

## LEARNING TO SWIM: A LAW STUDENT'S INTRODUCTION TO FUNCTIONAL THINKING IN TORTS

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When I was asked to write an essay for the Teaching Torts issue of the *Law Journal*, I reacted with a great deal of reservation. As a law student who has never taught anything law related, I am far from an expert in any field, including torts. In fact, I am still hesitant to put anything on paper related to "teaching." Instead, this essay will focus on "learning" torts. It is my hope that this provides professors with insight into the student's mind and further assists them in their pursuit to provide better legal education.

### PART I: INTRODUCTION

My own experience with learning torts began on my first day of law school at Saint Louis University. My professor<sup>1</sup> began the course with an appropriate simile. He stated that law school was like being thrown into a swimming pool in an effort to learn how to swim. At first, the student has trouble just staying afloat in the sea of discussion and legal doctrine. An instructor might be there to give a helping hand, but the student must quickly begin to learn rough and rudimentary strokes. Eventually, with some work, the student learns to better refine the strokes and can begin to feel his or her way around the pool walls. Finally, after years of work, one can explore the pool with efficiency and gain an understanding of how the various parts come together to form a whole. That is, only after a great deal of work, does any student learn that various fields link up to form the whole of "the law."

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1. In addition to Torts, I have had the good fortune to take a number of classes with Professor John Griesbach. Under his direction, I gained a greater understanding of torts, administrative law and legal philosophy. In addition, my understanding of the law was greatly expanded as a result of a summer fellowship under his direction. I apologize in advance for any mistakes, misunderstandings or misstatements in this essay. They are the result of my own shortcomings as a student, not Professor Griesbach's.

A class in torts focuses on the strokes necessary to learn the torts part of the pool.<sup>2</sup> My own experience has convinced me that Torts is also the best means to learn an important stroke or tool for understanding and practicing the law in general: functional thinking.

In the initial months, and perhaps for the entire first year, law students lack the ability to think functionally. My own notion was that law school would teach doctrine, which could be applied to any number of factual scenarios. Some of my classmates continue to hold this belief. They shutter at any professor that strays from blackletter law into the realm of functional thought. To their detriment, these students missed the mark. My Torts professor was the first and most effective in presenting a functional approach to torts and the law in general during my own legal education.

Part II of this essay will present a definition of “functional thinking.”<sup>3</sup> Next, Part III will provide some examples of functionalism at work in torts.<sup>4</sup> The essay will conclude that, without learning this approach early, students have a difficult time comprehending the intricacies of more complicated fields such as conflicts of law and contracts.<sup>5</sup> Further, Torts provides ample opportunity to describe this approach to new law students.<sup>6</sup>

## PART II: THE FUNCTIONAL APPROACH

I was introduced to functional thinking early in my legal education. However, I lacked the ability to formulate exactly what it entailed. That is, I understood how to think functionally,<sup>7</sup> but had trouble comprehending exactly what it was. Again my Torts professor came to the rescue, but not in Torts. In

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2. To clarify, when the word “torts” is capitalized it refers to a specific class taught by faculty members at an institution of legal education. When “torts” is not capitalized, it refers to the field of law in general.

3. See *infra* notes 7-19 and accompanying text.

4. See *infra* notes 20-25 and accompanying text. Although credit will be given during this discussion, I feel a need to provide the reader with an early qualification. None of the examples are original. That is, I have borrowed all of them from my notes from my first year torts class. The same examples may be found in other authorities as well.

5. See *infra* notes 26-32 and accompanying text.

6. However, Torts does not provide the only opportunity. In fact, a similar style of teaching is advocated by our distinguished faculty member here at Saint Louis University School of Law, Professor Vincent Immel, in an article on teaching Contracts. See Vincent C. Immel, *Use of the Contracts Courses as a Vehicle for Teaching Problem Solving*, 44 ST. LOUIS U. L.J. 1205 (2000). Professor Immel approaches legal education through a heavy emphasis in problem solving. See *id.* Such problems require a functional approach. Professor Immel insists that it is not enough to conclude that a promise has been made. One must go beyond that and explain why the particular facts involved require the conclusion. See *id.* at 1207. Students learn functionalism through these problems.

