

At the Lectern

A Good Lawyer

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One of the great advantages of teaching torts is that the case law tells so many colorful stories. Trains are constantly crashing, catching fire, or otherwise wreaking havoc on the community.¹ Boats and barges are always sinking, or smashing into things, or tossing their occupants into the sea.² Barrels of flour (and sometimes chairs) randomly fly out of building windows.³ People are constantly dropping things,⁴ falling into things,⁵ or throwing things at other people.⁶ There are heroic rescues,⁷ man-eating sharks,⁸ spurned lovers,⁹

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1. *See, e.g.*, *Ind. Harbor Belt R.R. Co. v. Am. Cyanamid Co.*, 916 F.2d 1174 (7th Cir. 1990); *Watson v. Ky. & Ind. Bridge & R.R. Co.*, 126 S.W. 146 (Ky. 1910); *Keffe v. Milwaukee & St. Paul Ry. Co.*, 21 Minn. 207 (1875); *Brower v. N.Y. Cent. & Hudson River R.R. Co.*, 103 A. 166 (N.J. 1918); *Globe Malleable Iron & Steel Co. v. N.Y. Cent. & Hudson River R.R. Co.*, 124 N.E. 109 (N.Y. 1919).
2. *See, e.g.*, *Rodi Yachts, Inc. v. Nat'l Marine, Inc.*, 984 F.2d 880 (7th Cir. 1993); *Frank v. United States*, 250 F.2d 178 (3d Cir. 1978); *Gardner v. Nat'l Bulk Carriers, Inc.*, 310 F.2d 284 (4th Cir. 1962); *United States v. Lawter*, 219 F.2d 559 (5th Cir. 1955); *Johnson v. Kosmos Portland Cement Co.*, 64 F.2d 193 (6th Cir. 1933); *The T.J. Hooper*, 60 F.2d 737 (2d Cir. 1932); *N.Y. Cent. R.R. Co. v. Grimstad*, 264 F. 334 (2d Cir. 1920); *In re Trans-Pac. Fishing & Packing Co.*, 152 F. Supp. 44 (W.D. Wash. 1957); *Vincent v. Lake Erie Transp. Co.*, 124 N.W. 221 (Minn. 1910); *Overseas Tankship (U.K.) Ltd. v. Morts Dock & Eng'g Co.*, [1961] UKPC 1 (appeal taken from N.S.W.).
3. *See, e.g.*, *Larson v. St. Francis Hotel*, 188 P.2d 513 (Cal. Ct. App. 1948); *Byrne v. Boadle*, (1863) 159 Eng. Rep. 299 (Exch.); 2 Hurl. & Colt. 722.
4. *See, e.g.*, *Combustion Eng'g Co. v. Hunsberger*, 187 A. 825 (Md. 1936); *In re Polemis & Furness, Withy & Co.*, [1921] 3 K.B. 560 (C.A.) (Eng.).
5. *See, e.g.*, *Alexander v. New Castle*, 17 N.E. 200 (Ind. 1888); *Yania v. Bigan* 155 A.2d 343 (Pa. 1959).
6. *See, e.g.*, *Manning v. Grimsley*, 643 F.2d 20 (1st Cir. 1981); *Crabtree v. Dawson*, 83 S.W. 557 (Ky. 1904); *Keel v. Hainline*, 331 P.2d 397 (Okla. 1958).
7. *See, e.g.*, *Eckert v. Long Island R.R. Co.*, 43 N.Y. 502 (1871).
8. *See, e.g.*, *The Margharita*, 140 F. 820 (5th Cir. 1905).
9. *See, e.g.*, *Tarasoff v. Regents of Univ. of Cal.*, 551 P.2d 334 (Cal. 1976); *Riss v. New York*, 240 N.E.2d 860 (N.Y. 1968).

witchdoctors,¹⁰ circus animals,¹¹ religious cults.¹² The stories are unexpected, tragic, amusing, compelling. And within each story there is a subplot about lawyers and judges strategically wading through the facts in a search for justice.

My favorite story to discuss with torts students is not in any casebook, and it does not teach any legal doctrine. It is a story about my first experience with a personal injury attorney.

I was eighteen years old, lying in a hospital bed with a respirator pumping bursts of air into my lungs. My head was bound to my torso with a “halo” brace—so named because it consists of a metal ring that circles the head, fastened at four points by screws that have been drilled into the skull; the ring is connected to a brace that wraps around the chest to immobilize the neck. With one minor exception, I could not feel or move any of my limbs. The most I could do was flex my biceps to bring my hand to my shoulder, after which I could not straighten my arm without help. I could not speak; I had to mouth words to my parents and the nurses.

