

Strategies and Techniques for Teaching Torts

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Strategies and Techniques for Teaching Torts

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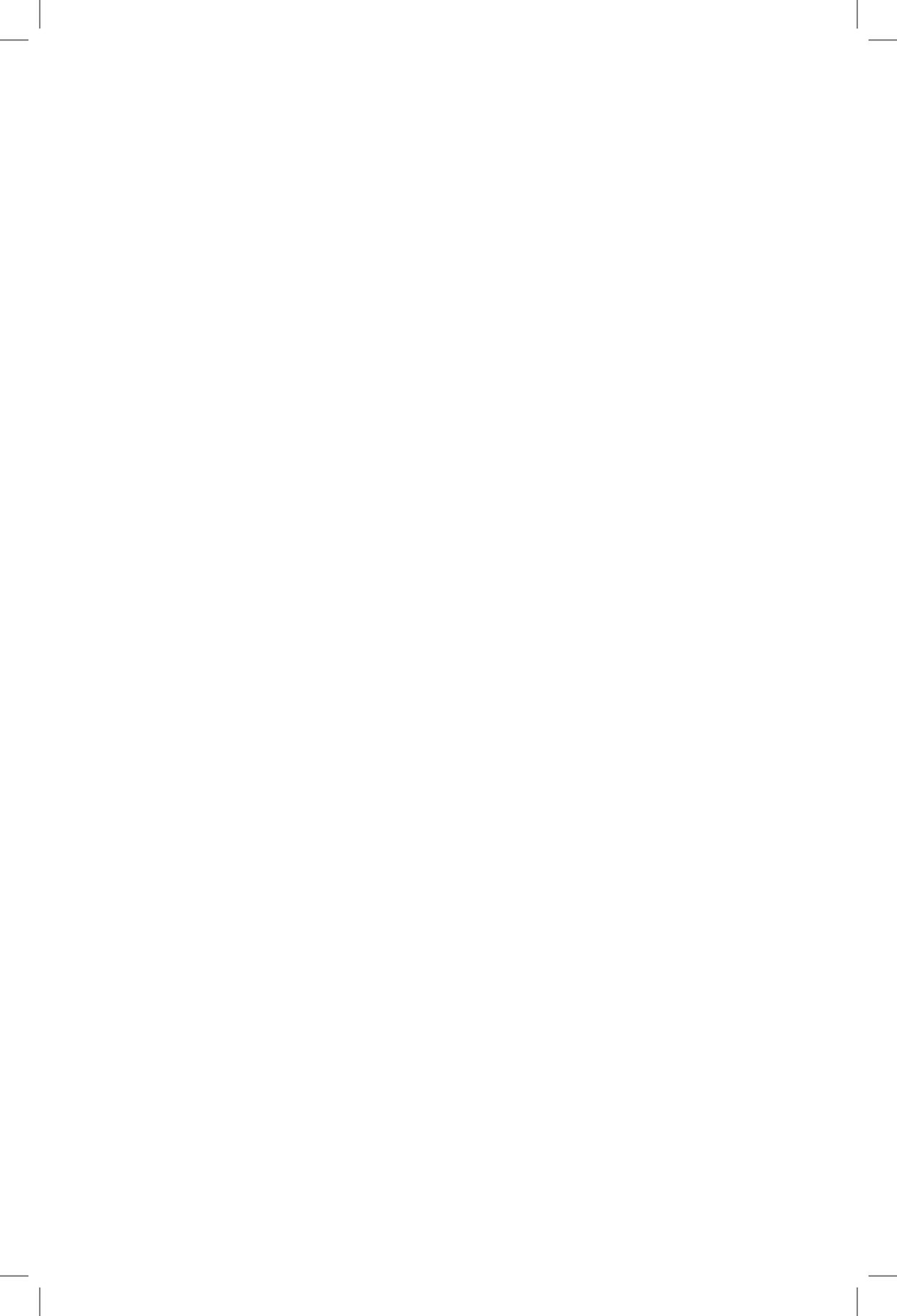
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This work is inspired by the memory of my courtly and brilliant Torts professor, Clarence Morris, whose frequent saying “We can’t teach every thing every day” reminded his students that patience and a compassionate guide can be really helpful in the lifelong enterprise of learning.



Strategies and Techniques for Teaching Torts



I. The Special Place of Torts in the First-Year Curriculum

This short book offers prospective Torts teachers some help in getting started with the course. It's a companion to *Strategies and Techniques of Law School Teaching* by Howard E. Katz and Kevin Francis O'Neill, which offers advice on almost all aspects of law teaching. This volume also offers general advice, but grounds most of it in the context of the Torts course. It also provides very specific suggestions about Tort law and how to teach it. If you are new to law teaching, all of this book will probably be of interest. If you're an experienced law teacher, the sections that are specifically about Torts will be of the most value.

Among first-year courses, Torts has the great advantage of being somewhat familiar to students. As the saying goes, everyone can understand a punch in the nose. Of course, students soon discover that much of what they think they know about compensation for injuries might turn out to be wrong or, at best, only partly correct. But still, we Torts teachers have a significant advantage over those who cover topics like civil procedure and property. Students arrive at the Torts course with the impression that it is proper for society to transfer money from defendants to the injured, and they are usually highly interested in learning the details of the way that happens.

II. Breadth Versus Depth

In planning to teach the Torts course for the first time, there are some important overarching decisions to make. First, should you try to offer breadth or depth? I recommend that the first time you offer any course, including Torts, it makes sense to cover as many topics as possible. The truth is that the first time anyone teaches a course, it's highly unlikely that the instructor will be able to probe deeply into many of its topics. Because providing depth might be close to impossible, the alternative of offering a wide-ranging overview of the course has a number of benefits. From the point of view of the students, an initial effort that covers a wide variety of subjects is guaranteed to offer a useful overview. Class sessions will never seem slow-moving because there will be lots of material to cover. Also, this approach will naturally give the beginning instructor a chance to

develop a complete orientation to the subject. Once you have taught the course in a format that covers as large a number of topics as possible, you will be well positioned to pick and choose among those topics in future years. You will have a basis for deciding which topics are the most interesting to you, and which topics are likely to serve best as contexts for whatever particular style of analysis you wind up choosing to emphasize.

III. Specific Goals

A. INFORMATION AND SKILLS

In addition to choosing between breadth and depth, it might be a good idea to devote some conscious thought to defining the goals of the course. In general, we hope to provide the transmission of information and the development of a range of skills. One of the strengths of the case-based style of instruction is that it can allow students to acquire information and acquire skills at the same time. For example, when lawyers approach problems, they often do their best work when they are creative and imaginative. A client comes to a lawyer with only a description of the client's plans or the client's problems, but the lawyer accomplishes the professional work of characterizing the needs of the client in ways that will take proper advantage of the legal system's context. Knowing how to develop and compare a range of characterizations might be among the most important skills of a lawyer. And when students study appellate opinions carefully, they are likely to observe how courts develop and apply characterizations. When they do this, they will be acquiring information about particular characterizations a court has used to solve a problem, and they will also be acquiring practice in that very process. So although it might be useful to think of the outcomes of a first-year course in terms of students having acquired knowledge and having developed proficiency in a range of skills, it could be that these two outcomes are often facilitated simultaneously.

B. COMMUNICATIONS SKILLS

Besides helping students to become more knowledgeable, creative, and imaginative, there are some additional learning outcomes that most instructors seek to accomplish. We would like to improve our students' communications skills. This means that even though many of our students are excellent at reading, writing, listening, and speaking, many of them can still benefit from thoughtful attention to each of those skills. While they are learning torts, it is possible to help them become better at reading different kinds of texts. Even in large enrollment classes, it might be possible to help them become better writers. Finally, the dialogue method of instruction can offer some highly useful opportunities to help students become better at both speaking and listening.

C. RULES AND RATIONALES

As is true for most law school courses, the Torts course is a setting for the study of rules, the application of rules, and the rationales that support rules. We all know that a legal education is not successful if students learn only information about a great many rules. We hope to teach our students how to apply rules sensibly. Also, we hope to help our students understand that when a rule is hard to apply, a key to being persuasive at how the rule should be applied can often be a careful understanding of the reasons why a court or legislature adopted the rule initially.

D. ARGUMENTATION

In the Torts course, students can observe and practice many kinds of argumentation. For example, they can argue by analogy, to suggest an outcome in a new case by comparing it to a prior decision. They can also extract basic doctrines or widely accepted aspects of public policy from decisions and use those ideas to support positions in new circumstances.

E. UNDERSTANDING JUDICIAL OPINIONS

Another general aspect of law school education that can be served well in the Torts course is the comprehension of judicial opinions. We want students to become proficient in determining the holdings of appellate opinions. This is important because it is one of the ways that students learn rules and doctrines. It is also important because comprehending legal opinions enables a lawyer to structure arguments that are congruent with existing doctrine, or to structure arguments that could be successful in leading courts to change or develop doctrines.

F. UNDERSTANDING STATUTES

Statutes can also be an important part of the Torts course, and students will gain greater value if they begin to develop the unique talents required to understand and apply statutes. At one time, Torts was thought of as the quintessential common law course. It still has that aspect in great measure, but legislatures have been amazingly active with regard to almost all aspects of tort law, and it would shortchange students to teach a Torts course that ignored this development. The Torts course can therefore make a significant contribution to the overall law school goal of making students comfortable with statutory interpretation.

G. THE ROLE OF COURTS

While students are learning doctrines, and while they are observing the relationship between courts and legislatures in the field of torts, they will also have an opportunity to develop more generally applicable knowledge about the institutional role of courts, and about how courts do their work. It's very important for students to develop a deep understanding of the differences between finding law and making law. The Torts course is one in which students can have a number of opportunities to see both explicit and implicit changes in the law.

IV. Topics for a Basic Torts Course

A. IN GENERAL

What are the main topics that should be included in all Torts courses? A general answer to this question is that students should be introduced to instances of the three main categories of tort liability: intentional torts, negligence causes of action, and strict liability. Of these three categories, negligence probably deserves the most attention.

1. Intentional Torts

Intentional torts against individuals include assault, battery, intentional infliction of emotional distress, and false imprisonment. Intentional torts against property include trespass to land, trespass to chattels, and conversion. Some of these topics can be covered quite quickly, such as trespass to land, trespass to chattels, and conversion. It should be noted that intentional infliction of emotional distress also allows for liability when a defendant's actions are merely reckless. This can be an occasion for treatment of recklessness, a category of analysis that has importance (particularly for damages) but exists outside of the conventional "intentional, negligent, strict liability" categorization of tort causes of action. Defenses such as consent, self-defense, and defense of property are also important topics.

2. Negligence

The concept of duty is often considered a starting point for analysis of negligence. It might make more sense, however, to approach this topic in a way that leaves "duty" undefined. Standards of care can be a better entry point for understanding negligence. A good Torts course will cover the reasonable person standard, and standards of care for children, physically and mentally disabled people, and professionals.

Special styles of proof such as evidence of statutory violation, evidence of industry customs, and the *res ipsa loquitur* doctrine are naturally related to the general topic of standard of care. Cause in fact and proximate cause are also essential topics.

Although the concept of duty is sometimes vague and is always a topic for scholarly controversy, in one sense, it is crucial to the Torts course and quite straightforward. There are a number of “limited duty” rules that limit the liability of actors for some foreseeable injuries. These important rules govern claims against owners and occupiers of land, claims for mental distress that does not arise from an initial physical harm, and claims for “mere” or “pure” economic loss.

