Saint Louis University Law Journal

Volume 45
Number 3 *Teaching Torts (Summer 2001)*

Article 11

5-1-2001

The Challenge of Teaching Damages

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THE CHALLENGE OF TEACHING DAMAGES

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In recent years, first-year students at my law school have taken a lawyering course in the spring semester. The course is taught in small sections, and each section works together as a kind of law firm, representing either the plaintiff or the defendant in a potential litigation claim from the initial client interview to the later stages of mediation, negotiation and settlement. One year, the case file on which they worked arose out of the death of "Lenore Lincoln." Mrs. Lincoln, an elderly woman with Alzheimer's, had wandered away one night from the special Alzheimer's care unit at a nursing home, and had died of heart failure resulting from exposure to the wind, cold and rain she had endured through that night after falling in a ditch.

The case had fairly strong liability facts, but the damages facts posed some problems for the plaintiffs, members of Lenore Lincoln's family. The damages, of course, were primarily nonpecuniary, and the family members' claims for loss of companionship and society had to confront evidence that the family had seldom visited Mrs. Lincoln in the nursing home. The students had to think carefully about these damages issues when, a little over halfway through the semester, each student had to write the client a "counseling letter," which advised the client about the strengths and weaknesses of the case, and evaluated the current options (such as filing a lawsuit, continuing negotiation, agreeing to mediation, etc.).

One spring, I taught the lawyering course for one of the small sections assigned to represent the plaintiffs. Although the students did a very good job on most of the skill segments—gathering facts, analyzing the law, negotiating, and settlement—their initial drafts of client counseling letters had dismaying weaknesses. In preparing the counseling letters, the students had to consider not just the strengths and weaknesses of the liability claims, but also the notion of damages: what is compensable in general; what range of damages might be expected in a case of this sort; why the plaintiff would likely have to testify, on direct or cross examination, about the nature of his or her relationship with Mrs. Lincoln.

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Though mindful that even experienced litigators often fumble at counseling clients on these topics, I was still dismayed at how poorly the students' letters handled any of these areas. Many students did not understand the doctrines of damages well enough to convey even the basics, much less give any more nuanced advice that related to damages.

The students' difficulties with damages were understandable, however. Judging from my experience and that of many friends and colleagues, those who teach first-year Torts seldom can find more than several days to devote to damages. The time crunch has only intensified as torts courses have been cut from six to five or four hours, or from two-semester to one-semester courses. Some professors handle damages with a lecture format near the end of the semester. Others assign one or two cases whose main function is to convey the categories of available damages and some basic issues posed by the one-time award of monies for past and future loss. Some try to delve into one or two damages concepts—nonpecuniary damages is a frequent choice.

With so much to do in so little time, many of us feel we must shortchange the conceptual and doctrinal riches of many topics. Yet the subject of damages poses some additional pedagogical frustrations. For one thing, to reach the conceptual and practical fascinations that damages can present, it seems necessary to go through a more mundane entry hallway of doctrinal basics that are technical and fairly uninteresting. And, even having crossed through that hallway, the professor still might find it difficult to convey the importance, difficulty, and fascination of damages-related legal practices and rules.

Yet, no matter how compressed the torts course, some serious attention to damages is essential. In this essay, I will set out some thoughts and suggestions about how to do this. The focus of this essay is compensatory damages, not punitive damages, although many of the same points apply to punitive damages.

The subject of damages is either the only way or a highly desirable way of accomplishing several important objectives. First, as to the core theoretical themes that the class probably already will have discussed—corrective justice and efficient accident reduction—the topic of damages allows a chance for rich re-visitation. Does corrective justice in theory demand full compensation to the victim? Does efficient accident reduction require full compensation to the victim? What concerns are raised, from either a corrective justice perspective or an efficient accident reduction perspective, when over the long haul juries tend to achieve vertical consistency but not horizontal consistency in damage assessments?

Second, the topic of damages—especially nonpecuniary damages—offers the best chance to introduce and explore several core theoretical themes that the class probably will not yet have considered in much detail: (a) the efficient insurance theme (does the tort system force us to buy an inefficient level of insurance?); and (b) whether the tort system commodifies love and

relationships or suggests that money is commensurable with intangibles such as love, health, and happiness.

Third, the damages segment is the best place for the students to be exposed to the stories of those who suffer injury, impairment and disability. By the time students arrive at the topic of damages, usually they will be used to reading variations on the following: ". . . and the plaintiff sustained injuries, for which she sued." Tort law springs from loss; if the students never or seldom hear the stories about loss, their understanding of tort and the societal disability fabric will be a more impoverished one.

Fourth, the subject of damages provides some terrific opportunities for exploring important lawyering issues, such as: how both sides in tort suits typically finance litigation, and how the contingency fee interacts with damages issues such as collateral source, pain and suffering; how the tort system affects the rehabilitation of injured persons, and whether the plaintiff's lawyer has any part to play in the process of rehabilitation; how lawyers calculate attorney's fees in structured settlements or periodic payment judgments; whether plaintiff's lawyers have any room to manipulate (in settlements or in evidentiary presentations at trial) the characterization of various damages as pecuniary or nonpecuniary, thus affecting the ultimate amount recovered in a jurisdiction with caps or with limits on joint and several liability as to nonpecuniary damages.