This miserable existence had started three weeks earlier. I was crossing the street (not at a cross walk) when I was struck by a car. As I remember the incident, I saw the car coming and thought I could beat it. But at the last second the car changed lanes, swiping me onto the hood. The impact broke my neck. The driver, a 16-year-old girl, was on her way home from a friend’s house.

I have a vivid memory of lying in the street just after the accident and hearing someone in the distance weeping uncontrollably. I asked my brother (who was at the scene) who was screaming. His answer: “That’s the girl who was driving the car.”

When we learned that the paralysis was likely permanent, my father met with Jay Peck, a friend and lawyer who had some personal injury experience. Jay did some research and talked with the lawyer who was representing the girl who had been driving the car that hit me. He determined that there might be a claim for negligence, depending on whether we could show the girl was driving carelessly and changed lanes improperly. But there was no pot of gold awaiting us if we succeeded. The girl had minimum liability insurance on the car (then a mere \$10,000—enough to pay my hospital bills for a day or two). We could attempt to go after the girl’s family, but they weren’t wealthy.

At the time of the accident, I knew nothing about how people with disabilities lived. I imagined that I would never work again, that I would never get married or have a family, that I would be an outcast, socially rejected and unable to support myself. Suddenly, every negative assumption I had about people with disabilities was staring back at me in the mirror.

10. *See, e.g.*, *Oles v. Pittsburg Times*, 2 Pa. Super. 130 (1896).

11. *See, e.g.*, *Behrens v. Bertram Mills Circus Ltd.* [1957] 2 Q.B. 1 (Eng.).

12. *See, e.g.*, *Eilers v. Coy*, 582 F. Supp. 1093 (D. Minn. 1984); *Peterson v. Sorlien*, 299 N.W.2d 123 (Minn. 1980).

Over the next few weeks, I slowly regained some movement in my atrophied arms and learned to breathe without a respirator. Soon, however, it became clear that the great majority of the paralysis was permanent. I was probably somewhere between the second and third stages of grief the next time we met with Jay. He laid out our options in cold detail. If we didn't sue, the statute of limitations would run out in four years. If we did sue, the outcome of the case would depend largely upon whether the jury believed my version of what happened or hers. If everything went well, we might get some money. But then Jay added a caveat to the "best-case scenario": the girl's family could lose their house and I would still be paralyzed.

This was a rotten thing to hear, and I can't imagine Jay was thrilled to be the one to give me the message. In my fragile state, I could have easily been persuaded to blame someone else for my situation. I would have welcomed an excuse to characterize my sorrow as a need for justice and to channel my anger toward a specific target. But that is not what a good lawyer does. A good lawyer explains the various options and their likely consequences. He helps the client see that there is more at stake in litigation than the client's immediate situation.

When I use this story in my torts class, I do not tell the students that it is about me. When we are discussing damages, often the last day of the semester, I tell the students that I am going to give a closing argument in a negligence case and that they must, acting as jurors, decide the damage award appropriate for the case. I tell them that the jury has already found that the defendant was negligent and identified the amount of damages for medical expenses and lost wages;¹³ now they just need to fix the amount of damages for past and future pain and suffering.

I start my closing argument by asking, "How much is your independence worth?" As I describe the facts of my case (in the third person and without disclosing anything about the driver), I draw upon the fears that haunted me when I first confronted disability. Will this boy ever be able to find the happiness he had before the accident? Will he ever be able to go to college? Will he ever get married and have a family? Will he ever be able to work and have a career? Think about how much you value being able to travel, compete in sports, and be master of your own fate. How much would I have to pay you to live in this boy's shoes?

Surprisingly, very few students guess that the story is about me. Perhaps my closing argument is too persuasive. When I poll the students for their decision on damages, the numbers vary widely, but they are always on the high side for this kind of negligence action, ranging from \$1 million to more than \$100 million. I toy with the students a bit by revealing that the defendant is a 16-year-old girl whose family has no significant assets. I tell them that a

13. I realize that having students assume negligence stacks the deck. In my case, it was uncertain whether the negligence claim would succeed on the merits. But I do not think this assumption taints the experiment given that the only question I am posing to students is the amount of pain and suffering damages.

verdict for more than a half a million dollars will force the girl's family into bankruptcy. Based on this new information, I ask, does anyone want to reduce the amount of their damage award? A few students squirm, but most of them stick to their guns.