Vicarious liability, the independent contractor limitation on vicarious liability, and the nondelegable duty limitation on the independent contractor concept are also important.

Finally, defenses to negligence liability must be examined. This means, primarily, significant coverage of concepts of comparative fault or comparative negligence. To some degree, students will understand comparative fault better if they learn some details about the prior contributory negligence framework. Additionally, the concept of assumption of risk requires careful attention.

3. Strict Liability

The course should cover some aspects of strict liability. Examples are liability for abnormally dangerous activities such as blasting and liability for some injuries inflicted by wild animals. With regard to products liability, strict liability has been controversial. It is certainly part of the acknowledged doctrine in many states, but in actual practice, strict liability for product-related injuries seems to be limited to the class of product defects known as “manufacturing defects.”

One approach to considering how to allocate coverage among the various substantive areas would be to review the list of Torts topics provided by the National Council of Bar Examiners for the multistate bar exam. That list includes so many topics that it is highly unlikely they could all be treated well in a basic Torts course. On the other hand, it would support a decision to give the most prominent treatment to negligence issues.

Multistate Bar Exam Distribution of Question Topics

| Topic | Percent of Questions |
|---|----------------------|
| Negligence | 50.0% |
| Intentional Torts | 12.5% |
| Strict Liability | 12.5% |
| Products Liability | 12.5% |
| Nuisance, Defamation, Invasion of Privacy, Misrepresentation, Interference with Business Relations | 12.5% |

B. TOPICS TO OMIT

Are there some topics that most Torts teachers choose to omit? The easiest way to answer this question, of course, is to see if your school has an advanced Torts course and to be sure to exclude that course's topics from the coverage of your basic course. If that solution to the "what to exclude" question is not available to you, there are some other possibilities. For example, the topic of damages might be treated well in your school's Remedies course. Within the topic of damages, punitive damages might be covered by your Constitutional Law colleagues. Another topic that was once solidly in the mainstream of Torts courses is defamation. Because that topic has been so significantly affected by First Amendment issues, it can be reasonable to leave it, as well, to the Constitutional Law course. Most current Torts courses ignore business torts such as misrepresentation or intentional interference with business relations, regardless of whether they are covered in some other course, such as an unfair trade practices course.

Although it is true that comparative negligence systems can best be understood in the context of the prior contributory negligence system, unless you are teaching in one of the few jurisdictions that continues to apply contributory negligence, it probably makes sense to give that subject only the lightest of treatment. Incidentally, the multistate bar exam's list of topics not only includes contributory negligence but specifically refers to the last clear chance doctrine. Giving careful attention to the last clear chance doctrine simply

because it is on the list of multistate topics would really be an instance of letting the tail wag the dog.

Insurance is sometimes the elephant in the room (or, more accurately, outside the room) in a typical tort law course. Even though insurance is quite influential when courts develop tort law doctrines, courts often fail to treat it explicitly. Especially if your school has a separate course on insurance law, the best treatment of insurance issues in your course probably is to refer to them when courts do, but otherwise to explain that most tort doctrines can be understood well either in the absence of a discussion of insurance, or by assuming the existence of liability insurance and understanding that tort law doctrines provide the source of the liabilities that liability insurance protects against.

V. The Range of Analytical Frameworks

A. IN GENERAL

As you teach the course for the first time, it would probably be best to adopt a neutral perspective. After all, the subject matter will be almost as new to you as it is to the students. However, you might want to have the range of analytical frameworks in mind as you teach the course for the first time, so that those frameworks might occasionally influence how you present the material. Also, when you teach the course in future years, you will very likely want to give some degree of attention to particular philosophies or analytical systems related to torts. To help you be on the alert for instances in which the various conventional styles of analysis might be illustrated the best, here is a brief description of some of them.

B. COMPENSATION

One of the main goals of tort law is the delivery of compensation to people who have suffered an unexpected injury. Tort law accomplishes this with large administrative costs and various categories of inefficiencies that are easy to notice.

C. DETERRENCE

Another goal for law is to shape people's conduct. The intentional tort of battery, for example, is meant to decrease the number of times that potential defendants inflict illegal contacts on others. Among the rationales for strict liability for the activity of blasting is the idea that the certainty of financial responsibility for injuries associated with that activity will lead potential blasters to make an optimal selection of the times and places for that activity.

D. ARTICULATION OF SOCIAL NORMS

Another function tort law could serve is the articulation of social norms. To some extent, it might serve society well to have an authoritative institution articulate answers to questions about how much one person's activities can properly interfere with another person's activities.

E. KEEPING THE PEACE

As is sometimes suggested for all substantive fields of law, the availability of a civil justice process might deter self-help. Although it might seem far-fetched that tort remedies for a slip-and-fall injury in a store might decrease the number of instances in which injured customers act violently against store owners, at least in theory there is a value to society in having legal institutions available to provide recourse.

F. LEGAL HISTORY

Some instructors might use the Tort course effectively to offer a legal history perspective. On a superficial level, one can identify populist influences that might have affected the development of doctrines that made it easier to obtain recovery against railroads for various injuries they inflicted during their time of greatest economic power. The ebb and flow of pro plaintiff doctrines for product-related injuries can be a setting for historical analysis.

G. LAW AND ECONOMICS

Tort law is one of the great canvases on which law and economics scholarship has been painted. All tort doctrines can be tested and evaluated from an economics perspective. Related to the law and economics perspective would be a careful observation of the ways in which some courts now attempt explicitly to describe economic consequences of doctrines, and to evaluate the quality of their economic analysis.

H. CLASS, DISCRIMINATION, AND STEREOTYPES

From an analysis of how the reasonable “man” doctrine might ignore realities that a reasonable “woman” or reasonable “person” doctrine would expose all the way to an economic analysis of various elements of “tort reform,” there are many opportunities in the Torts course to develop insights based on critical legal studies, critical race theory, and other social and political theories.

I. SOCIAL PSYCHOLOGY AND BEHAVIORAL ECONOMICS

These fields of study offer many insights for understanding the goals of tort law and the actual operation of the tort law system. Given that many tort law decisions are based in part on the idea that they will affect how people act, there could be great value in bringing knowledge from these disciplines into the tort law course.

VI. Preparing for the Course

A. WHAT TO READ: GENERAL ORIENTATION

Books that provide an overview of the course can be very helpful. The most generally accepted treatise is Prosser and Keeton, but because its last revision was so long ago the main value of that work to the beginning instructor is its manifestation of the conventional understanding of tort law a generation ago. More helpful, if what you want is a quick description of the bare bones of relevant doctrine, or if you would like to have a roadmap of the entire course before you

begin to teach it, would be any of the single-volume student guides currently published:

- *Torts: Examples and Explanations*, by Joseph Glannon, is a very clear book that covers most of the important topics in the course. Some of what it conveys is provided in a question-and-answer format, which is very useful to students. Working through the questions might put an instructor in an unfamiliar role, but it will definitely be worth the effort.
- *The Glannon Guide to Torts*, by Richard L. Hasen, is another one-volume work that surveys the basic topics. Part of this book's approach is a focus on multiple-choice and other so-called objective questions. Again, that format might be uncongenial to a professor in his or her office, but the book is a wonderful source of accurate and clear detail about all the important topics in the Torts course.
- *Understanding Torts*, by John L. Diamond, Lawrence C. Levine, and Anita Bernstein, is similar to the Glannon and Hasen books, but is not written in a question-and-answer format. It is somewhat more treatise-like and offers more citations to decisions and articles than those other two books.
- *Torts in a Nutshell*, by Edward J. Kionka, is shorter than the other books mentioned, and provides very worthwhile descriptions of most of the important doctrines and issues in a Torts course.

Another valuable resource is the work of the Restatement reporters. All of the reporter's notes and commentaries in the Restatement (Third) of Torts are extremely helpful. They explain the choices represented in the restatement sections, but they also provide descriptions of rival doctrines and references to scholarly treatments of those doctrines.

B. WHAT TO READ: SCHOLARLY ARTICLES

Scholarly articles are a source of knowledge and inspiration that beginning teachers sometimes overlook. We all know that they are valuable as the basis for our own research and writing, but their value in preparing for class can be immense. Sometimes the beginning instructor will think, "I don't have time to read law review articles." Deciding whether you have enough time to read law review articles

really requires you to assess what value the reading will give you. If you knew that reading a law review article for each class you teach could make that class much better than it would otherwise have been, you would probably think that finding the time to read such an article would be sensible. Here is another idea about the role of law review articles in preparing for class: You don't have to read an article really thoroughly and you don't have to understand every point it makes for the article to give you one or two interesting insights, or one or two illustrations that can enliven your teaching. So, it might be a very good idea to find the recent law review articles that relate to each topic you teach, and to read some of them seeking a general orientation and a small number of points that might intrigue you.

You can find citations to articles in the casebook you use, or in other casebooks. If you like to re-create the experience of browsing through bound issues of journals or browsing through library shelves, you can use a "natural language" search in Westlaw (or the equivalent in Lexis) and search in the law reviews and journals databases for articles that are rich in words related to any particular torts subject.

Also, here is a description of a batch of articles I have found helpful. The list is personal, and not exhaustive, but it can give you a good jumping-off point for using the years of thought and labor represented by legal scholarship in your own class preparation:

Arthur Best, "Impediments to Reasonable Tort Reform: Lessons from the Adoption of Comparative Negligence," 40 *Ind. L. Rev.* 1 (2007). Examines the adoption of comparative negligence by courts and legislatures and identifies the different tendencies of courts and legislatures with regard to the choice between adopting the pure and modified systems.

Guido Calabresi, "Torts—The Law of the Mixed Society," 56 *Tex. L. Rev.* 519 (1978). Compares collective rules with liability rules (such as the rules requiring lights when driving at night and the liability principle imposing responsibility for injuries associated with unreasonable driving).

John C. P. Goldberg, "Twentieth-Century Tort Theory," 91 *Geo. L. J.* 513 (2003). Reviews and critiques a range of tort law theories, including compensation-deterrence, enterprise liability, social justice, individual justice, libertarianism, reciprocity, and corrective justice.

John C. P. Goldberg, “Ten Half-Truths About Tort Law,” 42 *Val. U. L. Rev.* 1221 (2008). Explains the “conventional wisdom” on a number of torts topics, such as the system’s goal of making victims whole, and offers new ideas about them.

Scott Hershovitz, “Harry Potter and the Trouble with Tort Theory,” 63 *Stan. L. Rev.* 67 (2010). Suggests that law and economics theorists have failed to identify the full range of the costs and benefits tort law entails.

Dan M. Kahan, “The Economics—Conventional, Behavioral, and Political—of ‘Subsequent Remedial Measures’ Evidence,” 110 *Col. L. Rev.* 1616 (2010). Explains various treatments of evidence of alleged tortfeasors’ postaccident remedial measures, and critiques a typical law and economics analysis of those treatments.

A. Mitchell Polinsky and Steven Shavell, “Punitive Damages: An Economic Analysis,” 111 *Harv. L. Rev.* 869 (1998). Suggests how a damages regime can affect the level of activity chosen by actors in a particular field.

Ariel Porat, “Misalignments in Tort Law,” 121 *Yale L. J.* 82 (2011). Demonstrates that courts sometimes fail to take the same risks into account when they impose liability as when they award damages, for example when standards of care are set without regard to actors’ incomes but damages are keyed to those incomes.

Robert L. Rabin, “Some Reflections on the Process of Tort Reform,” 25 *San Diego L. Rev.* 13 (1988). Examines how the overall political context in various periods might have affected tort reform proposals.

