aspects of tort practice like courtroom testimony and expert assistance.

One year, I introduced Coase when we talked about necessity,³⁶ Jarvis-Thomson when we talked about actual cause,³⁷ and Fletcher when we made our transition from negligence to strict liability.³⁸ A very helpful reader includes these readings and many others.³⁹ In several different years, my students were introduced to concepts surrounding the interpretation of Arizona's unique Constitutional Torts Provisions by a respected and generous Arizona Supreme Court Justice.

I admit these sorts of supplementation are relatively easy for me because I have the luxury of a sixth hour of "Torts Lab"—a first-year legal writing and analysis tag-on to the basic torts class. Were I to have fewer hours, I think I would (after extensive pleas to the Dean and faculty for more time) take a similar approach. I would try to help my students develop a fuller understanding of tort law including the subtle contours of rules, and the culture, context, and theory that shape them, and the alternatives that supplement and rival their existence.

CONCLUSION

If in the end, Judge Posner is right that courts and others should do a grand BPL to resolve tort rules, and the man of the future is, following Holmes, the man of statistics and economics, then perhaps law

32. Here, I have assigned Ken Simon's insightful work, *Assumption of Risk and Consent in the Law of Torts: A Theory of Full Preference*, 67 B.U. L. REV. 213 (1987).

33. See Fox Butterfield, *Guns: The Law as Selling Tool*, N.Y. TIMES, Aug. 13, 2000, at 4 (reporting straw purchases made at a gun store whose gun sales were used in at least fifty homicides and 901 violent crimes).

34. See Briefs and February 1, 1999 Court Order, *Knochel v. Arizona* (Super. Ct., Maricopa Cy. 1999) (No. CV 98-09396).

35. Cf. *The True, the Good, and the Beautiful: An Interview with Howard Gardner, Across the Board* (1999) (discussing the Reggio Emilia schools in Italy which "start out with whatever happens to capture the fancy of the young children when school begins").

36. Ronald H. Coase, *The Problem of Social Cost*, 3 J.L. & ECON. 1 (1960).

37. Judith Jarvis-Thomson, *Remarks on Causation and Liability*, 13 PHIL. & PUB. AFF. 101 (1984).

38. George P. Fletcher, *Fairness and Utility in Tort Theory*, 85 HARV. L. REV. 537 (1972).

39. SAUL LEVMORE, FOUNDATIONS OF TORT LAW (1994).

professors and students should leave law now for other disciplines with a more sizable claim to the knowledge pie (though which disciplines those are remains debatable). Alternatively, perhaps there is a way that the study of law can become permeable to knowledge claims from economics, statistics, psychology, anthropology, public health, and others without being empty handed when approaching the knowledge store. For all of her openness about the substantive content of any legal rule, the lawyer knows how to take theory and data back to a human problem and get legal mechanisms to act. This might seem to be a fairly modest knowledge claim. But in a country in which millions of grievances are resolved with accompanying court procedures—in matters ranging from petty theft to the Presidency—that knowledge claim need not be insignificant.⁴⁰ In the future we may deal with injuries through insurance and other non-legal mechanisms, and perhaps rightly so.⁴¹ But from my view at the geographic border, until that transformation occurs, legal bilingualism must prevail.

If I had a single dime (okay 50¢) to call one person on the planet who could tell me how U.S. tort law with its fifty-fingered hands would act in a given factual scenario, I would spend my money on a phone call to Dan B. Dobbs. The law with its big coercive machinery functions through action or inaction. Dobbs and Hayden, through their exhaustive and careful review of existing cases and articles, understand what courts will do in actual cases. I cannot think of a more helpful place for law students or law scholars to begin the analysis.⁴²

40. DEBORAH HENSLER ET AL., *TRENDS IN TORT LITIGATION: THE STORY BEHIND THE STATISTICS* (1987) (studying the amount of tort litigation in the United States).

41. Posner, *supra* note 1, at 14 (suggesting that “if the law submitted to instruction by economics and the other social sciences, we might find the tort system replaced by a system of social insurance, and the system of the criminal law”). Though our criminal law colleagues’ search for consequences other than the extremes of prison and death, *see, e.g.*, Dan M. Kahan, *Social Influence, Social Meaning and Deterrence*, 83 VA. L. REV. 349, 359 (1997), suggests that the tort system, with its broader range of possible sanctions, may long continue to play a useful role, and that the question might equally be inverted to ask whether, if the law submitted to instruction by social sciences and economics, we might find the criminal law system replaced by the tort law in some number of cases.

42. Cf. Amartya Sen, *The Discipline of Cost-Benefit Analysis*, J. LEGAL STUD. 931, 933 (2001) (“I do believe that it may be quite useful to go from practice to principles, rather than the other way round.”).