7. This assertion should not be taken to mean that I mastered the approach. On the contrary, I still struggle to “think like a lawyer.” I presume that mastery of the approach does not come with efficiency for many years.

a class on legal philosophy,<sup>8</sup> he introduced the students to the American Legal Realists. Most notably, we read excerpts from Oliver Wendell Holmes<sup>9</sup> and Felix Cohen.<sup>10</sup> Together, these two giants of jurisprudence provided me the tools to comprehend both the “how” and “what” of functional thought.

Holmes laid the groundwork for the functional approach by describing law as “prophecies of what the courts will do in fact.”<sup>11</sup> Then Cohen finished the job. He argued that legal concepts cannot be defined using purely legal terms.<sup>12</sup> Such reasoning leads to a “vicious circle” of transcendental nonsense.<sup>13</sup> Instead, one must resort to asking what courts will do in fact. That answer may rely on psychology, social fact, custom and moral persuasions or prejudices.<sup>14</sup>

With these tools in hand, the concepts of fair value, due process and a corporation’s location disappear.<sup>15</sup> These concepts, rather than explaining why a court ruled in a certain way, become patterns of behavior. Cohen wrote, “The ghost-world of supernatural legal entities to whom courts delegate the moral responsibility of deciding cases vanishes; in its place we see legal concepts as patterns of judicial behavior, behavior which affects human lives for better or worse and is therefore subject to moral criticism.”<sup>16</sup>

I do not intend to advocate legal realism. Rather, the functionalist approach has paved the way for each positivistic approach in the twentieth century. Without functional thinking, Ronald Dworkin could not have defined law as a holistic pattern of decisions of policy and principles.<sup>17</sup> Neither could Richard Posner argue that the economic markets dictate legal decisions.<sup>18</sup> Cohen himself stated that “[i]t would be unfortunate to regard ‘functionalism’ in law as a substitute for all other ‘isms.’ Rather, we must regard

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8. The class was simply called Jurisprudence. The material was split between theories of natural law and legal positivism, and the material on the syllabus covered everything from Aristotle to Richard Posner and Arthur Allen Leff.

9. Oliver Wendell Holmes, *The Path of the Law*, 10 HARV. L. REV. 457 (1897).

10. Felix S. Cohen, *Transcendental Nonsense and the Functional Approach*, 35 COLUM. L. REV. 809 (1935).

11. Holmes, *supra* note 9, at 461. However, it is also clear that this approach to the law would not have been possible without the insight of Wesley Hohfeld. Hohfeld’s Fundamental Legal Concepts of right, duty, no-right, privilege, power, disability, immunity and liability form the basis for functional thinking. See Walter Wheeler Cook, *Hohfeld’s Contributions to the Science of Law*, 28 YALE L.J. 721, 723 (1919).

12. See Cohen, *supra* note 10, at 814.

13. *Id.*

14. See *id.* at 816.

15. See *id.* at 813-21.

16. See *id.* at 828-29.

17. See Ronald Dworkin, *Hard Cases*, 88 HARV. L. REV. 1057 (1975).

18. See RICHARD POSNER, *LAW AND ECONOMICS* (1997); Ronald Coase, *The Problem of Social Cost*, 3 J.L. & ECON. 1 (1960). These are only two examples of the countless volumes now covering the topic of law and economics.

functionalism, in law as in anthropology, economics, and other fields, as a call for the study of problems which have been neglected by other scientific methods of investigation.”<sup>19</sup>

A functional approach to the law seems necessary for any attorney today. It is no longer sufficient to look at a legal decision as the result of formalistic doctrine. If the decision is to be used in a subsequent legal argument, the lawyer must peel away the layers of formalism to discern why the decision was made as it was. Such thinking was introduced in Torts, and a few examples continue to capture my curiosity and fascination.

### PART III: FUNCTIONAL THINKING IN TORTS

As a first year law student, I was immediately faced with functional thinking. My professor emphasized throughout the class that the system must be viewed as more than a system for compensating the loss of a single individual. Rather, from a functional perspective, the torts system must be viewed as regulatory. That is, judges make decisions that form a decentralized regulatory system. Certain behavior is identified as bad or good and this identification is reinforced through the award of damages.

