When Torts is More than a Series of Accidents: Epstein on Torts

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I. INTRODUCTION

When I was approached about writing a review of my chosen torts book for this issue of the *Law Review*, I was a bit hesitant. After all, torts was not really my specialty. I was primarily an environmental law professor who came to torts because I wanted to help my law school with the always heavy first-year teaching load. Among first-year courses, I chose torts because I liked the subject matter area, and it was related to some of the research that I did in environmental law; however, I am no expert. Could I then have anything of value to say to those, including new law professors, who come to this issue seeking guidance on which casebook to use in their own first experience teaching torts? After some consideration, I decided that the answer was yes. After all, most law professors who tackle torts for the first time, whether new to the academy or simply changing their course load, will also not be self-described experts in torts. Like me, they may come to their first class with a bit of institutional history in their law schools as to which torts book is best or perhaps, also like me, they will be splitting the course with another faculty member who already has a preferred book.

That was my history and that is how I initially came to my torts book. Though I was certainly not limited in which torts casebook I could use, the fact that other professors in my school were already using a casebook was a powerful motivator for sticking with that casebook. After all, many new professors, or professors taking on a new classroom preparation, are already swamped with work. Reviewing

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multiple casebooks will only add to that load, and if mentors on the faculty are already using another book, why rock the boat without a powerful reason?

I could end here, and this would be enough for many new law professors. Having examined several different torts casebooks after my first year, I have run across few duds. The lesson for the new teacher is that, because few of the books are truly bad, it may be sufficient to simply begin with the casebook that is the easiest to prepare with (the one already used by faculty at your school), at least for the first time. You are probably not going to be stuck with a total bomb if someone in your school is already using the book and you may get excellent help from those who are already teaching with a given text. For while the casebooks themselves may be of sound vintage, the same cannot be said for all of the accompanying teacher's manuals. Thus, if you do have important questions about your book and how to teach certain topics (and you will), it may be advantageous to have your very own casebook decoder, in the form of a colleague, who is prepared to help you.

Nevertheless, if you are still curious, are particularly unsatisfied with the "fallback" casebook, or are simply looking for an approach to using a casebook or teaching a torts class in a way to get the most out of it, some things I have learned in teaching torts and in using the casebook that I do, which is the casebook with which I started, may be of help. I think the best way of doing this is to make the selection of the casebook a part of the bigger question of teaching the class as a whole. Consequently, in order to demonstrate the value of *Epstein on Torts*, it will be necessary to describe how I came to teach the torts class I teach. This may be broader than simply looking at the pluses and minuses of a particular casebook, but I do not really believe that the two can be separated. Moreover, a description of the process of teaching the whole class may be as or more helpful than simply describing a book in a vacuum.

II. WHAT DO YOU WANT TO ACCOMPLISH?

I believe that the most important question in determining which casebook one should use for *any* course, and the most important question in approaching the teaching of a class, is what you as a teacher want to accomplish. This is an individual determination for which there are no correct answers. It depends on your strengths as a teacher, what your institution wishes to impart to students of your class, whether you are focused more on substantive law or the reason-

ing process, and what kind of students you have—what they want and for what they will likely use the material.

For instance, if you are generally a shy person or uncomfortable being "on stage," you may need to choose a casebook that depends more on student exercises than on lecture or Socratic method. If your school has determined that torts will be a basic three-hour class, with attention only to negligence, then you will want to focus on a book that treats negligence in the way you think your students should be taught. By contrast, a text's treatment of the dignitary harms of strict liability may be immaterial.

For my class, I was guided by what I (and the college) wanted the students to get from the class, as well as where our students were in terms of their own learning needs and prospective employment options. I teach at Georgia State University College of Law in Atlanta, Georgia. We have been very successful in a relatively short time, doing well in national rankings, attracting talented students, and becoming a vibrant part of the intellectual and legal life of the city of Atlanta. After graduation, our students work in government positions, large firms, non-profits, and small to mid-size firms, as well as solo practices. Our students are good, with a high level of competency, a wealth of past experience, and a healthy demand for results. Our students want practical knowledge but want to be challenged academically; to pass the bar, but also to be the intellectual stars in their future careers.