Geoffrey Christopher Rapp, “The Wreckage of Recklessness,” 86 *Wash. U. L. R.* 111 (2008). Demonstrates the confusion among various jurisdictions and Restatement authors on the content of “recklessness,” and suggests a framework based on behavioral science insights.

Michael J. Saks, “Do We Really Know Anything About the Behavior of the Tort Litigation System—And Why Not?” 140 *U. Pa. L. Rev.* 1147 (1992). Reviews anecdotal and nonanecdotal evidence about the operation of the tort system.

Steven D. Smith, "The Critics and the 'Crisis': A Reassessment of Current Conceptions of Tort Law," 72 *Cornell L. Rev.* 765 (1987). Assesses a range of conceptualizations of how tort law serves society.

Jason Solomon, "Judging Plaintiffs," 60 *Vand. L. Rev.* 1749 (2007). Considers why tort law often judges the conduct of plaintiffs, and uses that viewpoint to assess a number of theoretical views of tort law.

C. CHOOSING A CASEBOOK

There are lots of very good casebooks. The challenge is to select one that will work well from two important points of view: the position of students who are new to law school and for whom Torts is just one course among many, and the position of the beginning instructor, who would like to have a solid foundation in the subject matter as well as a good supply of opportunities for inquiries that are more sophisticated than students would ordinarily anticipate.

There are some commonsense suggestions for picking a book. First, devoting a significant amount of time to the project will be a good investment. No one wants the experience of noticing halfway through a course that the casebook has significant shortcomings. Also, paying close attention to a variety of casebooks will itself be part of the process of deepening one's knowledge of the subject.

When you approach the daunting task of examining and evaluating as many as 10 or 12 books, a few points of reference might help. If you believe that one of your goals is to contribute to teaching students how to read and understand judicial decisions, then a good book for the course will be one that presents judicial opinions in moderate length. You should also estimate the study habits of your prospective students. In particular, if a casebook has large numbers of notes following cases, there is a risk that some students will read none of the notes. Additionally, you will want to assess the clarity of a book's organization, and the extent to which it gives balance to all of the main topics in the course. As a first-time teacher of the subject, you will probably be served best by a book that does not adopt any particular ideological perspective.

Among the best Torts casebooks are some with first editions that were published as long ago as one or two generations. This can be a

great strength. On the other hand, you might find that some of these books betray their age in unhelpful ways. The editorial styles could vary from section to section, and they might contain some material almost entirely because it has been in the book for decades, rather than because the material is important to a contemporary course.

D. DESIGNING THE COURSE

Some people begin the course with intentional torts, and others begin with negligence. A minority start with damages, on the theory that recovery is the overall goal of litigation, and that it is a good idea to focus the attention of students on that fact.

There are many advantages to beginning with intentional torts. An important one is that some basic procedural ideas are quite clear in that context. For example, the tort of battery provides facts and doctrines that make it relatively simple to explain the plaintiff's obligation to present a *prima facie* case, and then to explain the operation of defenses. Also, intentional torts are marked by a generous number of apparently clear-cut rules. Beginning students like to be in touch with rules, and intentional torts provide many opportunities for exploring how small differences in factual contexts can change the outcomes derived from applying rules.

The other main choice, starting with negligence, also has a lot of appeal. Professors who begin the course with negligence usually do so because they believe that the problems encountered in negligence cases are more common in actual practice than the problems treated in the intentional tort framework. Studying how society deals with bad driving, hazards on land and in buildings, and substandard medical care is likely to appeal to students. Those circumstances are familiar in almost everyone's daily life. Also, students are likely to intuit that these problems are at the center of contemporary theoretical and practical tort law issues. Negligence is also, at present, a primary component of products liability litigation, which is another topic of great interest to students and major significance in practice.

Starting with either intentional torts or negligence works well with almost all casebooks. Illustratively, the casebook for which I'm a co-author presents intentional torts at the beginning, but when I teach with that book, I start the course with its negligence chapters.

When a course begins with the topic of damages, there might be some difficulty because students have not yet paid attention to the questions associated with deciding that a defendant has any liability at all. On the other hand, there is no getting around the fact that it is impossible to teach everything every day. Some point of entry has to be selected, and damages has a lot to recommend it for that purpose.

E. INNOVATION OPPORTUNITIES

As you teach the course for the first time, you will probably be mainly interested in making steady progress from the beginning to the end. But from time to time, you might be interested in some opportunities to shape the course to reflect current trends or to capture the students' interest in topics that are likely to be particularly important to them.

Tort reform is something students have heard of, even if they do not know its details and its history. You can pay attention to tort reform ideas throughout the course, or you can focus on them in some particular contexts in which they have been the most influential. For example, the choice between the pure and the modified forms of comparative fault can be a flashpoint for tort reform. Another topic of that kind is in the retention or modification of the joint and several liability doctrine.

Related to tort reform is the dramatic increase in legislation about tort law issues. There can be great value in comparing statutes from different states on topics that commonly attract legislative attention, such as product liability causes of action, or standards of care for healthcare professionals.

A topic that always captures the interest of students is tort law's treatment of the standard of care for people with mental disabilities. The common choice by courts, to give special attention in terms of standard of care to people with physical disabilities but to deny that special attention to people with mental disabilities, usually strikes students as odd and out of step with modern notions of mental health. The topic can be an occasion for a detailed analysis of the ways in which tort law might change to reflect changing public opinion, and the ways in which courts can base their decisions on assumptions about science.

There is a growing consensus that law schools should do a better job of acculturating students to the practice of law and of inculcating professional identity. In a surprising way, the Torts course offers an opportunity to do some of this work. The opportunity to accomplish this comes in the study of legal malpractice doctrines. Legal malpractice cases can be a setting in which all of the principles of professional malpractice litigation can be reviewed. Students might even be attracted to the idea that a course that pays detailed attention to suits against doctors might also pay some attention to the parallel topic of suits against another group of professionals: lawyers. Additionally, in the context of legal malpractice actions, students can begin to consider topics such as conflicts among clients, obligations of confidentiality, and the consequences of simple mistakes such as failures to comply with applicable statutes of limitations.

VII. In the Classroom: General Pedagogy

Ideas that work well for some professors might not work well for others, and students' expectations can vary from school to school. With those limitations in mind, I'd like to share some simple ideas about running the course.

A. HIGH POINTS

A story that makes a useful point about teaching was published in the *New York Times* some years ago.¹ One of the newspaper's reporters was an amateur clarinetist. The New York Philharmonic agreed to let the reporter rehearse with the orchestra and actually play during a concert. At that time, the first clarinetist with the orchestra was a musician named Stanley Drucker, who had been playing with the orchestra for 54 years. The article described rehearsals and explained that the reporter did well, especially because he was restricted to playing passages where the whole orchestra was playing, or where all the clarinetists were playing at the same time. During the actual performance, the reporter noticed that Mr. Drucker played a particular solo in a symphony's first movement "with surprising freedom." Later on, Mr. Drucker explained that choice to the reporter. "Give the audience something to remember," he said. Isn't

that a valuable point about our teaching? It's possible for a master clarinetist to play a solo in a standard way, but if there is a way to make the moment special, it's great to find that way and offer it to the audience.

If each class we teach has one or two powerful ideas, we will be accomplishing a lot. Naturally, our classes offer more than a couple of ideas per day, because all of the work of teaching a first-year course involves careful attention to case reading and case analysis, and repeated experience in understanding how changes in factual situations could affect the application of doctrines. But along with these basic and valuable aspects of information transmission and skill development, it can be very helpful for the instructor to have one or two particularly interesting ideas to include in the class. In a way, this might seem like too simple a goal, but it has the value of protecting the beginning instructor from thinking that a class can be successful only if the plan for the class includes a multitude of important ideas. If you have one or two ideas that are particularly interesting to you for each class, it is very likely that your enthusiasm for those ideas will be obvious to the students, and this will help the students become enthusiastic about those ideas and about the course in general.

What kinds of "special" ideas might you develop? Sometimes these ideas can be humorous or quirky. For example, you might notice, and you might help your students to notice, that appellate courts seem to vary in the ways in which they describe the injuries tort plaintiffs have suffered. Although it's not true invariably, I think that when an opinion begins with a horrifying description of the extent of a plaintiff's injury, it is very likely that the opinion will end with a result that favors the plaintiff. When an opinion is opaque about the details of the plaintiff's injury, that opinion is usually good for the defendant. Noticing something like this and explaining it to students, or inviting students to see whether the intuition is accurate, can be fun. It will also serve the purpose of encouraging students to be active and critical readers of opinions.

Whenever you notice that there is a discrepancy between a court's articulation of policy goals and that court's choice of or application of legal doctrines, that kind of observation can be very interesting to students and can highlight a class. A similar category of observation would be to identify differences among various states' statutory

approaches to similar problems, or jurisdictional differences in common law for important issues.

B. CALLING ON STUDENTS

I recommend that in a first-year course like Torts, every student should have a fair chance to be among the students called on at random during each class session. In my experience, students appreciate that incentive to be well prepared for each class. To be a decent human being, it's a good idea to couple the practice of making every student eligible to be called on with a method of excusing students from participation on particular days. In my case, I offer students three or four free passes, with no explanation required. I ask that students who would like to be excused from participation just leave a slip of paper with their name on it at the lectern prior to the start of class. It's true that there have been some days, especially when the students have a paper due in another course, when there have been as many as 20 slips of paper at the lectern. But organizing them is not too hard, and I think it's worth the effort to reach what seems to be a nice compromise between having students on call every day and, on the other hand, recognizing that students have busy lives and that sometimes being unprepared is a reasonable adaptation to reality.

For my Torts course, I prepare an index card for each student. The card includes the student's name, the student's picture, and (if the class is large) an indication of where the student sits. I shuffle the deck and use it to call on students each day. Sticking with this method has two benefits that might not be obvious. First, if you have a conscious or unconscious reluctance to call on the student whose name is difficult for you to pronounce, this method guarantees the student will be called on a fair number of times. Second, if you sometimes spend mental energy worrying about whether a student who you are about to call on might think you have picked him or her because he seemed inattentive or for any other particular reason, this method saves you that effort.

I usually make a mark on the student's card to indicate that the student has been called on. Sometimes I fix the deck so that it is particularly rich in cards for students who have been called on the least number of times. If you care to assign credit for the quality of

class participation, obviously a system of cards such as this one could be helpful.

C. HANDLING BAD ANSWERS

When a student is unresponsive, comes up with a non sequitur in response to a question, or says something that's completely wrong, the most common explanation for why the student has "failed" is something that instructors usually overlook. The most common reason why a student might give a poor response to an instructor's question is not that the student has been unprepared, has been inattentive during class, or lacks the capability to be a good law student. The most common explanation for this kind of event in the classroom is that the instructor has asked a bad question. It should always be our goal to ask questions that our students are capable of answering. The question that "stumps" a student is likely to have been a bad question.

So, even though the instructor is definitely the most experienced person in the room with regard to the instructor's subject, and even though the instructor might be tempted to think of himself or herself as the most intelligent person in the room, the humbling fact about bad student responses is that they are usually linked to bad instructor questions. You can protect against this by bearing in mind some of the attributes of successful questions. First, they are usually short enough for students to follow. Second, they usually call for a small step, not a giant step, from the general background of the topic or the most recent question that has been handled. Finally, the question should alert the student to the level of abstraction that would be required to answer it well. If you are interested in exploring the political science implications of the role of a state high court, you should let students know that, because there is a good chance that they will assume your interest is more on the level of "what was the issue on appeal, and who presented it?"

