THE TORTS CURRICULUM: AN OVERVIEW

Fleming James*

I sometimes wonder whether the first year torts course is destined to survive the onslaught of no-fault upon the field of personal injuries, and those of the Supreme Court upon the fields of defamation and privacy. And now, as if that were not enough, it is suggested that further assaults may be coming from new quarters—from courses and casebooks which take over some of the material traditionally associated with torts and treat some topics in far greater detail and depth than is usually done in a general torts course. It is to the second of these questions that I address myself.

I have been through all of these four excellent casebooks¹ and I can envisage, to some extent, the courses they cover. But I don’t think they threaten the territory of the first year torts course as I see that territory. I welcome them. They complement the first year torts course by either going beyond the area that we usually cover, or else going to a greater depth in some of the materials than the first year torts teacher has time to do.

Naturally these conclusions stem from assumptions about what a basic first year course should do, and I will state my assumptions. These are my ideas of what the course ought to be, and I state them with diffidence because there is one thing that I know very

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* B.A. 1925, LL.B. 1928, Yale; LL.D. (Hon.) Lund (Sweden); LL.D. (Hon.) 1968, University of Chicago; Sterling Professor of Law, Emeritus, Yale Law School. The Yale Law Journal, noting the retirement of Professor Fleming James from full-time teaching took several pages to list his writings and, of course, referred to the encyclopedic text in torts that he authored with the late Professor Harper. The Journal concluded its tribute by saying that “Professor James is loved and respected by generations of law students to whom he has been an energetic, witty, and lucid teacher.” Forward to, 81 Yale L. J. 1054 (1972).

These pages cannot fully convey that unique dynamism—only the live audience had that benefit. Yet they can capture the thoughtful reflections of a man who has done more to change and develop the dimensions of the subject of torts in his lifetime than any other living American.

¹ P. Keeton & M. Shapo, Products and the Consumer: Defective and Dangerous Products (1970); See Professor Shapo’s article supra p. 408. P. Keeton & M. Shapo, Products and the Consumer: Deceptive Practices (1972); See Professor Keeton’s article supra p. 415. M. Handler, Business Torts (1972); See Professor Handler’s article supra p. 419. E. Kitch & H. Perlman, Legal Regulation of the Competitive Process (1972); See Professor Perlman’s article supra p. 427.

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well: there is more than one way to skin a cat—and more than one good way at that!

Every teacher's idea of what a torts course ought to do is partly a function of his own taste, background and interests; that is as it should be. Moreover, a man's interests change over the years, and consequently, the course he teaches changes.

My background in torts has colored my choice of what to do and how to do it because I got into teaching through the back door. Teaching was the last thing in the world I planned to do when I left law school. I was impressed by Shaw's aphorism, and I wanted to try cases. By God, after I got out I would try cases! And try cases I did—mostly for the jury. Then I argued those cases on appeal, and it was my boast that I was appellee eight times out of nine in the Connecticut Supreme Court.

Now, given that background, this is what I try to do with a torts course: First, it ought to introduce the student to the basic underlying principles or concepts of substantive tort law. Second, it should introduce how these concepts are interwoven with rules for their procedural implementation, and how both substance and procedure may impinge very differently on the many facets of life with which tort law deals. Third, it should show how various and varying non-legal considerations need to be weighed to properly evaluate the job that tort law is doing. Finally, the course should highlight the interplay between common law and statutory development.

More specifically, the basic concepts of liability that run through tort law are generally stated to be: An imposition of liability because, first, harm was intended; or second, because harm or injury was negligently inflicted; or third, because the defendant's conduct was engaged in at his own peril, that is, because liability was strict.

Crossing these concepts are others, also pervasive. For instance, the cause-in-fact relationship in the context of cancer and the DES cases mentioned by Professor Shapo. Other cross-cutting tort concepts include proximate cause, scope of duty, and the effect of contributory fault or other participation by the plaintiff in the enterprise that caused his injury. Finally, there is immunity—either total or partial. Each of these basic concepts runs through all the

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2 See Professor Shapo's article supra p. 408 n.13 and accompanying text.
law of torts. The general torts course affords a singular opportunity to do a multiplicity of things with these concepts.

Torts also offers the opportunity to trace some of the great developments that have taken place by common law process, or by common law and statutory process. I suppose the greatest is the one that Gregory characterized in his article, "From Trespass to Negligence to Strict Liability." Another important development that has taken place is the one from Winterbottom v. Wright through MacPherson v. Buick Motor Co. to Henningsen v. Bloomfield Motors, Inc. and Greenman v. Yuba Power Products, Inc. and Section 402A of the Second Restatement of Torts. This is the product liability transition. And yet another development is that of the law of privacy. There are a great many more, but one of the things that I think the general torts course ought to do is to teach this kind of development, to teach the way the courts have worked out a change with continuity.