Thus, one of the important goals of our torts classes is to help our students with the nuts and bolts—to make sure that they learn the basic substantive law. To that end, students should not be able to leave a torts class without firmly understanding the elements of an intentional tort, the elements of negligence, and the situations that call for the application of a strict liability regime. This is not enough, however. Because our students want to be challenged and to learn about the theories underpinning law, we must go further. While we are not Yale or Harvard and are thus not in the business of primarily teaching our students academic theory,[1] we do have a cadre of students who would be at home in that environment and who could learn a great deal with some instruction in theory. Such theoretical underpinnings are also valued in the creative environment where many of our students will work within the government and private sectors. So in addition to the basics, I want our students to learn of the theoretical underpinnings of torts, to understand why the reasonable person stan-

1. That comment is not meant as an insult to the faculties or students of either Yale or Harvard.

dard can be approximated by the economic efficiency model,[2] and to be able to identify when theories of strict liability can be utilized to argue for a higher standard of care in certain circumstances.[3]

Additionally, we want our students to learn how to "think like a lawyer"—a somewhat amorphous standard in common parlance, but one that I define as being able to organize thoughts and legal analysis clearly and to present it in a way that may affect the legal outcome governing a factual situation. "Thinking like a lawyer" may be viewed primarily as a practical skill, but theoretical training can certainly bolster a student's acquisition of such skills.

Last, but certainly not least, we are a school that prides itself on teaching, and believes that interested and engaged students are more likely to learn and think creatively. I enjoy theatrics in teaching and thus need a book that helps support the "fun" in the classroom.

Overall then, I want a casebook that clearly outlines the black letter law, but does so with challenging theory, helps the students think in an organized manner, and is fun. Too much to ask? Perhaps, but these goals are a good starting point for what I wanted in a torts casebook and explain my reasons for continuing to use *Epstein on Torts*.

III. HOW EPSTEIN GETS THE JOB DONE

The first virtue of the Epstein casebook is that it is interesting to read. Though torts law is not merely a collection of well-known or influential cases, torts cases do have the virtue of being interesting, and probably because they are so memorable, the canon of cases may be similar from book to book. Most law students do not get out of law school without remembering the poor sickly Vosburg child, who suffers an abscessed knee because of the "tap" of Mr. Putney,[4] or the brat "Dailey" kid who pulls the chair out from under Ms. Garrett.[5] Add to this *Rylands v. Fletcher*,[6] *Carroll Towing*,[7] *Palsgraf*,[8] the train cases,[9]

2. *See* United States v. Carroll Towing, 159 F.2d 169 (2d Cir. 1947), *reprinted in* RICHARD A. EPSTEIN, CASES AND MATERIALS ON TORTS 190 (7th ed. 2000) (determining barge owner's liability for injuries as a "function of three variables: (1) [t]he probability that [the barge] will break away; (2) the gravity of the resulting injury[] if [it] does; [and] (3) the burden of adequate precautions."); *see also* Richard A. Posner, *A Theory of Negligence*, 1 J. LEGAL STUD. 29 (1972) (presenting a principled overview of the Hand formula as a barometer of reasonability under negligence law).

3. *See* Powell v. Fall, 5 Q.B. 597 (1880), *reprinted in* EPSTEIN, *supra* note 2, at 127.

4. *See* Vosburg v. Putney, 50 N.W. 403 (Wis. 1891), *reprinted in* EPSTEIN, *supra* note 2, at 4.

5. *See* Garratt v. Dailey, 46 Wash. 2d 197, 279 P.2d 1091 (1955), *referenced in* EPSTEIN, *supra* note 2, at 7–8.

6. L.R. 3 E. & I. App. 330 (H.L. 1868), *reprinted in* EPSTEIN, *supra* note 2, at 116.

7. *Carroll Towing Co.*, 159 F.2d 169.

and the spring gun cases,[10] and you go a long way to filling up your book. Though these cases primarily are standards used to explore aspects of the black letter law, they are also interesting, providing a ladder of accessibility to the more complicated and nuanced structure of tort law itself.

Epstein exploits this natural drama well. He not only presents the chestnuts, but also he presents much of the factual background and the follow-up that make the cases even more interesting and compelling to students.[11] Of course, his is not the only casebook to do so. In something of a trend, many casebooks have taken to providing background on cases, but not all do so with a mind to currying interest. Happily, Epstein's clear and thoughtful explanatory notes provide a powerful boost in interest level as well as explication.

Further boosting the "fun" level, Epstein chooses an array of lesser-known, but factually interesting, cases that keep the students hanging on when they might otherwise tire. A personal favorite is the "flopper" case, a case about assumption of risk whose facts revolve around a carnival ride that was a sort of stepless escalator on which people tried to keep their balance.[12] Keeping their balance was not easy, but for young couples that was apparently the point, as they fell upon each other giggling and trying to regain their balance—a sort of sanctioned form of necking, something that amusement parks have long provided for the young. This case allows me to draw a diagram on the board, bringing in some visual stimulation, felt to be important in adult learning.[13] What can I say? Drawing the "flopper" always amuses the class, and I am not too proud to go for the cheap laugh. But Epstein is the one that gives me these opportunities. Drawing pictures or acting out voices may not be your strength in the classroom, but starting with something that can be made visually interest-

8. Palsgraf v. Long Island R.R., 162 N.E. 99 (N.Y. 1928), *reprinted in* EPSTEIN, *supra* note 2, at 501.

9. In addition to *Palsgraf*, some classics include *Rylands*, L.R. 3 E. & I. App. 330; *Eckert v. Long Island Railroad*, 43 N.Y. 502 (1871), *reprinted in* EPSTEIN, *supra* note 2, at 181; and *Baltimore & Ohio Railroad v. Goodman*, 275 U.S. 66 (1927), *reprinted in* EPSTEIN, *supra* note 2, at 270. Cases involving trains and railroads figure prominently in the torts lexicon.