When I reveal that this is not a hypothetical but a true story about how I came to use a wheelchair, the room grows quiet. Eventually, a student asks what everyone else is wondering: "How much did you get in damages?"

I tell them that I received no recovery. Nothing. In fact, I did not sue. Why? Because I had a good lawyer.

No matter how much time we have spent during the semester talking about the economic and emotional costs of litigation and the benefits of early dispute resolution, this answer still takes students by surprise. The good lawyer, they automatically assume, is the lawyer who can form an argument out of thin air and bring home victory at trial. Lawyers litigate, and good lawyers win. How could a good lawyer leave a client with a serious disability and no money?

I like this story because it forces students to confront the limits of the judicial system. We might like to think that for every innocent victim there is a malevolent (and wealthy?) villain, that all great harms are capable of compensation, that the arm of justice reaches at least half as far as the bowels of mercy. The truth is that the great majority of harms we suffer in life go uncompensated.¹⁴

This leads into a discussion of whether money is a good proxy for compensation. Everyone agrees that having money is not the same thing as being able to walk. But perhaps if I had received some recovery following my injury, I would have been able to adjust more easily to being paralyzed.¹⁵ Or perhaps litigating would have made matters worse by focusing my attention on my losses¹⁶ and then left me dependent on unsustainable financial habits.¹⁷

14. "Compensation" is a strange concept. When we speak of compensation, we assume that everyone has a right to a negligence-free existence, as though we were entitled to the benefits of living in society without the costs. The moral imperative of just compensation is overshadowed by the dumb luck that controls who gets an award of damages. Would I have been more deserving of compensation if I had been run over by Bill Gates?

15. I was fortunate to have health insurance and family support. If I had not had support, I doubt that any amount of money would have made the transition easier.

16. It is interesting to discuss how a trial might affect the self-image of someone new to disability, as well as the perspective of those observing. An excellent vehicle for this discussion is the opening scene of *A CIVIL ACTION* (Touchstone/Paramount Pictures 1998). Note how passive and pathetic the plaintiff is in that scene. He does not operate his own (power) wheelchair, takes no part in the settlement negotiations, is underdressed for court, speaks no audible words, and expresses no emotion when the settlement is reached. His very presence causes one of the jurors to weep. How would you feel about yourself if people wept when they saw you? For more on the problems with the specter of disability in the courtroom, see Anne Bloom & Paul Steven Miller, *Blindsight: How We See Disabilities in Tort Litigation*, 86 WASH. L. REV. 709, 727 (2011).

17. Anecdotal evidence suggests that for some newly-disabled litigants, a large damages award simply exaggerates the consequences of pre-existing strong or weak coping skills.

We also discuss whether the jury—or anyone for that matter—can reliably divine the consequences of a life-altering injury. I point out to students that, for the most part, the horrors of disability that I dramatically evoked in my closing statement—isolation, financial dependence, stigma, disappointment—did not actually come to pass in my case. Indeed, I can easily say that despite various ups and downs, my life is currently better than it was before the accident. Like most people, well-meaning jurors are apt to rely upon their own fears and assumptions about disability, even though those assumptions may be misplaced.¹⁸

This exercise is not intended to suggest that a good lawyer is one who advises clients not to litigate. To the contrary, I hope students recognize that often litigation is the best way to bring justice to the broader community. What I hope students learn from my tort story is how important it is for a lawyer to be a counselor. In the moment when emotions are running high and the future is uncertain, a good lawyer is one who sees beyond the immediate situation, explains what a lawsuit can and cannot accomplish, and helps the client decide to do the right thing.

Studies of lottery winners suggest a similar phenomenon. See Robert Frank, *Will Winning the Lottery Ruin Your Life?*, WALL ST. J. BLOG (March 30, 2012, 11:14 AM), <http://blogs.wsj.com/wealth/2012/03/30/will-winning-the-lottery-ruin-your-life/> (summarizing studies and noting “sudden wealth merely exaggerates your current situation”).

18. Carol J. Gill summarizes the counterintuitive results of research on quality of life and disability: “A remarkably consistent finding across studies using widely varying samples and methods is that life satisfaction does not diminish with increasing degree of physical impairment. In fact, several studies indicate that persons with ‘severe’ physical disabilities, such as spinal cord quadriplegia and neuromuscular disabilities requiring mechanical ventilation, express greater life satisfaction than do those with less disabling conditions.” Carol J. Gill, *Health Professionals, Disability, and Assisted Suicide: An Examination of Relevant Empirical Evidence and Reply to Batavia*, 6 PSYCHOL. PUB. POL’Y & L. 526, 529 (2000) (citations omitted).