D. IN-CLASS SMALL GROUP DISCUSSIONS

Having students talk problems over in small group discussions during class can really help them overcome the stage fright many first-year students feel when they anticipate speaking to the entire

class. The groups can be as small as two students each. These small-group conversations can also break the ice when a question you have asked turns out to be too difficult to elicit a helpful answer. If you ask students to take three or four minutes to discuss the pending question with one or two people seated near them, you will be amazed at how the noise level in the classroom increases from quite low to quite high, and how the energy level increases in parallel. After these small discussions, there will usually be lots of people interested in volunteering to share their ideas with the class. I think this happens because a student who has said something out loud to a peer and has noticed that the peer has treated the idea with interest and respect is then naturally willing to expose that idea to the larger group, the entire class.

E. COLLABORATIVE LEARNING

Group exercises can provide a lot of benefits. For one thing, some students work better in teams than as individuals. Also, because modern law practice involves working with other professionals, we should train students to work with others. Finally, a group exercise can present a welcome change of pace from the dialogue style of instruction students are likely to be experiencing in most of the Torts course and their other first-year courses. I suggest that if you incorporate a group exercise in your course, you set up a system in which performance in the group has some small effect on each student's course grade. It is probably a poor idea to allow the group exercise to have a large effect on grades, because there are often issues about uneven contributions by members of each group.

I have been successful in using group exercises to accomplish two goals: first, to introduce students to the fact that many tort law doctrines are much more complex and varied in individual states than they seem to be based on presentations in typical casebooks, and second, to give students opportunities to translate their knowledge of the law into various styles of written communication. For example, I have assigned students in a large course to four-person groups and conducted the following assignment: Each group must find and describe the law of a selected state on a tort law issue for which there is significant variation among states. I assign the state that each group will work on. Once the students in each group have a common body

of knowledge that describes how their particular state handles the issue, each of the students in the group must write a document based on that law for a particular audience. I have the students assume the roles of lobbyists writing to a legislator, a lawyer writing a section of a brief, a lawyer writing a narrative memo for nonlawyer employees of the lawyer's client, and a scholarly observer writing a descriptive and evaluative essay.

For this exercise to work well, it's helpful to identify issues that students will enjoy investigating and for which there are a range of jurisdictional approaches. Issues of that kind could include the following:

- What information must a doctor give to a patient to obtain informed consent?
- Should a jurisdiction adopt the pure form of comparative negligence or a modified system, and should the jurisdiction apply its choice to product liability actions?
- For negligent infliction of emotional distress cases, should bystander recovery be limited to blood relatives of the initial victim, or should the class of potential plaintiffs be defined in a more general way, based only on a jury finding of a close connection to the initial victim?
- In resolving suits between landowners and entrants on land, should a jurisdiction employ a general duty of reasonable care, should it divide plaintiffs into legal entrants and trespassers, or should it use the traditional three-category approach of the common law?

Another possible topic for a group exercise would be the open and obvious danger doctrine, and whether a jurisdiction should continue to use that doctrine as a limitation on the liability that landowners owe to invitees or other legal entrants on their land.

F. QUIZZES TO HELP STUDENTS PREPARE FOR CLASS

Beginning law students often do not know how carefully to read cases. They might be accustomed to undergraduate courses in which they did well merely by skimming assigned readings the way a person might read magazine articles. You can help students figure this out by offering multiple-choice quizzes keyed to their assigned readings.

The Blackboard and TWEN platforms make this extremely easy to do. My students have appreciated the availability of multiple-choice questions related to each assigned case, which they can use or ignore and that have no effect on their grades for the course.

The kinds of questions that students have found useful in general fall into two categories. Some questions are almost trivial. These questions ask for basic information about the case, such as the identities of the plaintiff or plaintiffs, or a precise description of the way in which an injury occurred. The other category of questions is intended to help students see if they have focused on the most important issues in the case. So, for example, in a case where a court recognized a strict liability cause of action for a product defect, multiple-choice questions might outline the required elements for a negligence cause of action and ask students to identify which of those elements was missing in the plaintiff's case.

Other types of multiple-choice questions can encourage students to think fairly deeply about the styles of analysis that courts might use. For example, a question can list three or four possible rationales for an opinion and can ask students to identify which one would be most likely to be adopted by a court like the one that wrote the opinion on which the question is based. Another kind of question that encourages and can test careful analytical thinking would be a question that identifies particular facts in the principal case, and asks students to identify one that was crucial in the court's analysis (or, for that matter, to identify an aspect of the factual setting that had no relevance in the court's analysis).

G. SIMULATED EXAMS FOR REAL LEARNING

Students' concerns about the exams they will be taking in each of their courses can present a valuable learning opportunity. Even very early in the course, students are likely to be worried about whether they are learning what the instructor hopes they will be learning. You can take advantage of this interest and give students extremely valuable assessment information by offering a practice exam, a midterm, or a variety of in-class exercises.

There are numerous worthwhile techniques for exam simulations. You can give students a short hypothetical of perhaps one or two paragraphs, and give them as long as 15 minutes to read the question

and write a brief answer. The trick is to make sure that students evaluate their practice answer in a careful way. I have found a nonthreatening technique to help students in the anxious moments when they are preparing to evaluate the answers they have just written. Instead of calling on a student or two to read their entire answers aloud, I like to call on a large number of students and ask each of them to state just one idea that he or she thought could have a role in a well-constructed answer to the question. I write those ideas on the board. Once the board has a batch of ideas and a batch of references to the facts of the problem, the class is ready to do the work that any exam taker would have to do: Take the store of raw material, doctrinal ideas, and references to facts that have come to mind, and construct a coherent narrative from that material.

It's possible to call on a student and ask that student which items he or she would cover first, or all the students can be invited to make a brief outline. Once the students see on the board an array of facts and ideas, they are positioned to look at their own answers and see how many of them show up in those answers. Next, I recommend that the students carry out a simple but sometimes startling analysis. The challenge to the students is to circle in their answers each occurrence of words like *therefore*, *since*, and *because*. As you can predict, many students write answers to practice exercises that are entirely bereft of words that link conclusions to supporting doctrines or facts. In a highly mechanical way, just by looking for words like these, students can see whether they have done that analytical task or whether they have left the instructor to fill in the logical gaps on behalf of the exam takers.

The work of seeing how many of the main ideas for a good answer made it into each student's practice response, as well as the simplistic search for words like *because*, can be done by each student individually for his or her own draft answer. If students are willing to look at each other's laptop screens or notebooks, they can have the additionally valuable experience of assessing another person's work.

H. SEEKING THE "RIGHT" ANSWER

Is there a right answer? Students sometimes think that questions involving the application of doctrines to facts will have a "right" or "wrong" answer. From an instructor's point of view, however, a good

answer will usually be one that describes doctrines properly, associates those doctrines with facts that a court would use in connection with those doctrines, and explains how a reasonable jury might relate the facts and doctrines. Such an answer might conclude that a particular combination of doctrine and fact would necessarily produce a jury response in favor of one side or the other. But the decision about whether a plaintiff or defendant would win is of negligible value, compared with the recognition in an answer that a jury would ordinarily make that calculation. It can be very helpful to students for the instructor to reflect this orientation in reacting to students' in-class comments and responses. What a good first-year Torts answer will provide, instead of a conclusion about any party's chances of success, would be a neutral articulation of what components would go toward any part of that success, and a recognition (where sensible) that the ultimate disposition of the case would necessarily be dictated by a jury's conclusion.

I. ADOPTING AN ADVOCATE'S ROLE

Related to the desire to have an answer that identifies the single "correct" analysis is another common misconception. Many students take it for granted that in problem analysis or exam writing, they are supposed to be advocates. Often they assume that they are supposed to be advocates for plaintiffs. It could be that in a class problem or examination question, you will, in fact, instruct students to assume such a role. In my experience, though, students often jump to the conclusion that advocacy is required. This might be because of how they conceptualize the role of lawyers. It could be because they have compassion for the fictional plaintiff in a sad torts hypothetical. I recommend that you demonstrate this kind of jumping to a conclusion if you see it when students talk about responses to in-class problems, and that you help students avoid making that kind of unwarranted assumption in circumstances where it can inhibit them from developing a fair evaluation of all the aspects of a problem.

J. USING PRONOUNS CAREFULLY

The Torts course, like other first-year courses, can help students learn skills that have general application. One goal that students

should have is to become clearer communicators. You'll notice that students in the Torts course will often use the pronoun *they*. Those students will communicate better, and perhaps think more clearly about their ideas, if you encourage them to use actual names rather than pronouns. For example, the pronoun *they* in a statement about a torts case might refer to the plaintiff, the defendant, the trial court, or the appellate court. If you point that out to students who use the pronoun, they might realize that they had no idea to which of those actors they meant to refer. Or, if they really did know who they were talking about, you will be giving them a chance to express themselves much more clearly.

VIII. In the Classroom: Help with Specific Tort Law Issues

A. IDEAS FOR THE FIRST DAY OF CLASS

The first day of class is very important to students. From the instructor's point of view, we know that the first class is really only a very small percentage of the total instruction students will receive. We also know that, because of the changing pace of the semester as it goes along, later classes will provide more content and more opportunities for the development of skills than any first class ever could provide. Nonetheless, the first day of class is memorable to students. Many of us have the experience of talking to alumni who have been out of school for years, but who can narrate clearly the story of the first time they spoke in a first-year class. So it makes sense to try to come up with content for the first class that will take advantage of students' heightened attention. It's also true that the first class is a significant opportunity for the instructor to make a good impression on the students, for the students to develop a working relationship with the instructor, and for students to learn their key reason for taking the class. All this can be accomplished in a variety of contexts.

Some people like to conduct the first class entirely on the basis of a hypothetical example that is separate from any readings that have been assigned. It could be that students will have had no time to do any assigned reading prior to the first class, anyway. A good hypothetical exercise is to ask students to conjure up a world that is ideal in every way, except that it will feature the occurrence of

accidental injuries. Students can imagine how societies in that ideal world would respond to those injuries. They can describe, or develop, dispute resolution systems or compensation systems. This discussion can quite promptly demonstrate that fault might or might not be an aspect of our society's response to accidental injuries. You could also develop articulation of criteria by which to evaluate our society's method of responding to injuries. There is some chance that this kind of open discussion will also reveal preconceptions students in the class might have about our justice system in general or tort law specifically.

Another approach is to select a short case from the casebook, regardless of where it occurs in the book, that has some attributes that make it a good case for the first day of class. The kind of case I would look for in that situation is one where the procedural posture is clear. For example, a trial court might have granted a defendant's summary judgment based on the trial court's comparison of plaintiff's allegations and the applicable doctrines. That aspect of the case will provide a chance to explain to students that juries apply the law as a jurisdiction has developed it, in contrast with a system where juries might just do whatever seems fair to them. The appellate opinion might either conclude that the trial court was mistaken in thinking that the facts clearly required a particular disposition under the governing doctrine, or the appellate court might promulgate a change in the applicable doctrine.

A case of this kind that I have used successfully is *Ryals v. United States Steel*.² The trial court stated that in its jurisdiction, landowners owed trespassers only the duty to refrain from wanton conduct, and that under that doctrine, the defendant was entitled to summary judgment because the landowner's maintenance of electrical equipment on which a trespasser was killed was not wanton. The state Supreme Court held that under that doctrine, summary judgment was wrong because prior injuries on the land in the same circumstance would have supported a characterization of the defendant's conduct as wanton. But, somewhat surprisingly, the high court announced a change in doctrine, and noted that under its newly adopted doctrine, recovery for the latest trespasser would be prohibited. This case has compelling facts that are easy to understand. It illustrates the role of trial courts, and also shows how an appellate court can change the law.