Fifth, the damages segment is a wonderful occasion to help the students consider the tort system as one strand in the societal disability fabric, a fabric that includes numerous public and private insurance programs. Because many first-year courses will not have time for a segment on non-tort compensation programs or insurance, a segment on damages is a natural place for drawing some attention to tort as just one part of the societal disability fabric. Several entry points for this discussion are: the collateral source doctrine; discussion of rehabilitative expenses and lost wages, and whether and how laws prohibiting disability-based discrimination play into the assessment of those damages; and the tort reformists' contention that tort damages rules for nonpecuniary compensation force consumers to buy insurance that is less desirable than first-party insurance sources.

Sixth, although tort reform can be addressed in many places, the damages section fits together extremely well with a discussion of tort reform. For instance: (1) Why place limits on nonpecuniary damages, and if limits are needed then why use caps rather than schedules? (2) Does it make sense to change current practices for post-verdict review by trial and appellate judges? (3) Why mandate periodic payments in some cases or at one party's request, rather than just leaving it to the agreement of the parties?

I. SOUNDS GREAT, BUT WHO HAS TIME TO DO EVEN A FRACTION OF THE ABOVE? SOME GENERAL SUGGESTIONS

We all have so little time. Yet two suggestions might help us make meaningful headway towards these objectives even in a shorter time frame. The first is to cover the "basics" in as streamlined and clear a fashion as possible. The basics might include the categories of compensable damages in nonfatal tort cases, the notion of present value, the traditional lump-sum delivery form of damages, the fact that damages represent a variable distinct from the liability strengths or weaknesses of the case, and at least a brief explanation of the collateral source rule (noting its frequent modification post tort reform). Most books now contain textual materials that should serve this end; if your book does not, you can supplement with something brief in this respect.

Keep several questions in mind when deciding how to present the basics in a streamlined way. First, do you really need a case for this? Textual material probably will work just as well. Second, consider asking the class some simple case valuation hypos that will dovetail nicely with coverage of these basics. All litigators and mediators understand that the case's expected value, and its settlement range, hinge on predictions about success on liability and the outcome on damage findings. But, since students will have spent weeks and weeks covering the elements of liability, they tend to be focused only on this. One can easily give some "real world" hypos of weak liability/high damages or strong liability/weak damages that will help them refocus.

The second part of my suggested strategy is to take at least one damages theme and develop it more fully. If you have more time, then move on to another theme as well. By "theme" I mean a topic that, although fairly specific, allows you to consider a few doctrinal points in more detail, lends itself to exploration of some of the theoretical and practical topics mentioned at the outset of the paper, and is workable given the cases and materials that are currently in use, perhaps with some supplementation.

One advantage of thinking along the lines of a theme or themes is that this might help you in deciding what to omit, given limited time. For example, consider the theme of damages for nonpecuniary losses. Several books contain more than one case that could serve as a jumping off point for discussing this theme. Some books, for example, include both *McDougald v. Garber*[1] (whether a comatose woman should receive damages for pain and suffering and loss of enjoyment of life) and a parental or child consortium case, such as *Borer v. American Airlines.*[2] The cases obviously address different doctrinal points, but the discussion points they generate will overlap considerably. If

1. 536 N.E.2d 372 (N.Y. 1989).
2. 563 P.2d 858 (Cal. 1977).

you're pressed for time, you could choose just one of the cases, which then might leave you time to handle another larger theme as well.

Second, consider the subject of plaintiff's mitigation of losses. Cases on mitigation are reasonably interesting and certainly lend themselves to the typical first-year classroom discussion, but I would submit that covering the doctrine of mitigation, by itself, isn't as useful as considering the subject of mitigation as part of the larger theme of rehabilitation and the social disability fabric (this theme is elaborated below).

II. SOME SUGGESTED THEMES

A. Nonpecuniary Damages

Most of the casebooks currently have at least one main case, and a number of notes or excerpted readings, that can serve as the basis for this theme. A good case on any of several different doctrinal points could provide an entry point to the theme:

1. Whether damages for loss of enjoyment of life are distinct from damages for pain and suffering, and whether either should be awarded to someone who is comatose.

McDougald v. Garber,[3] already a main case in several books, is a good case for this.

2. Whether damages should be awarded for parental or child consortium in cases of nonfatal injury.

Some books already include *Borer v. American Airlines*.[4] If your book doesn't include such a case and you want to consider one, two other good cases for use in class are *Belcher v. Goins*[5] and *Reagan v. Vaughn*.[6] The *Belcher* case allows parental consortium claims, summarizes the caselaw, and responds point-by-point to the arguments against such claims.[7] The *Reagan* case is longer but perhaps even more interesting. It allows the claim for loss of consortium, discusses how the consortium claim differs from a claim for mental anguish, and contains a sharp dissent.[8] The dissent devotes considerable time to telling the full story behind the father's injury (hit with a baseball bat in a fight outside a bar) and the troubled circumstances of the

3. 536 N.E.2d 372 (N.Y. 1989).
4. 563 P.2d 858 (Cal. 1977).
5. 400 S.E.2d 830 (W. Va. 1990).
6. 804 S.W.2d 463 (Tex. 1990).
7. *See Belcher*, 400 S.E.2d 830 (W. Va. 1990).
8. *See Reagan*, 804 S.W.2d at 464-68.

family.[9] So the *Reagan* case offers a good chance to discuss when and why opinions choose to tell more or less of the story behind an injury.