The first cases in my casebook presented a broad overview of the tort system.<sup>20</sup> In fact, the first case in the book, *Glick v. Olde Town Lancaster, Inc.*,<sup>21</sup> provided the first dose of functionalism in Torts. In this case, the plaintiff was raped in an abandoned and boarded up building owned by the defendant, Olde Town Lancaster, Inc. The court held that the defendant had not been negligent and the plaintiff failed to state a cause of action. The case appeared to be a formal look at sections 323 and 324A of the Restatement (Second) of Torts, which cover the liability for injuries to third persons for negligent performance of an undertaking. As a first-year student, I remember feeling very comfortable with this formalistic read of the case. The plaintiff simply did not meet all the elements of the Restatement provision. Fortunately, no one in the class was allowed to remain comfortable.

Instead, we were questioned as to why we thought the defendant was not held liable. Most of the class seemed to think that Olde Town should have been liable. After all, its property had been abandoned. This contributed to the rape of the plaintiff. Others, thinking with extreme formalism, thought that Olde Town should not be liable because the plaintiff was unable to fit her case within the Restatement provisions.

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19. Cohen, *supra* note 10, at 829.

20. JERRY J. PHILLIPS ET AL., TORT LAW: CASES, MATERIALS, PROBLEMS 2-21 (2d. ed. 1997).

21. 535 A.2d 621 (1987), *app. denied*, 548 A.2d 255 (1988), *reprinted in* PHILLIPS, *supra* note 20, at 2-6.

After a great deal of wrangling, the professor explained that the first element of a tort case is “duty.” However, he urged us not to look at duty as something owed by the defendant to the plaintiff. Rather, it should be viewed as a question of whether the plaintiff has the power to sue in tort. If the plaintiff has the power, then the defendant is liable to that action.<sup>22</sup> The professor then generally explained if one does not affirmatively act, a person injured by the non-feasance will not have a power to sue. In *Glick*, Olde Town had committed non-feasance by allowing its property to fall into disrepair, not malfeasance. Thus, Glick had no power to sue and Olde Town was not liable, or put another way, Glick was disabled from suing in tort and Olde Town was immune.<sup>23</sup>

The explanation did not stop with this description of the case. The Hohfeldian concepts merely paved the way for a functional explanation of the case. Simply stating that the court held for Olde Town because it had committed non-feasance says little about the case. The questioning turned to “why” such a rule was used. That is, rather than explaining the courts action using purely legal concepts, the professor demanded something outside of the law. He first had the class describe the judicial behavior and then also forced us to explain why the court might have behaved in such a way. This was our first introduction to functional thought.

A number of possible reasons for the “no duty for non-feasance” rule were suggested, most at the urging of the professor. For instance, the court may have been guarding against tort law driven socialism. That is, if one could be held liable for inaction, then there was little to prevent the courts from transferring wealth. In this particular case, the court may have been protecting Olde Town because it owned a building that could not be restored nor sold without a severe loss under the relatively recent changes to tax law. In addition, it had become very difficult to prevent criminals and recently de-institutionalized homeless people from breaking into abandoned buildings. Olde Town could have done little outside of selling the property to avoid this incident. In a system intended to regulate people’s behavior, such liability makes little sense.

The professor explained that any or none of these explanations may have played a role in the court’s decision. However, he also emphasized that law students and attorneys must be able to use functionalism to explain the law as it is handed down by courts and legislatures. *Glick* seemed well-suited to

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22. “Power” and “liability” are two of Hohfeld’s jural correlatives. A “power” is the ability to change a legal relationship. If one has a power, then some other person must have a correlative liability vis-à-vis the one holding the power. See Cook, *supra* note 11, at 725.

23. Again, Hohfeldian concepts are extremely helpful in explaining the court’s actions. Because the court refused to grant Glick the power to sue, that “power” was replaced by its jural opposite, a “disability.” The jural correlative of disability is “immunity.” See *id.* at 726-27.

introduce functional thought, and the professor continued this approach throughout the semester.