The first class can also work well in the standard style, with students describing cases and answer questions about them. It might

be a good idea, though, to pay special attention to some methodology questions. Students can benefit from a suggested standard style of study and analysis. For example, it can help to tell students that for every single case they study, they must know what the loser said went wrong at trial. They must know what conduct by what actor was scrutinized by the trier of fact. Also, they should be told that the basic foundation for understanding the case will be knowledge of precisely what rules the trial and appellate court chose to apply.

For a course that begins with negligence, the first case might well be *Vaughan v. Menlove*.³ In considering the standard of care that is applied to a low-intelligence person, the class can identify the considerations that support that doctrinal choice. Those considerations can be applied to other standard-of-care cases, involving the child's standard of care, or the contrasting positions on standards of care for people with physical disabilities and people with mental disabilities. For each of these standards, we can ask a series of questions: Does society want to encourage the conduct of the person for whom a special standard might be used? Are there reasons to think that injuries inflicted by people in that class will typically be small? Are potential victims of people in a defined class able to identify members of that class and take precautions to avoid being injured by them? If a special standard is authorized, will judges find it simple to identify people to whom the standard applies, or would there be difficult definitional issues? Finally, if the standard is adopted, will jurors be able to apply it based on the range of their own experience?

Most of these questions can be answered in the affirmative with regard to children who are engaged in age-appropriate activities. Most of them, in contrast, would be answered in the negative with regard to people of low intelligence. Creating a table with these criteria can be a helpful exercise that illustrates one common style of legal analysis.

For a course that begins with intentional torts, a simple battery case is a typical introduction. It might be helpful to contrast such a case with a hypothetical involving conduct that is only careless. By the way, a complication best left for later in the course (or perhaps for an advanced course) involves the current practice of "underpleading," in which the victims of what might well be intentional wrongdoing merely allege negligence so that the defendant's liability will be covered by a homeowner's insurance policy even if the insurance policy excludes coverage for intentional wrongdoing.

For those who choose to begin the semester with an analysis of damages, a typical approach is to describe someone's injury, and then invite questions from the class seeking additional information about the person and his or her injury. Then students can individually write down estimates of the dollar value of the plaintiff's claim. Points to discuss will include the unavoidable impact of our inability to predict the future, the consequences of our system's requirement that plaintiffs bear the costs of their own legal representation, and the impossibility of a rational equivalence between money and pain.

B. EMOTIONAL REACTIONS

Tort law can involve topics of great emotional power. In particular, students who are doctors or who have close relatives who are doctors might have strong emotional reactions to medical malpractice cases. Also, students who have been accident victims or are close to people who have suffered in that way can be expected to have very complex and strong reactions to many aspects of tort law. I suggest that you pay close attention to their ideas when they express them. With regard to medical malpractice issues, it will probably be helpful to state plainly (if you believe this idea, as I do) that you believe that the primary reason individuals enter the helping professions is that they want to help people, not that they want to earn a lot of money, and certainly not that they want to be associated with bad outcomes. Additionally, you will probably feel comfortable sketching out some of the reasons why almost everyone agrees that our current medical malpractice system has major flaws.

C. READING CASES CLOSELY

There are lots of opportunities in the torts course to demonstrate the benefits of close reading of decisions and to reinforce that value. For example, in *MacPherson v. Buick Motor Co.*,⁴ the Cardozo opinion provides a careful analysis of prior cases, and serves as an example of how creative characterization of a line of cases can lead to an apparently reasonable new doctrinal position. Additionally, the opinion states one mundane and yet consequential fact, given the doctrinal problem in the case: the car in which the plaintiff was injured had three seats. This fact indicated that the manufacturer was

aware that people other than the manufacturer's immediate customer would likely use the vehicle. Of course, that knowledge was possessed by the manufacturer for many other reasons. But Judge Cardozo could count to three, and realized that identifying that fact provided an irrefutable argument about the knowledge of the manufacturer.

In the *Palsgraf*⁵ case, the Andrews opinion claims that foreseeability is a legitimate element of a proximate cause analysis. Students will be intrigued to notice that Judge Andrews treats the collapse of a scale far away from the place where the defendant's employees might have acted negligently as foreseeable, even though it was caused by a surprising explosion. He accomplishes this by considering what events would be foreseeable if an explosion were to be assumed (this might have been an unintentional foreshadowing of the law and economics approach, given the propensity of economists to "assume" possibly unrealistic facts).

Another example of the value of close reading of cases is provided by early products liability cases that explore strict liability. We are accustomed now to characterizing a product defect as either a manufacturing defect or a design defect. But you will notice and can point out to your students that in numerous early opinions, "defective condition" is the term used by courts without consideration of whether the defect was associated with design choices or the manufacturing process.

Sometimes courts will justify their treatment of cases by referring to "public policy." It's easy to find cases in which courts make that reference and never explain what they mean by "public policy." Students will often be taken in by that lack of clarity, and may express support for an outcome in the same vague way. If you and the students are able to notice that the phrase "public policy" lacks content, that observation provides the basis for a number of questions about the quality of analysis. It can help the students learn that many high court decisions fail to provide clear guidance for people's conduct and for the resolution of future cases.

D. WORKING WITH NUMBERS

Tort law was once much more binary, more black and white, than it is now. The advent of comparative fault has made courts comfortable with conceptualizing partial liability in terms of percentages.

Comparative contribution has come along with comparative fault. And the “loss of a chance” doctrine brings predictions and percentages into another cause of action. These developments might pose a challenge to students who are uncomfortable with arithmetic. Some students, once an element of mathematics is introduced, are likely to avoid paying close attention. They might just assume that they understand the concept in general, and might never actually prove to themselves that they understand it thoroughly.

The topic of comparative negligence is ideal for an in-class exercise that involves actual numbers for damages and percentages of responsibility, and that allows students to see the consequences of those numbers under the various systems of comparative negligence. For example, the only difference between the 49 percent and 50 percent forms of modified comparative negligence is how each of those systems treats cases in which a jury finds that a plaintiff and defendant are equally at fault. Having students use a pencil and paper to compute the results in hypothetical cases under both styles of modified comparative fault will give them an opportunity to understand this important detail. Another aspect of modified comparative fault that is very hard to understand in the abstract is the fact that these systems treat a *plaintiff* who is more than 50 percent responsible differently than they treat a *defendant* who is more than 50 percent responsible. A plaintiff who is more than 50 percent responsible collects zero, and therefore bears *all* of the economic consequence of the injury. A defendant, in contrast, who is more than 50 percent responsible pays only a share of the damages to the plaintiff, and thus bears *only some* of the economic consequence of the injury. Working out some examples will help students see that different parties bear different consequences for identical assignments of percentages of responsibility.

The following worksheet can illustrate all of these possibilities. It also offers students an opportunity to work with a hypothetical statute that highlights the lack of symmetry inherent in modified comparative negligence systems. In my classes, I distribute this worksheet and invite students to work on it in groups of two or three students. I use a document camera to fill in the blanks as one or two students dictate their answers.

Comparative Negligence Worksheet

I. Actual Statutes. Assume that juries have made the following assessments of plaintiff's and defendant's negligence in two-party cases. Under pure, 50% modified, and 49% modified forms of comparative negligence, what judgment would a trial court impose on the defendant in each case, and what portion of the cost of the injury would the plaintiff continue to bear?

| Jury Assessment of Responsibility | | Pure | | 50% Modified | | 49% Modified | | Hypothetical Statute (Symmetrical Modified) | |
|-----------------------------------|-----|--------|---------|--------------|---------|--------------|---------|---|---------|
| D | P | D pays | P bears | D pays | P bears | D pays | P bears | D pays | P bears |
| 75% | 25% | | | | | | | | |
| 51% | 49% | | | | | | | | |
| 50% | 50% | | | | | | | | |
| 49% | 51% | | | | | | | | |
| 25% | 75% | | | | | | | | |

II. Hypothetical Statute. Assume that the following hypothetical "Symmetrical Modified Comparative Negligence" statute had been adopted by a state. What judgment would a trial court impose on the defendant in each case, and what portion of the cost of the injury would the plaintiff continue to bear?

In any action by any person to recover damages for negligence, contributory negligence shall bar recovery if such contributory negligence was equal to or greater than the negligence of the person against whom recovery is sought, and contributory negligence shall have no effect on recovery if it is less than the negligence of the person against whom recovery is sought.

E. DEALING WITH URBAN LEGENDS OF THE TORT LAW VARIETY

Some students will have heard of the now fairly outdated tale of McDonald's hot coffee and large damages.⁶ The McDonald's incident can be seen from two points of view. An elderly lady spilled a hot cup of coffee in her lap as she drove away from the fast-food drive-through, she suffered an injury, and her story became well known. Some students will focus on the gravity of her injury and be satisfied that she was likely able to collect hundreds of thousands of dollars in compensation. Others will think that the circumstances of the injury can best be understood by assigning all the blame to the plaintiff. In newspaper coverage of this incident, several facts have been established. For one thing, the temperature at which McDonald's served its coffee was significantly hotter than the temperature other fast-food outlets chose to use for their coffee. Also, prior to this plaintiff's injury, the defendant had known of similar injuries being suffered by other customers.

There must be something about this case that makes it particularly salient to many of our students. First, it is easy to reach the conclusion that handling coffee is simple and each of us should be personally responsible for how we do that. Second, the discrepancy between the vast tort recovery and the low price of a cup of coffee seems startling to some. It could be that this case provides an occasion to think about how modern commerce sometimes seems to be straightforward but is in fact quite complicated. For example, the choice of temperature for the coffee was the result of an analysis of risk and benefit, with the benefit, from the point of view of the defendant, being increases in customer loyalty because of the desirability of hot coffee. In other ways, too, even though the subject of this event, a cup of coffee, seems commonplace, the process by which it was constituted and delivered might well be understood as having been complex.

F. HELPING STUDENTS UNDERSTAND THAT RISK-ASSUMERS CAN RECOVER

Another topic rife with opportunities for misunderstanding is assumption of risk. Students sometimes believe that even at the present time, plaintiffs who knowingly encounter dangers must

be barred from recovery. As you know, or will find out, among the doctrine's complicated aspects is the relationship between contemporary assumption-of-risk doctrine and assumption-of-risk doctrine as it was understood prior to the nearly universal adoption of comparative negligence. In the contributory negligence era, of course, a plaintiff's negligence was a full defense. Under comparative regimes, many negligent plaintiffs are permitted to recover. The equivalence of assumption of risk and contributory negligence in most circumstances had only slight interest in the time of contributory negligence, because either characterization of a plaintiff's conduct, if established by the defendant, resulted in a victory for the defendant. In our current comparative negligence systems, the vast majority of courts have noted that conduct that would support a finding of assumption of risk is ordinarily careless conduct. They have also noted that comparative negligence doctrine is forgiving of negligence, whereas the traditional assumption of risk doctrine treats risk-assuming conduct as a complete bar to recovery. To continue the complete bar approach of that era in the modern context of comparative fault would mean that our system would treat a careless and ignorant risk encounterer more generously than it treats a person who encounters a known risk with his or her eyes wide open. To some, that would create perverse incentives.

A full understanding of how comparative fault might best integrate assumption-of-risk ideas will be among the most interesting topics in the course. But in connection with this early warning about common student misconceptions, it is sufficient to provide the prediction that some of your students will unconsciously believe that any person who brings an injury onto him or herself ought to be a person who bears full responsibility for that injury.

