

INTRODUCTION

JOHN M. GRIESBACH*

A year ago, the *Saint Louis University Law Journal* published "Teaching Contracts"¹ as the first in a series of symposium issues addressing the teaching of particular law school subjects. Not unpredictably, the *Journal* has selected "Teaching Torts" to be the second in the series. As another mainstay of the first year, Torts is a subject that every lawyer (and every law teacher) has experienced, and so each of us is in a position to compare and assess what various instructors mean to do with their courses. And that covers quite a bit of ground, for we who teach Torts, like those who teach Contracts, attempt to do many different things. Some of them come with the territory. Every torts course involves the explication of some version of "the common law method" for creating and changing legal rules and doctrines. Every torts course explores critical connections between "substantive" and "procedural" law. Every torts course demands that the student bring to bear his or her understanding of legal structures to solve actual problems. But, beyond this common ground, torts teachers vary greatly in their objectives, in their perspectives and methodologies and in the extent to which they accept or are critical of the present state of the law.

Indeed, the most striking overall impression from reading this issue is one of variation and difference in the perspectives, approaches and objectives of those who teach Torts. Some torts courses are taught with close attention to technical detail and the lawyering craft; others are pitched at a much more abstract level; still others are offered from a critical reformist point of view. Some torts teachers stress historical context and doctrinal pedigree; others emphasize sociological features of the cases; still others approach their materials from economics or from the theory of ethics or from some stance in post-Modern thought. Some torts courses focus on procedural and evidentiary issues; others emphasize connections with insurance; still others open many important enquiries with questions that arise in the treatment of damages materials.

There is much to be gained from the many approaches and perspectives set out in these papers. Any teacher of Torts will find in them some unexpected

* Associate Professor, Saint Louis University School of Law.

1. *Teaching Contracts*, 44 St. LOUIS U. L.J. 1193, 1193-1560 (2000).

ways to enrich the quality of his or her course. Serious students of Torts will be rewarded with deeper and broadened understandings. But this overall impression of pedagogical diversity is somewhat misleading, for it needs to be considered in light of the great many doctrines, rules and issues common to all torts courses. Every teacher of Torts has a plan or strategy for taking up these common elements. In the opening article, professor Joseph Little from the University of Florida describes how he organizes these common tort law topics around the stages of the lawsuit.² Professor Jerry Phillips of the University of Tennessee explains how, influenced by Grant Gilmore and American Legal Realism, he uses the cases and problems of tort law to illustrate the complex, tentative and indeterminate character of doctrinal analysis.³ In my own case, I treat the basic rules, doctrines and issues of tort law as components of a distinct kind of regulatory system. Stripped to its basics, that system is taken to be a structure for generating a great many object lessons as to how to avoid otherwise occurring injuries. And it is as relative to that structure that I find the contributions to this symposium issue to be especially useful.

On my course organization, the heart of the torts regulatory system is what I call “the lesson drawing part” of tort law. It consists of those doctrines, rules and legal moves by virtue of which judges and juries examine past injurious scenarios with an eye towards specifying what people should do (and what people should avoid doing) so as to reduce the incidence of injuries. Lessons are drawn at three levels of human action. At the least detailed level—which is circumscribed with strict liability causes of action—lessons are drawn as to eliminating, transforming or modifying the natures of activities in ways that are reckoned to reduce injurious outcomes. At a more detailed level of human action—which is addressed with negligence cases—lessons are drawn with respect to taking worthwhile preventive measures in the course of carrying out presumptively benign activities. And finally, at the most discriminating level—which is the domain of intentional tort causes of action and associated privileges—lessons are drawn as to abstaining from intentionally acting in ways that are deemed to be almost invariably harmful.

Befitting the centrality of this lesson drawing part of tort law, more than half of the contributions to this issue address the teaching of such matters. And each takes a perspective that brings out the richness or suggests a pedagogical approach that speaks to the complexity of tort law in action. Professor Patrick Kelley of Southern Illinois University-Carbondale offers a fascinating look at the intellectual and historical contexts within which Learned Hand formulated his famous cost-benefit elaboration of negligence in the *Carroll Towing Co.*

2. Joseph W. Little, *Introduction to the Law of Torts*, 45 ST. LOUIS U. L.J. 715 (2001).

3. Jerry J. Phillips, *Law School Teaching*, 45 ST. LOUIS U. L.J. 725 (2001).

case.⁴ Professor William Nelson of New York University, taking up the Hand test in its universalized Chicago School interpretation, shows how he uses ordinary hypotheticals to bring out moral objections to the extension of cost-benefit criteria to the assessment of intentional conduct.⁵ Professor Margo Schlanger of Harvard also writes about the teaching of negligence, but her focus is on confronting her students with what I call “the categorization problem,” as she has her class consider how taking gender differences into account tends to skew conduct assessments generated by the Hand test.⁶ Judge Robert Keeton, writing from the perspective of a third career in the law, illustrates how jury instruction drafting exercises can be used to engage students in a rigorous analysis of how to deal with partly unsettled issues of “intent” in complex, statute-based liability cases.⁷ And Professor Joan Vogel of Vermont Law School, writing from the standpoint of legal anthropology, illustrates through a study of the background of the 1908 Vermont case, *Ploof v. Putnam*, how attention to realities of class and ethnicity is often necessary to a solid understanding of the conduct of the principals in the cases.⁸