Even in traditionally formalistic issues, functional thought provides insight into the law. For instance, my torts casebook laid out the elements for battery in a case styled *Clayton v. New Dreamland Roller Skating Rink, Inc.*<sup>24</sup> In that case, a woman was injured at the defendant's skating rink. Believing her arm to be broken, an employee of the rink decided to set the broken bone, rather than calling for medical assistance. Such action fulfilled each of the elements of battery. The defendant's employee intentionally caused a harmful or offensive contact with the plaintiff.<sup>25</sup> For these reasons, the court held for the plaintiff.

This could have ended the class time devoted to the case. The elements of battery had been explained by reference to the facts of the case. However, the professor pressed ahead with a more functional approach. This time, he asked the class whether the same result would have been reached if the plaintiff and the defendant's employee had been in an isolated canyon, and the plaintiff could not have climbed out of the canyon without the bone being set. The same contact would have occurred. Under a purely formal approach, the defendant should again be liable. However, under a functional approach, holding the defendant liable for the action in the canyon would make no sense. If one assumes the tort system is regulatory, the defendant's conduct could not be identified as "bad" behavior. In the skating rink, medical professionals could have been consulted. Thus, setting the arm was considered "bad," while identical behavior in an isolated canyon must be identified as "good." Therefore, a different result must be reached.

Other examples could be provided, but they would add very little to the essay. I do not intend to list each and every instance of functionalism contained in my notes from torts class. Rather, I only wish to demonstrate how Torts can be an effective means of showing new law students how to think functionally and why such an approach has advantages throughout a legal career.

#### PART IV: OTHER USES FOR FUNCTIONAL THOUGHT

Functionalism is important from the outset of one's legal education. Without it, many issues cannot be solved with credibility. Formal rules of consideration provide descriptions of a court's action, but they do little to explain why the court has decided to enforce one promise and not enforce another. Most of my fellow students had little difficulty memorizing the rule that "a peppercorn" is sufficient consideration or that an enforceable promise required a "bargained for exchange." However, we all struggled to understand

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24. 82 A.2d 458 (1951), reprinted in PHILLIPS ET AL., *supra* note 20, at 39-41.

25. *Clayton*, 82 A.2d at 462.

why a court enforced one promise and not another.<sup>26</sup> The problem was that we had not yet grasped the idea of functional thinking.

In the world of conflict of laws, resort to territorialist rules<sup>27</sup> may hold great appeal, but often lead to strange results. New approaches ushered in during the twentieth century forego formalistic rules in favor of functional analysis.

Brainerd Currie propounded the governmental interest analysis, which requires one to discern the interest of each state involved in a conflict problem.<sup>28</sup> State interests are derived from the purpose behind each state's respective law. Such purpose might be found in legislative history, but it is more likely that one must understand the function of the conflicting laws to discern a state interest.<sup>29</sup> A state law may function differently than it was originally intended.<sup>30</sup> Thus, modern conflict of laws problems require functionalism for there to be any hope in arriving at a solution.

A final example of the importance of functionalism can be found in the realm of contracts. In an article about unconscionability, Judge Irving Younger wonderfully described the doctrine.<sup>31</sup> Formally, there must be inequality of bargaining positions or gross unfairness, but as a first-year law student, I was rather perplexed when he concluded that much of his own analysis of a case was subjective. He looked for something that shocked his conscience.<sup>32</sup> Such epiphanies are frustrating for the first-year law student

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26. See Peter Linzer, *Consider Consideration*, 44 ST. LOUIS U. L.J. 1317 (2000). Linzer noted that most of us begin with a rather formalistic notion of consideration, one that "seems to exist mostly to be set up and knocked down again." *Id.* at 1318. In fact, students often think they understand why courts enforce a promise, but when pressed they often provide circular answers such as, "because there was (or was not) consideration" or the slightly more developed "because there was (or was not) a bargained for exchange." Such circular and conclusory logic is difficult for students to avoid, and without a dose of functionalism early in their legal education, their answers as attorneys will be no better.

27. SYMEON C. SYMEONIDES ET AL., *CONFLICT OF LAWS: AMERICAN, COMPARATIVE, INTERNATIONAL* 16-37 (1998). Such was the approach of early American courts. *See id.*

28. For an excellent summary of governmental interest analysis, see CHEATHAM ET AL., *CONFLICT OF LAWS* 477-78 (5th ed. 1964), reprinted in SYMEONIDES, *supra* note 27, at 112-13.