G. INTEGRATING NEGLIGENCE PER SE AND MODERN COMPARATIVE FAULT

The negligence per se doctrine, or tort law's treatment of proof of statutory violations, happens nowadays to involve a complication related to the adoption of comparative negligence systems. Students are likely to "learn" that when the plaintiff qualifies for the benefit of the negligence per se idea, the plaintiff will be entitled to a mandatory finding that the defendant acted negligently. Prior to the adoption of

comparative fault, a finding that the defendant in a case was negligent would lead to full recovery, unless there was also finding that the plaintiff had been negligent, which would have led to a complete loss for the plaintiff. The idea that statutory violation is equivalent to a finding of negligence needs to be modified in our current tort regime. In any case now where the plaintiff and defendant are each negligent, any effort to establish an actor's negligence by proof of violation of statute must be understood in the context of comparative negligence. In other words, the idea that proof of statutory violation is equivalent to proof of negligence might still be correct, but it does *not* require a finding that the negligence so identified be valued at 100 percent or any other particular percentage. The plaintiff's benefit from proof of statutory violation in a case where the plaintiff and defendant are each negligent is that the jury must find that the defendant had a percentage of responsibility greater than zero. It does not, however, require any finding that the negligence attained any particular percentage level.

H. SOLVING PROXIMATE CAUSE

How many books and articles have been written about proximate cause? Like those authors, students have an almost innate desire to fit all proximate cause doctrines into a coherent whole. They believe that if they notice any inconsistencies, they will be able to root them out with proper study. They would also like to believe that for any factual scenario, there is one correct and one wrong answer to the question of whether the plaintiff has introduced adequate evidence to support a finding of proximate causation. In reality, students who understand proximate cause doctrine well will be able to identify the reasons why the topic is complex and the reasons why courts and scholars often have disagreements about it. They will also understand that in most cases, proximate causation is quintessentially a question for the jury and therefore immune from predictability.

At present, a scope of the risk, or foreseeability, analysis has been adopted by the Third Restatement. The attempt to narrow what might be called general foreseeability by employing a scope of the risk concept has a number of scholarly supporters. The restatement itself justifies its approach with a statement claiming that the approach seems fair. As you will see, identifying situations in which general

foreseeability and scope of the risk foreseeability produce different results is quite difficult. We all know a familiar hypothetical about a child who hurts his or her foot by dropping a firearm on it. Should the person who carelessly gave a child a gun pay for a broken toe? This is why students find proximate cause confusing, and, truth to tell, a little annoying.

I. RELATING TORT LAW TO CRIMINAL LAW

The overlaps between tort law and criminal law sometimes are troubling to students. Why should society have more than one approach to handling the consequences of wrongful conduct? The short answer to these students might be, “Get used to it.” On the other hand, if you are inclined to pursue this topic, there might be interesting comparisons between the use of proximate cause in tort law and the use of that concept in criminal law. Also, on the frontiers of tort reform, an argument might be made that because the deterrence effects of tort law are difficult to establish, we might do well to leave all that effort to the criminal law arena.

J. SORTING OUT NEGLIGENT INFLICTION OF EMOTIONAL DISTRESS

Another topic in the Torts course that causes students ample confusion is negligent infliction of emotional distress, and the subtopic within that field of recovery by bystanders for negligent infliction of emotional distress. There is a basic threshold issue in this subject that students often miss. They have trouble understanding why these cases are special. After all, recovery for emotional distress after injuries is a typical feature of tort cases. It can be very helpful to make clear to students that in the vast majority of tort cases, the initial contact between the defendant and the plaintiff is a contact that causes a physical harm. In emotional distress cases, the physical harm for which the plaintiff seeks recovery occurred as a consequence of the plaintiff’s emotions. The law has reflected a belief that there are substantial problems of proof and substantial risks of fraud associated with linking physical conditions to a victim’s mental state.

The impact rule, which was the common law’s first effort to allow some recovery in this troubled field, makes the analysis additionally

confusing. Cases that satisfy the impact rule are cases where the initial contact between the defendant and the plaintiff does involve some physical interaction. Many of these cases will involve a physical interaction that causes a direct harm to the plaintiff. Those cases, then, are standard tort cases, in which recovery would be permitted for the immediate physical harm and physical consequences related to subsequent emotional distress. On the other hand, the impact rule could also be satisfied by contacts that did not cause any physical harm separate from the physical harm the victim suffered later as a consequence of his or her emotional reaction to the events.

The zone of danger rule is another approach to satisfying the goal of recognizing “fewer but truer” emotional distress cases. It has the appealing logical insight that individuals who are almost the victims of significant physical harm are likelier than other individuals to have suffered emotional consequences from the defendant’s conduct. One last complication to keep in mind, and to try to help students sort out, is the fact that some modern courts permit recovery for emotional distress damages regardless of whether the victim’s emotional distress is physically manifest. These jurisdictions believe that modern science and roles of expert witnesses and juries make it possible to identify emotional distress that has been a consequence of the defendant’s bad conduct, even if there are no physical manifestations of that distress.

K. DOES DUTY MATTER?

The issue of duty can be particularly vexing to students. We often teach students that all tort cases can be analyzed in terms of duty, breach, causation, and damages. The first of these elements, duty, naturally gains prominence in students’ thinking, if only because it has the first place in this four-element mantra. (By the way, many instructors believe that treating cause as separate concepts of cause in fact and proximate cause properly makes this description a five-element description.) Even in traditional tort frameworks, duty is present in almost every case. Most appellate decisions pay no attention to the concept of duty, so it can be a problem to emphasize a concept that has very little role in determining the outcomes of real cases. On the other hand, duty does have a genuine role in one of tort law’s most fundamental aspects, the effort to delineate some borders for the responsibilities of defendants.

It could be most helpful to students to emphasize the law's small number of "no duty" and "limited duty" circumstances. Two prominent examples are the limitations on recovery for negligent infliction of emotional distress and the typical prohibition of recovery for mere economic harm (economic harm in the absence of physical injury). Another classic example of the role of duty in limiting our obligations to others is tort law's acceptance of the idea that one has no obligation to help a stranger. The Restatement did develop some partial exceptions to this doctrine, and it can be interesting to follow state legislative responses, mostly in the form of Good Samaritan statutes.

IX. Review and Exams

There are pros and cons to scheduling a review session for your Torts class. Students like review, and anything that will reinforce students in their desire to master the course is probably a good thing. On the other hand, to some extent it might trivialize the course for the instructor to represent that a one- or two-hour discussion can do a good job of surveying all of the knowledge and skills that it was meant to help students to acquire. From the point of view of the instructor, a review session can be highly difficult. It's hard to be prepared to discuss every detail of a course, especially if the format allows students to ask questions with no advance notice.

One way to recognize these concerns is to offer a review session with a restricted format. I suggest that you invite students to e-mail you with questions or topics that they would like to have clarified. Then, you can be guided by those concerns and construct a useful overview of the topics that your students asked you to highlight. It's hard to predict how many students will write to you in advance of the scheduled session, but in my experience, the number has been small. You can follow the ground rules strictly, or you can take the small number of requests you receive and design a class that covers those requests plus some related topics.

Often, students who attend review sessions become quite anxious. They are reminded of lots of topics of the course about which their confidence is low, and the discussions of those topics are not usually deep enough to remedy their feelings of uncertainty. It might help in dealing with this problem to include in the review session a few

sample exam questions. You can make them fairly easy, to protect students against feeling discouraged, or you could offer a range of difficulty, to give students the fairest possible introduction to what they might encounter in your exam.

A. EXAMS

I recommend that you consider giving both a midterm and a final exam. The tradition in law teaching is to base a course grade entirely on the final exam. This makes the final exam extremely nerve-racking for students. In contrast, if you provide a midterm exam experience, students obtain a fairly low-risk introduction to exam taking and also get the benefit of having their course grade based on more than one performance. In terms of your own workload, it is possible to offer students a midterm exam without increasing your grading time at all. For example, a midterm exam could count for one third of the course grade, and it could be based on a one-hour exercise. Having administered a one-hour midterm exam, you might feel comfortable limiting the length of the final exam to two hours. That way, your total grading work for the two exams might be approximately the same as it would have been had you given only a single three-hour exam.

When students have taken a midterm exam, a class can be devoted to the substantive law of the question and also to the exam-taking techniques that would have helped the student do well on the test. This is certain to be a class that your students will appreciate and to which your students will pay a great deal of close attention. You will also have the opportunity to meet with students individually to discuss their midterm exams, which is surely a practice that has much more potential to be helpful to students than the common practice of meeting with students to discuss their final exams, when the knowledge they learn from that discussion can only have general helpfulness to them in the rest of their law school work.

1. The Purposes of Exams

In my view, exams have four purposes. They get students to study. They enable schools to rank students from best to worst. They help students to feel a sense of accomplishment, and they can increase the likelihood that students will have a good impression of your course.

To serve these goals, an exam of moderate difficulty in almost any format will be satisfactory. One somewhat controversial component of exams is multiple-choice or objective questions. Multiple-choice questions have two great advantages. Their grading is absolutely uniform, in stark contrast to the grading of essay questions. The other advantage is that the grading is almost completely effortless. The reason that grading of multiple-choice questions should not be entirely automatic is that the grading software most schools now use will provide a statistical report about your multiple-choice questions. This gives you the opportunity to be thoughtful about identifying questions that failed to discriminate well between students with adequate knowledge and students with inferior knowledge. Even without software, you can look at all the responses given by students whose overall multiple-choice scores were in the top 10 percent of the class. Within that group, if there are any questions for which many of those students gave wrong answers, that is a powerful clue that there were shortcomings in those questions. The statistical measures can also serve this purpose in a more sophisticated way. I suggest that you winnow out any suspect questions and recalculate multiple-choice scores for all students in the class based on a refined list of which questions will count.

Using a fairly large number of multiple-choice questions and improving your array of questions by paying attention to the statistical approaches just explained can help you to develop a supply of questions that do a good job. Here is one additional suggestion: When you are writing multiple-choice questions, it's a poor idea to offer as possible answers fictional doctrines or doctrines that are badly misstated. The reason those kinds of distractor or wrong answers can be a problem is that sometimes the students unconsciously learn from the arrays of multiple-choice answers. It would be a disservice to students to teach them wrong ideas through the medium of multiple-choice questioning.

Essay questions are, of course, the most common style of law school examinations. The most common error that beginning teachers make with regard to essay questions is making the questions much too difficult. When a question is very hard, most of the students will write poor answers. This makes it very difficult to rank the papers with any degree of confidence. A related problem, especially in the Torts course, is to present a highly implausible sequence of events in an essay question that verges on the ridiculous. My view is that

exam taking is a serious enterprise, and that we can show respect for our students by offering exam questions that have some degree of realism.

It would be good to pay attention to including essay questions that test more than one aspect of the course, both in terms of substance and in terms of skills. For instance, some essay questions provide students with the opportunity to show that they can read a lot of facts and figure out what legal issues those facts present. If you include only questions of this type in your exam, and you have some students who are relatively weak at issue spotting, you will put those students at a multiple disadvantage. You will penalize them repeatedly for their lack of skill at spotting issues. Also, you will never find out whether they are good at analyzing issues when the particular issues are carefully identified for them. If you think that issue spotting is the most important skill, then you might be comfortable using questions that all hinge on that skill. However, it would be wise to make that choice consciously, rather than by accident.