10. *See, e.g.*, Katko v. Briney, 183 N.W.2d 657 (Iowa 1971), *referenced in* EPSTEIN, *supra* note 2, at 44.

11. *See id.* at 44–45 (recounting the very interesting story of *Katko v. Briney*, in which the outrage of liability for someone shooting a criminal defendant is well illustrated).

12. *See* Murphy v. Steeplechase Amusement Co., 166 N.E. 173 (N.Y. 1929), *reprinted in* EPSTEIN, *supra* note 2, at 346.

13. Paula Lustbader, *Teach in Context: Responding to Diverse Student Voices Helps All Students Learn*, 48 J. LEGAL EDUC. 402, 404 (1998).

ing or theatrical allows the teacher to bring these cases to life himself or herself or figure out ways for students to do so.

Epstein also selects cases that are well written by respected and legendary judges. Again, while they may not be the only cases to illustrate a point, they do so with flair. The day we discussed the case of *Andrews v. United Airlines*,[14] many students were quoting the wonderful, wry warning from Judge Kozinski that "what goes up must come down. For, while the skies are friendly enough, the ground can be a mighty dangerous place when heavy objects tumble from overhead compartments."[15]

By focusing on interesting facts and then providing explanatory text, Epstein also illuminates the importance of perspective. Fleshing out the facts of a case often shows the influence of the perspective of the tribunal—a factor that I believe the law student should always be aware of, particularly in torts where it may explain an otherwise inexplicable outcome. It may not be true that negligence emerged simply as a subsidy to nascent industries and their industrialist owners (a position explored in some length in Epstein),[16] but law students should be aware that a great current of legal thought believes that case results may be related to the wants and prejudices of the powerful.[17] This can be no more chillingly conveyed than the *Buch*[18] case where, in finding that a company was not liable for an eight year old child's hand being crushed in a factory machine even though the overseer did not make the boy leave when he saw him being trained on the machine by his thirteen year old brother, the judge says:

> An infant, no matter of how tender years, is liable in law for his trespasses. . . . If, then, the defendants' machinery was injured by the plaintiff's act in putting his hand in the gearing, he is liable to them for the damages in an action of trespass and to nominal damages for the wrongful entry.[19]

In making the presentation enjoyable and interesting, Epstein does not sacrifice the basic lessons that are to be learned from torts. His black letter law is clearly presented and accurate. When a concept is introduced, more often than not Epstein will follow the discussion with a summary of the law, usually from the *Restatement*. The casebook starts with the overview of intentional torts and then moves into

14. 24 F.3d 39 (9th Cir. 1994).
15. *Id.* at 40, *reprinted in* EPSTEIN, *supra* note 2, at 197.
16. *See* EPSTEIN, *supra* note 2, at 105–11.
17. *Id.*
18. Buch v. Amory Mfg .Co., 44 A. 809 (N.H. 1897).
19. *Id.*, *reprinted in* EPSTEIN, *supra* note 2, at 550.

negligence. For those wishing to cover more advanced topics, there is a discussion of modern strict liability and emotional and dignitary harms. Though many torts books follow this example, there is still a hangover of the "old" style that presents cases and asks questions without actually setting out the elements of a particular tort. While this has been defended as forcing the student to think, thus gaining one of the goals of the first year curriculum, I find the "hide the ball" theory unbelievably frustrating for most law students. There is so much to learn in the first year curriculum that many students floundering for the basics may never even find the time to "think like a lawyer." At best, many learn to "think like a law professor" for purposes of an exam. In addition, when the students are at least given the black letter law, it decreases the discomfort they may feel with the Socratic method. While I do not use this method per se, I do require my students to participate; and I can do so because I know that Epstein's explication of the basic law gives them a platform of confidence from which to begin.