Another thing that the general torts course ought to do is to examine comparatively the different kinds of considerations involved in applying basic principles in different fields. For instance, the consequences, both direct and indirect, of imposing liability without fault are probably different in many very important ways in the field of accidental personal injury, on one hand, and the field of defamation on the other.

Also, another way in which these principles may be compared in their operation is involved in an extension of the scope of the duty to use care. Such an extension, I suggest, may mean entirely different things where conduct threatens personal injury as opposed to where it threatens economic loss. Indeed, as you well know, the law draws very different limits to the scope of duty. Why it should, and whether it should, pose provocative questions, and these are the kinds of questions to which a general torts course is peculiarly suited.

In dealing with all of these concepts, the student can and should be taught something of rigorous case analysis. He should learn the way lawyers and judges use cases as precedents, or distinguish

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9 217 N.Y. 382, 111 N.E. 1050 (1916).
7 RESTATEMENT (SECOND) OF TORTS § 402A (1965).
them, and how this use of precedents may interplay with substantive law. For example, the Winterbottom–MacPherson–Henning–sen development can teach with unique facility: how case law was used, how precedents were used, how embarrassing precedent was circumvented, and what the effect was of the fact that courts were reluctant to overrule, but would distinguish prior decisions.

Here is where the trial lawyer comes in. Legal method concerns should also be brought home. One is the function of judge and jury, which is central to our system. Despite its disappearance from English law, the civil jury still is with us and as far as I can see there is no likelihood that it will be abolished in tort cases. It is true, however, that some of the tort field may be removed from torts altogether, as happened with workmen's compensation and may well happen with no-fault.

Another concern is the relationship between the trial and the appellate process. Most of the materials in casebooks are from appellate cases and thus the trial process can only be seen imperfectly by the student. It seems to me that one of the things that ought to be done in a general torts course is to give the student an insight into what happened below and how that shaped the appellate process. The student should also be made aware that tort law is largely found and applied in such procedural concepts as admissibility of evidence, sufficiency of evidence, and instructions to the jury. Rulings in these areas are the repositories of much of our substantive tort law.

A modern first year torts course certainly would be incomplete without a considerable treatment of the institution of insurance—liability insurance and loss insurance—and their impact on tort law. It would be incomplete without some essay into the excursus, into the field of theoretical economic analysis, as developed by Coase, Calabresi, or Blum and Kalven. Students ought to be exposed to all of these men and their ideas. And they ought to be exposed to other phases of the current struggle over no-fault liability in the automobile and other fields, and to some of the statutory attempts to deal with this area.

Now, so far as the topical coverage is concerned, I like the more or less conventional coverage. Certainly everyone seems to feel,

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8 Professor R. H. Coase, University of Chicago Law School; Professor Guido Calabresi, Yale Law School; Professor Walter J. Blum, University of Chicago Law School; Professor Harry Kalven, Jr., University of Chicago Law School.
and I heartily agree, that the torts course ought to cover accidental and intentional infliction of physical damage. I think it ought to cover something of nuisance as well. Furthermore, I like to have it cover some of the business aspects of torts. I like to teach misrepresentation—it is a very fruitful thing. It is so different from the personal injury cases, and it gives the student an idea of the scope of tort law. I also like to include defamation and privacy and, to a lesser extent, the misuse of legal process.

The last two years that I taught torts at Yale, my mimeographed materials brought back a good deal more of the business torts than were in the second edition of Shulman and James—principally those that dealt with disparagement, interference with contractual relations, and with the prima facie tort. In each there is the intentional infliction of economic injury on a competitor or on an employer by a labor union. They present such an entirely different kind of picture from an assault, battery, or false imprisonment that it does something good for a person who has a tendency to think conceptually.

As I see it, the general torts course will fall short of some of the things that Professor Shapo suggests. My suggested torts course does not involve an inadmissible or wasteful duplication with any of the casebooks that have been discussed here. Rather it serves as a good introduction to them, and it ought to provide a framework for dealing with those matters that give a person breadth of perspective about the law and its operation.

The greatest possible overlap occurs with misrepresentation as it is conventionally taught. But if both courses are taught by the same man, he can easily avoid the problem of overlap. If they are taught by different men, there is something to be gained by overlap because I think there is a good deal of educational value learning from men with different approaches, different points of view, and different backgrounds, each dealing with similar subject matter. This gives further insights into the law and into the limitations of conceptual thinking that I think are valuable to the student.

It is true that a great many torts courses don’t cover the new specialized torts at all. But even where they are covered to the extent that I have suggested, it will only be a small corner of what these gentlemen deal with—it is only an introduction.
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