29. In fact, it is entirely possible that courts are more interested in achieving the "right" result, rather than discerning the true policy behind a law. *See id.* at 119.

30. For instance, some states may adopt a guest statute. A guest statute is a law that prohibits a passenger in a car from recovering damages from the driver for injuries sustained in an accident where the driver was at fault. Other states may allow the passenger to recover. When two such laws come into conflict, the interest of each state must be discerned under Currie's approach. *See, e.g.,* *Babcock v. Jackson*, 191 N.E.2d 279 (1963), reprinted in SYMEONIDES, *supra* note 27, at 121-27.

31. Judge Irving Younger, *A Judge's View of Unconscionability*, JUDGE'S J., Apr. 1974, at 32-33.

32. *See id.*

trying to make sense of case law, the Socratic method and the mountain of blackletter law that we all assumed needed to be put to memory.

After three to four semesters, I finally realized that the key to these examples was functional thought. Slowly, I began to recall my professor's approach to Torts. First, we would review what the court said. But then, and more importantly, we discussed what the court was doing. More often than not, the discussions were not the same, but the second discussion is imperative in solving legal problems.

#### PART V: CONCLUSION

In describing law school, second and third year students describe a "light bulb" coming on sometime during the first or second year of law school. In this way, they attempt to explain how it is they come to understand the thought process required of law students and attorneys. Unfortunately, I think a "light bulb" is a misdescription. Instead, my own experience was more like a light attached to a dimmer switch.

In Torts, my professor turned the switch to the on position by constantly requiring his students to think functionally. In his own words, he was throwing us all into the pool in an effort to teach us to swim. Slowly, over time, other professors continued to move the switch to a brighter and brighter position. At some point, which is impossible to pin down, enough light was cast to allow one to make out the shape of the law. One might say that at this point, the student begins to make his or her way around the edges of the pool. Rudimentary strokes are learned.

Without functionalism, real solutions to legal problems are impossible. While reviewing an early draft of this essay, someone asked why I thought students had trouble with functional thought. This is an extremely difficult question, and the answer probably varies with each student. Generally, I think two reasons account for the vast majority of problems. First, students, while willing to put in thousands of hours of reading and study time, do not want to address the difficulties of a new way of thinking. As I said before, many of my peers groan when a professor leaves the safe confines of blackletter law and factual scenarios. They show even less enthusiasm when they are called upon to try their hand at problem solving and functional thinking.

Second, functional thinking is difficult to convey. It seems to me that functionalism requires the student to learn by doing. Thus, class discussion seems to be the best means. Unfortunately, students are often of the mindset that they have little, if anything, to learn from their peers. In my own experience, I find class discussion tedious because so much of the information provided by other students is misstated or ineffectively communicated.

However, such problems can be remedied by the student's own careful preparation<sup>33</sup> and by a professor who insists on careful and accurate analysis.<sup>34</sup>

In the ideal setting, well-prepared students learn the requisite problem solving skills and functional thought through a heavy dose of lecture and class discussion. In such an environment, functional thought becomes second nature. It sheds light on cases and doctrines that seem illogical or nonsensical. With the broad array of fact patterns and legal doctrine, Torts is an ideal place to introduce functionalism.

I am grateful to my Torts professor for doing so. My strokes are still rough and rudimentary, but without his help I could never have started to make my way around the pool.

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33. For these reasons, I, unlike most of my classmates, prefer a professor that does not go alphabetically or in groups when calling on students for answers. A "shotgun" or "cold-calling" approach forces students to stay prepared throughout the semester. See Douglas L. Leslie, *How Not to Teach Contracts, and Any Other Course: Powerpoint, Laptops, and the CaseFile Method*, 44 ST. LOUIS U. L.J. 1289, 1298-99 (2000).

34. I should also note that I have had many professors opt for lecturing over the Socratic Method. While such an approach is often frowned upon by legal academia, see, for example, *supra* note 33, at 1295, many of these lectures have been extremely effective in communicating the necessary legal analysis. It also allows for a much broader range of coverage and prevents the class from becoming stuck on a single topic for too long.