I do not mean to minimize the importance of comfort with ambiguity or the ability to "think like a lawyer"—far from it. As noted above, one of my most important requirements for a torts book comes from my desire to challenge the students intellectually. What I do dislike, however, is this one obfuscatory method of trying to get students to think. Epstein solves this problem nicely by setting out the black letter law and then supplementing the black letter law with the intellectually challenging notion of why and how it developed and what cogent theory underlies torts, if any. This approach is challenging without being frustrating. It challenges the student to think creatively and make links that are not obvious at first glance. This has the added advantage of giving the students a tool to expand their understanding of torts beyond what they have learned in class. So instead of struggling just to identify the elements of a tort, the students can think about how and why strict liability arose from negligence, knowing that their knowledge of black letter law rests securely in their memory, there to serve them at a moment's notice. After all, our legal employers are not paying newly minted law students to tell them the elements of a battery but to understand what nuances in a case might shade the "unlawfulness" of a touch. If we are going to teach our students to "think like lawyers," we might as well do so in a useful way.

Epstein's overarching questions regarding the relationship and development of tort law, I believe, do this better than most. For instance, in many torts texts, economic theory is in vogue as a way of explaining much of torts law, from the test for reasonableness in negli-

gence to the determination of who would be the lowest cost risk avoider. Though economic theory does provide something of an overarching theory of torts, I do not think that a torts class should rely on this economic theory exclusively. It does provide some template for understanding some kinds of tort law, but it suffers from a lack of generality beyond negligence and risks becoming too dislodged from the reality of life and the law to be very inspiring or convincing to students. Mercifully, given Epstein's reputation,[20] he goes beyond this single theory. What Epstein does present are the factors, economic and otherwise, that show how one kind of tort is related to another; how strict liability gave way to negligence; how certain factors were explicitly identified as being important to determining liability; and how these affect our cases today and the future of torts.

Of course, one has to be aware of this aspect of the book and work with it. The first time I used the Epstein book I was puzzled about the long section dealing with the historic emergence of negligence from strict liability.[21] It was not that there existed some part of the book dealing with this evolution—that was to be expected. What was puzzling was its length and complexity. I wondered why so many cases were needed and why so much time was devoted to this section, given the limited amount of time we all face in attempting to teach first year courses. However, as I taught from this section for the first time, its importance became clearer. I may have been familiar with the relationships between the various parts of tort law, but the students were not. To allow them to really learn from this section required them to make these links themselves, and they did so. Since I have understood this part of the book to be a way to engage the students in larger ways of thinking, this learning has been enhanced.

For instance, one of the things one notices about intentional torts and the earliest forms of strict liability is that there was an understanding that people had some sort of culpability for their actions. Not that those who committed such torts were at fault as we understand that term, but in the simpler times of old, they could have some understanding of fault and precautions.[22] Negligence sought to provide a bit of fairness to the defendant, recognizing that there were some times

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20. *See, e.g.*, Richard Epstein, *The Dunbar Lecture: Life Boats, Desert Islands, and the Poverty of Modern Jurisprudence*, 68 MISS. L.J. 861 (1999) (remarks of Michael Hoffheimer). "[T]here is no scholar in America who is . . . more controversial . . . than Professor Epstein." *Id.* at 862. *See also* George Rutherglen, *Abolition in a Different Voice*, 78 VA. L. REV. 1463, 1464 (1992) (book review).

21. *See* EPSTEIN, *supra* note 2, at 85–201.

22. *See* The Thorns Case, Y.B. 6 Edw. 4, fol. 7, Mich., pl. 18 (1466), *reprinted in* EPSTEIN, *supra* note 2, at 86.

when there were no obvious precautions and that, with greater interaction in our society, sometimes the plaintiffs had to care for themselves.[23] When they absorb this lesson, the students can then better understand the situations in which strict liability may still exist. In cases such as products liability and abnormally dangerous activities, the students notice again that the defendants do seem to be in control of their actions and precautions and that they are not so "innocent" when harm is caused to a plaintiff.[24]

Thus, by using the Epstein book, the students learn the basics of torts in a way that is not frustrating, but in which they are still challenged by legal theory and pushed to think. Coupled with the interest and entertainment that are behind the choice of cases, I find the Epstein book to be very appropriate for our students. Of course, no book will fit everyone's needs or styles of teaching. But if you can determine what it is you wish to emphasize, both substantively and doctrinally, you can use this information to assist in selection. If, like me, you want your students to see torts as a whole system of legal thought rather than a series of entertaining cases or "things gone wrong," then the Epstein book may be for you.

23. *See* EPSTEIN, *supra* note 2, at Ch. 4. The assumption of risk and contributory negligence portions of the text usually provoke a spirited student response, perhaps from a sense of shared life experiences with the subject matter of some of the famous cases. *See, e.g.*, Li v. Yellow Cab Co. of California, 532 P.2d 1226 (Cal. 1975) (automobile accidents); Derheim v. N. Fiorito Co., 80 Wash. 2d 161, 492 P.2d 1030 (1972) (seat belts).

24. *See* EPSTEIN, *supra* note 2, Ch. 9, at 647–69.