If you would like to use essay questions that do test a variety of types of knowledge and skill at argument, you might well choose to include an essay question that tells a complicated story raising many issues, and then ask students to identify and discuss all of those issues. But you would likely include additional essay questions in the exam, such as questions that present an issue clearly but give students an opportunity to discuss its application, or questions that explicitly provide an opportunity to critique particular doctrinal positions or draw analogies among them.

For example, a question might describe a plaintiff's evening at a restaurant that involved a waiter touching the plaintiff, food poisoning, the hiring of an inexperienced cook, a violation of a food safety statute, and a fight in a poorly lit parking lot. This would be an example of an improbable sequence of events, of a type known primarily to take place in tort law exams. This kind of question would only allow a student to show that he or she understood tort law's approach to statutory violations if the student understood that such an issue was among the important issues in the overall problem. Another question might simply present a story of food poisoning and violation of a statute with an ambiguous relationship to food safety. This type of question would give every student in the class a fair chance to show his or her knowledge of how tort law deals with statutory violations. If a student dealt with that aspect of tort law

poorly, you would know for sure that the student's knowledge of those doctrines was weak. In contrast, there could be a variety of explanations for poor treatment of the statutory violation issue in the context of a question that raises many other topics.

You might also choose to test your students' abilities to evaluate the wisdom of particular doctrinal choices by presenting such a problem explicitly. For example, the question could ask students to discuss the strengths and weaknesses of a jurisdiction's decision to either retain the joint and several liability doctrine or to abrogate it.

There are, of course, many styles of questions that one can use. One style that has worked for me has been to present students with three or four hypothetical state high court decisions, presented in a condensed form so that each decision is contained in only three or four paragraphs. The question then asks students to resolve a particular problem that is related to the prior cases but not exactly controlled by them. This allows students to show the development of their ability to reason from past cases, and to understand what factual details should be important in the context of a particular set of doctrines or precedents.

Another idea for an exam question would be to present students with a hypothetical statute. The question could ask students to describe how the statute changes the common law and to evaluate the strengths and weaknesses of the change.

Here are some sample questions of all these styles. By the way, in these questions, the names of characters in the scenarios are usually mnemonic in some way. Instead of calling an injured person something like "Alan Able" or "X," calling that person something like "Victor Victim" can help students remember who's who in the problem.

2. Sample Question 1

This is an example of a question that reveals its issue, to test how well students can deal with an identified issue instead of testing how well they can spot issues:

Ivan Illman was a patient at Healthworld Hospital. The hospital used computers and a computer network as its main method for keeping records about patients and about the drugs that doctors prescribed for patients. The computer network failed one day and was out of service for 36 hours. Because of this failure, the medical

staff had limited access to information, and Illman was not given drugs that had been prescribed for him. This injured Illman.

Illman has sued Healthworld for damages, claiming that Healthworld's chief technology officer, Tom Tech, was negligent in designing and maintaining the computer system. Tech has a PhD degree in computer science and is the author of a number of scientific articles about the design of computer information systems for hospitals.

Assume that you are a law clerk for the trial judge. Write a memo for the judge discussing what standard of care the jury should apply to Dr. Tech's conduct.

3. Sample Question 2

This question presents a hypothetical statute. It tests how well students have developed the skill of reading statutes, and it offers a setting in which students can demonstrate that they understand various aspects of a complicated doctrine:

Assume that a state legislature is considering adopting the following statute. Part A: Identify the ways in which the statute favors defendants over plaintiffs. Part B: Describe specific changes a legislature might reasonably adopt that would make the statute more favorable to plaintiffs. Part C: Discuss the strongest arguments in favor of those changes.

Statute: Plaintiff's Negligence, Several Liability, Joint Liability,
Jury Instructions

(1) Contributory negligence shall bar recovery in any action by any person or a person's legal representative to recover damages for negligence resulting in death or an injury to person or property, unless such negligence was less than the negligence of the person against whom recovery is sought. Where recovery of damages is permitted, damages shall be diminished in proportion to the amount of negligence attributable to the person for whose injury, damage, or death recovery is made.

(2) In an action brought as a result of a death or an injury to person or property, no defendant shall ever be liable for an amount greater than that represented by the degree or percentage of the negligence or fault attributable to such defendant that produced the claimed injury, death, damage, or loss, except as provided in subsection (4) of this section.

(3) The finder of fact in a civil action may consider the degree or percentage of negligence or fault of a person not a party to the action in determining the degree or percentage of negligence or fault of those persons who are parties to such action.

(4) Joint liability shall be imposed on two or more persons who consciously conspire and deliberately pursue a common plan or design to commit a tortious act. Any person held jointly liable under this subsection shall have a right of contribution from fellow defendants acting in concert.

(5) In a jury trial in any civil action in which contributory negligence or comparative fault is an issue for determination by the jury, the trial court shall instruct the jury on the effect of its finding as to the degree or percentage of negligence or fault as between the plaintiff or plaintiffs and the defendant or defendants. The jury shall not be informed as to the effect of its finding as to the allocation of fault among two or more defendants.

4. Sample Question 3

This question presents a moderately complex, but somewhat believable chain of events. It combines issues related to express assumption of risk, implied assumption of risk, and the significance of an actor's violation of statute:

Medical Management School (MMS) operated a business that provided training in medical office management. It conducted classes in a store that had formerly housed a fast-food restaurant.

Larry Learner enrolled in an MMS course that was comprised of 20 two-hour classes scheduled in a four-week period. He signed a contract agreeing to pay for the classes. The contract stated: "I agree to waive any right to assert a negligence claim against Medical Management School for negligence, gross negligence, or any intentionally tortious conduct that may injure me."

Learner attended a number of classes without any problems. When he arrived at MMS's facility for his fourth class, he was free to sit at any of six or seven tables. He noticed that a wooden chair at one of those tables had a sharp split piece of wood protruding from the top of its back. He attempted to use that chair, and pulled it out from the table so that he could sit down on it. When Learner pulled the chair away from the table, the sharp portion of the damaged chair back cut his hand severely.

The chair involved in this injury had been used at that store when it was used as a restaurant. A statute in effect at that time, and when Learner was injured, provided that to facilitate cleanliness and protect patrons from food poisoning, restaurant furnishings were required to be made from materials that could be cleaned thoroughly, such as metal or plastic, and that if chairs were made with wood or fabric components, those components were required to meet specified standards. The chair that caused Learner's injury did not satisfy the statute's requirements.

Learner has sued MMS for damages, claiming it acted negligently in providing a dangerous chair for his use. Discuss the strengths and weaknesses of Learner's case.

5. Sample Question 4

This question offers students a chance to show that they can argue by analogy from a jurisdiction's choice of a particular doctrine in one context to support a conclusion about how that jurisdiction should rule in a different context:

In a legal malpractice case, the plaintiff seeks damages from the defendant lawyer. The plaintiff claims that the lawyer failed to tell the plaintiff about certain possible consequences of a transaction for which the lawyer was providing legal services to the plaintiff.

The trial judge will give one of these two jury instructions:

- “The plaintiff must persuade you that the defendant failed to provide information that a reasonable client in the plaintiff's position would consider important.”
- “The plaintiff must persuade you that the defendant failed to provide information that a typical lawyer would provide to a client in the plaintiff's position.”

The jurisdiction has recently adopted the prudent patient standard for informed consent cases. Discuss whether that should affect the judge's choice between these two instructions.

6. Sample Question 5

This question presents a fact pattern and asks students to work on it in the context of a statute and some high court decisions from a

hypothetical jurisdiction. The length of this question would make it a good one for a take-home test rather than an in-class test:

This question, set in the hypothetical state of Lathrop, describes a defendant's conduct, a plaintiff's injury, some evidence presented at trial by the plaintiff, some evidence presented at trial by the defendant, the trial court's instructions to the jury, the jury's verdict, the judgment entered by the trial court, two Lathrop statutes, and three Lathrop Supreme Court decisions. The question asks you to discuss arguments that might be made on appeal.

Foodfun Corporation operates Foodfun, a restaurant in the state of Lathrop. The restaurant has a parking lot with spaces for about 80 cars. There is a large area between the parking lot and the restaurant building. Most of that area is a lawn. In the middle of the lawn, there is a small playground for the exclusive use of customers' children. The playground is equipped with slides, swings, and climbing equipment. The surface of the playground is covered with small gray rubber pellets to protect children who might fall. The play area is surrounded by a concrete curb or edging to keep the rubber pellets in place and separate the play area from the lawn. This concrete edging is about six inches high and about four inches wide. It is painted white.

Tom Tripper took his young daughter to dinner at Foodfun. After dinner, she played for a short while on the playground equipment. Tripper walked around the lawn while she was playing. While he was about 50 feet away from the playground area, Tripper saw his daughter fall and apparently suffer an injury. He ran very quickly to come to her aid, but he tripped on the concrete edging and fell down. He suffered a serious injury to his back.

Tripper sued Foodfun, seeking damages for his back injury. He claimed that Foodfun had been negligent in its design of the lawn and playground areas. He claimed that he would not have fallen if the playground and the lawn had been separated from each other in some way that did not create the risk of tripping and falling that caused his injury. An architectural expert testified for Tripper that grass can obscure the view of a border between a lawn and a playground, and that yellow paint would have made the concrete edging easier to see. The expert also testified that a low fence would have been safer than concrete edging with regard to the risk of tripping and falling. An architectural expert testified for

Foodfun that a white border between a green grassy area and a gray playground surface is readily visible to the vast majority of people, and that borders or curbs of that kind are common.

The trial judge gave a variety of jury instructions covering all aspects of a negligence case. One of those instructions stated that “a possessor of land is not liable to invitees for physical harm caused to them by any activity or condition on the land whose danger is open and obvious.”

The jury verdict was in favor of Tripper. The trial court entered judgment as a matter of law for Foodfun, stating that application of the open and obvious danger rule required a verdict for Foodfun.

Tripper has decided to appeal the trial court’s action. Discuss and evaluate the arguments Tripper could make on the basis of any of the following Lathrop statutes and Supreme Court decisions (if they are relevant) or on any other basis.

Lathrop Statute: Comparative Negligence (enacted in 1982). “Contributory negligence shall not bar recovery in any action by any person or the person’s legal representative to recover damages for negligence resulting in death or in injury to person or property, if such negligence was not greater than the negligence of the person or in the case of more than one person, the aggregate negligence of such persons against whom recovery is sought, but any damages allowed shall be diminished in proportion to the amount of negligence attributable to the person for whose injury, damage, or death recovery is made.”

Lathrop Statute: Recreational Use Immunity (enacted in 1985). “Any public or private landowners or others in lawful possession and control of any lands whether designated resource, rural, or urban, or water areas or channels and lands adjacent to such areas or channels, who allow members of the public to use them without payment for the purposes of outdoor recreation, which term includes, but is not limited to, hunting, fishing, camping, picnicking, swimming, hiking, bicycling, skateboarding or other nonmotorized wheel-based activities, paragliding, rock climbing, the riding of horses or other animals, clam digging, pleasure driving of off-road vehicles, snowmobiles, and other vehicles, boating, nature study, winter or water sports, and viewing or enjoying historical, archaeological, scenic, or scientific sites, without charging a fee of any kind therefor, shall not be liable for unintentional injuries to such users.”

Lathrop Supreme Court Decision: Walker v. Theater Corporation (1944). “Plaintiff-appellant Walker was injured at Theater Corporation’s movie theater when Walker walked into a metal box about four feet high and one foot square that the theater’s ticket taker used when taking tickets from patrons. The box was in the middle of the lobby and could be plainly seen by anyone in the lobby. Walker sought damages from Theater Corporation on a theory of negligence, claiming that the design and location of the box were unreasonably dangerous. The trial court entered judgment on a jury verdict for the defendant, having instructed the jury that a landowner owes no duty to invitees with regard to hazards that are open and obvious. The ‘open and obvious’ exception to the usual duty owed to invitees is widely applied and appears in the Restatement of Torts, protecting landowners from liability to unobservant land entrants. We find no error in the trial court’s jury instruction or judgment.”