But lessons as to how to prevent injuries are not likely to in fact prevent them unless they are brought home to prospective injurers. And that is the function of what I call “the object lesson-making part” of the tort system. Tort law transforms lessons drawn from past injurious scenarios into object lessons by using those cases to apprise prospective injurers of connections between particular kinds of tortious conduct and particular kinds of injuries and by creating incentives for prospective injurers to avoid the indicated sorts of injurious conduct. The connections between the kinds of tortious conduct and the kinds of injuries avoided are traced primarily by satisfying cause-in-fact requirements. The incentives are created largely in consequence of tort law’s damage remedy. These functions, of course, are greatly complicated when the conduct of multiple injurers and of the injured parties themselves are involved, and so doctrines of comparative fault, contribution and indemnity, and rules respecting settlements, set-offs and liens are implicated. And though of more theoretical and pedagogical than practical import, it is in this object lesson-drawing part of the torts system that “no legal cause” doctrines (including the oft-confusing “unforeseeable kind of injury” locution) have their true home as

4. Patrick J. Kelley, *The Carroll Towing Company Case and the Teaching of Tort Law*, 45 ST. LOUIS U. L.J. 731 (2001).

5. William E. Nelson, *The Moral Perversity of the Hand Calculus*, 45 ST. LOUIS U. L.J. 759 (2001).

6. Margo Schlanger, *Gender Matters: Teaching a Reasonable Woman Standard in Personal Injury Law*, 45 ST. LOUIS U. L.J. 769 (2001).

7. Robert E. Keeton, *Teaching Torts Through Exercises on Drafting Verdict Forms*, 45 ST. LOUIS U. L.J. 779 (2001).

8. Joan Vogel, *Cases in Context: Lake Champlain Wars, Gentrification and Ploof v. Putnam*, 45 ST. LOUIS U. L.J. 791 (2001).

devices for excepting cases of psychological mismatch and of deterrent overkill from an otherwise imposition of liability.

Several contributors already mentioned touch upon issues that surface in this object lesson-drawing part of tort law. Judge Keeton's discussion of the jury instruction drafting exercise considers alternative ways of focusing the cause-in-fact enquiry.⁹ Professor Nelson refers to a proximate cause line of cases in his questioning of the limits of cost-benefit assessments of conduct.¹⁰ But here we have more than side-glances at the teaching of this part of tort law. Three contributors to this issue extensively address the teaching of matters involved in object lesson-making. Professor Ellen Pryor of Southern Methodist University surveys many of the issues, controversies and developments that the teacher might address in dealing with compensable damages in non-death cases, and she offers a strategy for the teacher pressed by time and coverage demands.¹¹ Professor David Robertson of the University of Texas shows us how the law teacher can take a reformist stance, as he criticizes the prevailing percentage-based approach to apportioning comparative fault for, among other things, fostering a confusion with cause-in-fact and legal cause issues, and he proposes the adoption of a much simplified "fault line method" for apportioning fault.¹² And Professors Fischer and Jerry of the University of Missouri describe how study of insurance law concepts and issues can be used to examine tort law objectives and how it enhances students' understandings of many matters involved in this object lesson-making part of tort law.¹³

Now on my organizational scheme, there is a third part to the tort system—which I call "the scope of tort part"—that includes various rules and doctrines by which judges (in the main) determine the reach of tort law's object-lesson style regulation. This delimiting function is performed partly by use of general rules disabling injured persons from proceeding in tort in "nonfeasance" cases, in cases of "pure psychic loss," and in cases of "pure economic loss," along with the many exceptions to those rules. But the same function, with a reversal in the burden of persuasion, is performed with the various immunity rules and with several types of "assumption of risk." Though juries are commonly charged with applying such rules, the basic decisions have judges comparatively assessing the propriety in various contexts of tort law's object-lesson style regulation relative to other ways of controlling, influencing or regulating the incidence of injuries.

9. See Keeton, *supra* note 7.

10. See Nelson, *supra* note 5.

11. Ellen S. Pryor, *The Challenge of Teaching Damages*, 45 ST. LOUIS U. L.J. 817 (2001).

12. David W. Robertson, *Eschewing Ersatz Percentages: A Simplified Vocabulary of Comparative Fault*, 45 ST. LOUIS U. L.J. 831 (2001).

13. David A. Fisher & Robert H. Jerry, II, *Teaching Torts Without Insurance: A Second-Best Solution*, 45 ST. LOUIS U. L.J. 857 (2001).

Not surprisingly, perhaps, there are no contributions to this issue that extensively address the teaching of the proper limits of tort law. Professor Pryor touches on the topic in her discussion of the teaching of parental and child consortium cases.¹⁴ Questions of the proper reach of tort lie in the immediate background in much of Professor Fischer and Jerry's discussion of connections between insurance and teaching Torts.¹⁵ But it seems to me that the failure to address these matters here in this "Teaching Torts" symposium says something important about teaching Torts. Partly, it reveals some of the losses that have been suffered as credit hours for the basic torts course have been reduced from six to five to four or fewer over the past decades. However, it also reveals some of the practical consequences of theoretical change, as both scholars and judges have confused doctrinal devices for limiting the reach of tort with issues properly belonging to the lesson drawing and object lesson making parts of tort law. But as evidenced by recent tort-like litigation by states and cities seeking damages for wholly economic losses attributed to the actions of tobacco, lead paint and firearm manufacturers, questions as to the proper scope of tort law do not disappear. The importance of these issues argues for an advanced "Proper Limits of Tort" course and perhaps for a future symposium issue dealing with the teaching of it.

14. See Pryor, *supra* note 11, at 821-22.

15. See Fischer & Jerry, *supra* note 13.