Lathrop Supreme Court Decision: Youngster v. Petroleum Corporation (1995). “Evidence at trial showed that Youngster, a ten-year-old boy, was severely injured when he trespassed on the defendant’s land and attempted to ride on a moving horizontal bar that was part of an oil well’s pumping mechanism. The moving part caused a serious injury to one of Youngster’s legs. Youngster sought damages from the defendant, alleging negligence and seeking to rely on the attractive nuisance doctrine. The trial court granted summary judgment to the defendant because it was undisputed that Youngster understood the risks of climbing on the defendant’s equipment. We reverse and remand for trial.

“We have formerly applied all the elements of the Restatement (Second) of Torts definition of the attractive nuisance doctrine. That definition includes the concept relied upon by the trial court, a requirement that the trespassing child be unaware of the risk because of the child’s youth. We now conclude that this aspect of the Restatement definition should no longer apply. Modern concepts of fairness require care for thoughtful and observant children just as they require care for naive, innocent, and ignorant children. We are no longer persuaded that a child trespasser must be free from blame in connection with an injury in order to be entitled to recover damages for that injury, so long as the child can establish that a defendant landowner knew or should have known that children would be likely to trespass and can also establish the

other Restatement elements of the attractive nuisance doctrine. All children deserve whatever nurture and protection the law can provide.”

Lathrop Supreme Court Decision: Homeowner v. Gas Corporation (2008). “In this tragic case, several deaths and serious injuries were caused by an explosion in the plaintiff’s house. The plaintiff, who was among the injured, sought damages from Gas Corporation and sought to establish negligence with the *res ipsa loquitur* doctrine. Testimony showed that the likely cause of the explosion was a leak in a natural gas transmission pipeline that allowed natural gas to escape from the pipeline, enter a sewer system, and eventually collect in the basement of the plaintiff’s house. Testimony also supported the possible finding that the plaintiff had been negligent by lighting a match in the basement of the house, even though the gas had a distinctive smell meant to alert individuals to its presence. The trial court’s instructions to the jury stated that the plaintiff must have been free from negligence in order to have the advantage of the *res ipsa* inference. The trial court entered judgment on a jury verdict for the defendant.

“The plaintiff argued on appeal that freedom from negligence should no longer be required as part of our *res ipsa loquitur* doctrine, because that element is contradicted by the adoption of comparative fault in our state. We agree. Negligent plaintiffs are often allowed to recover under our current statute. Furthermore, the function of the doctrinal element requiring plaintiff’s freedom from negligence is served by careful attention to other elements of the *res ipsa loquitur* doctrine that reinforce the likelihood that negligence by the defendant was a cause of the plaintiff’s harm. We therefore reverse and remand.”

B. EXAM REVIEW

Exam review can occur on various occasions, either during the course, if there has been a midterm or some use of practice questions, or after completion of the course, when students ask to understand how their final exam performance was evaluated. In my view, meetings with students to review exams can be highly beneficial to students, but they entail a large risk that the conversations will fail to meet that goal. Often, when a student makes an appointment to discuss

an exam, it will turn out that the professor reads the exam answers carefully in advance and the student fails to do that. That leads to a very inefficient conversation, in which the student is simultaneously trying to recall or quickly read what he or she wrote, along with trying to understand and respond to the professor's critique.

A solution to this problem that has worked well for me is to give students a self-evaluation form related to each question on the test, and to require students to fill out that form prior to having a conference about the test. This serves several functions. First, it makes it much more likely that the conversation will be helpful to the student, because the student will have paid close attention to his or her work and will also have begun to become oriented to the kinds of ideas and analysis that the exam author thought more important. Second, it might work to provide an exam review experience to more students than would have had such an experience in the absence of this kind of procedure. I believe this is true because I have seen many students take advantage of the availability of these self-evaluation forms. The form allows students to satisfy their curiosity about how their work measures up to the professor's goals for their work, and the form does this in a way that is unthreatening. Finally, there are many instances in which reviewing an exam can be fraught with emotion. In my experience, when students have measured their work against the description of high-quality work, they are relatively unlikely to feel aggrieved or to be extremely defensive in discussing their work. This naturally can help them learn from the experience of discussing their exams. The following are some sample self-evaluation exam forms.

Self-Evaluation Form 1

This form applies to Sample Question 1, shown earlier. At the top, it reproduces the text of the question. It then provides two columns. The first column states concise descriptions of ideas that a good answer will treat. The second column provides a space for the student to jot down how his or her answer might have dealt with each of those ideas.

Self-Evaluation Form

Ivan Illman was a patient at Healthworld Hospital. The hospital used computers and a computer network as its main method for keeping records about patients and about the drugs that doctors prescribed for patients. The computer network failed one day and was out of service for 36 hours. Because of this failure, the medical staff had limited access to information, and Illman was not given drugs that had been prescribed for him. This injured Illman.

Illman has sued Healthworld for damages, claiming that Healthworld's chief technology officer, Tom Tech, was negligent in designing and maintaining the computer system. Tech has a PhD degree in computer science and is the author of a number of scientific articles about the design of computer information systems for hospitals.

Assume that you are a law clerk for the trial judge. Write a memo for the judge discussing what standard of care the jury should apply to Dr. Tech's conduct.

| Main Ideas for Good Answer | Treatment of Each Idea in Your Answer |
|--|--|
| Definition of reasonable person standard. | |
| Definition of professional standard. | |
| A "profession" should be allowed to set its own standard of care, for tort purposes, only when a court believes that that standard will serve the public interest. | |
| Relative unimportance of the profit motive in actions of the group seeking a professional standard would support use of that standard. | |
| Tech's field, computer design and application, is generally practiced with strong consideration of profits. | |
| Close contacts with clients in actions of the group seeking a professional standard would support use of that standard. | |

| Main Ideas for Good Answer | Treatment of Each Idea in Your Answer |
|--|---------------------------------------|
| Tech's occupation insulated him from contact with patients. | |
| The availability of professional discipline processes for actions of the group seeking a professional standard would support use of that standard. | |
| Professional discipline and licensing are not common, and might not exist at all, for Tech's field of work. | |
| Complexity of the subject matter involved in a lawsuit does not require use of the professional standard, as expert testimony can educate the jury. | |
| Identify a standard that would be the best, <i>either</i> in terms of the criteria explained above or in terms of different criteria that an answer might specify and justify using. | |

Self-Evaluation Form 2

This form applies to Sample Question 2. It shows how a question with many elements can be presented to organize the student's own review of the question and the conversation you and the student might have about it, once the student has studied the self-evaluation form and his or her own answer to the question.

Self-Evaluation Form

Assume that a state legislature is considering adopting the following statute. Part A: Identify the ways in which the statute favors defendants over plaintiffs. Part B: Describe specific changes a legislature might reasonably adopt that would make the statute more favorable to plaintiffs. Part C: Discuss the strongest arguments in favor of those changes.

Statute: Plaintiff's Negligence, Several Liability, Joint Liability, Jury Instructions

(1) Contributory negligence shall bar recovery in any action by any person or a person's legal representative to recover damages for negligence resulting in death or an injury to person or property, unless such negligence was less than the negligence of the person against whom recovery is sought. Where recovery of damages is permitted, damages shall be diminished in proportion to the amount of negligence attributable to the person for whose injury, damage, or death recovery is made.

(2) In an action brought as a result of a death or an injury to person or property, no defendant shall ever be liable for an amount greater than that represented by the degree or percentage of the negligence or fault attributable to such defendant that produced the claimed injury, death, damage, or loss, except as provided in subsection (4) of this section.

(3) The finder of fact in a civil action may consider the degree or percentage of negligence or fault of a person not a party to the action in determining the degree or percentage of negligence or fault of those persons who are parties to such action.

(4) Joint liability shall be imposed on two or more persons who consciously conspire and deliberately pursue a common plan or design to commit a tortious act. Any person held jointly liable under this subsection shall have a right of contribution from fellow defendants acting in concert.

(5) In a jury trial in any civil action in which contributory negligence or comparative fault is an issue for determination by the jury, the trial court shall instruct the jury on the effect of its finding as to the degree or percentage of negligence or fault as between the plaintiff or plaintiffs and the defendant or defendants. The jury shall not be informed as to the effect of its finding as to the allocation of fault among two or more defendants.

| Main Ideas for Good Answer | Treatment of Each Idea in Your Answer |
|---|---------------------------------------|
| A. Statute adopts the 49 percent form of modified comparative negligence. | |
| Statute is unclear about use of unit or individual rule. | |
| Statute applies several liability, generally. | |

| Main Ideas for Good Answer | Treatment of Each Idea in Your Answer |
|--|---------------------------------------|
| Statute provides only narrow exceptions to its application of several liability. | |
| Statute keeps effect of several liability secret from jury. | |
| B. Describe 50 percent form and pure form of comparative negligence. | |
| Describe unit rule. | |
| Describe joint and several liability generally. | |
| Describe various possible statutory choices that fall in between several liability on the one hand and joint and several liability on the other: Joint and several for economic harms, joint and several for all damages up to a certain share of plaintiff's damages, joint and several applied to particularly blameworthy defendants (blameworthy either because of type of conduct or size of share of responsibility), sharing effect of uncollectible amounts among all remaining parties. | |
| Describe possible jury information about effects of several liability. | |
| C. Replacing the 49 percent form makes sense because deterrence and compensation will be more effective if applied in all cases, not just cases with plaintiffs whose share of blame is less than the share of defendants. | |
| Pure comparative negligence recognizes that bad conduct should be discouraged no matter who commits it. | |
| The unit rule fits well with the underlying rationale for modified comparative negligence. | |

| Main Ideas for Good Answer | Treatment of Each Idea in Your Answer |
|--|---------------------------------------|
| Where multiple actors have caused a harm, imposing the consequences of a party's insolvency only on the plaintiff is arbitrary. Sharing those consequences avoids imposing them only on one party when there is no clear reason for singling out that one party. | |
| Joint and several liability cannot ultimately be harsh to defendants because contribution actions might be available to them. | |
| If it is desirable to inform the jury about comparative negligence's effects, then the same rationale would support informing the jury about several liability's effects. | |
| Generally, having the jury act from knowledge rather than from guesses about the law will produce the fairest results. | |

X. Conclusion

I hope that some of these suggestions will help you. One additional idea might also be useful: Even if a casebook has a good teacher's manual, there will probably be times when you will wish you could just ask one of the casebook authors a question about why a case was included, or about how the book's organization on some point made sense to the authors. I recommend that you send the authors an e-mail presenting that question. You'll probably get a quick response and be glad you asked. Good luck in Torts.

Endnotes

- 1 Daniel J. Wakin, "His Moment in the Sun," *New York Times*, June 20, 2004, Section 14, p. 1.
- 2 562 So.2d 192 (Ala. 1990).
- 3 132 Eng. Rep. 490 (C.P. 1837).
- 4 111 N.E. 1050 (N.Y. 1916).
- 5 *Palsgraf v. Long Island Raliway Co.*, 162 N.E.99 (N.Y. 1928).
- 6 See "McDonald's Settles Lawsuit over Burn from Coffee," *Wall St. J.*, Dec. 2, 1994, B6.