3. Whether damages should be awarded for fear of future cancer resulting from a toxic exposure.

Most books handle this issue through note materials, not main cases. Doctrinally, such cases offer the benefit of allowing you to address how the tort system, in garden-variety cases, handles risks of future exacerbations, complications, or injuries connected to the initial injury. Yet the cases also provide a good jumping off point for the theme of nonpecuniary damages. If you are interested in supplementing with such a case, you might consider *Potter v. Firestone Tire and Rubber Co.*,[10] which gives a full airing of the theoretical and practical concerns on both sides of the issue.

4. Whether legislative caps on noneconomic damages should survive constitutional attack.

A few casebooks already include such a case as a main case or in the note materials. My own view is that this topic, though an obvious entry point into discussion of noneconomic damages, isn't as good an entry point as the case topics just noted. I've found that, given limited time for damages, I just can't afford the time necessary for discussion and understanding of the state constitutional standards that underpin these cases. If your casebook doesn't contain such a case, and you'd like to include one, a number of good cases are available for this purpose.[11]

5. In death cases, whether compensation should depart from the pecuniary loss rule OR in death cases, whether compensation to the estate should include the decedent's loss of the pleasures of life.

Many books currently contain a main case on the pecuniary loss rule in death cases. A newer question is the recovery of "hedonic" damages for the estate. Either topic can provide a good entry into the discussion of nonpecuniary damages, but two caveats should be noted. First, using these cases as an entry into nonpecuniary damages will require you to cover, doctrinally, the basics about how the tort system covers death-related losses.

9. *Id.* at 469-72.

10. 863 P.2d 795 (Cal. 1993).

11. *See* Moore v. Mobile Infirmary Assoc., 592 So. 2d 156, 171 (Ala. 1991) (striking down cap); University of Miami v. Echarte, 618 So. 2d 189, 197 (Fla. 1993) (upholding cap on noneconomic damages in medical malpractice case when party requests arbitration); Samsel v. Wheeler Transp. Servs., Inc., 789 P.2d 541, 543 (Kan. 1990) (upholding cap); Adams v. Children's Mercy Hosp., 832 S.W.2d 898, 904-05 (Mo. 1992) (upholding cap and periodic payment provisions); Tenold v. Weyerhaeuser Co., 873 P.2d 413, 421 (Or. 1994) (striking down cap).

Second, some of the cases on the pecuniary loss rule or on hedonic damages turn mostly on statutory construction, and thus don't contain a rich discussion of whether tort common law should allow recovery. Of course, many of the cases do contain such a discussion. If you want to supplement with a case on hedonic damages in death contexts, consider *Sterner v. Wesley College, Inc.*,[12] which discusses whether evidence of the decedent's lost pleasures of life should be (1) recoverable as a damage in itself, or (2) admitted as relevant to the parent's claim for mental anguish damages.[13] This two-prong argument by the parents makes for a nice class discussion. The shortcoming of the case is that it doesn't really set out the expert methodology for valuing those lost pleasures, and this valuation issue is of course one of the most interesting to discuss in class. The valuation methodology is discussed in *Sherrod v. Berry*.[14] The valuation methodology is also beginning to appear in *nondeath* cases.[15]

6. Some suggestions for discussion points or other short reading excerpts under the theme of nonpecuniary damages.[16]

a. How the subject of damages links up to the core theoretical aims of corrective justice and efficiency.

An excellent, succinct and accessible discussion of this appears in an article by Dean David Leebron.[17]

b. Whether insurance for nonpecuniary damages is efficient.

This question has been the subject of much recent torts scholarship, some of which is quite complex. But the basic notion is a fairly intuitive one, and students enjoy discussing it. Discussion begins with the insight that, even if accident prevention is optimal, accidents will nonetheless occur; tort still might serve a function with respect to unpreventable accidents if tort provides a useful insurance mechanism. So the students can be asked to compare the tort insurance policy with first-party insurance policies that they might buy, and in particular whether and why they might buy insurance for pain and suffering or other nonpecuniary losses.[18]

12. 747 F. Supp. 263 (D. Del. 1990).

13. *Id.* at 272-73.

14. 629 F. Supp. 159 (N.D. Ill. 1985), *rev'd on other grounds*, 856 F.2d 802 (7th Cir. 1988) (en banc).

15. *See infra* note 19.

16. Some of the questions and points that follow are adapted from GEORGE C. CHRISTIE, JAMES E. MEEKS, ELLEN S. PRYOR & JOSEPH P. SANDERS, THE LAW OF TORTS (3d ed. 1997).

17. David Leebron, *Final Moments: Damages For Pain and Suffering Prior to Death*, 64 N.Y.U. L. REV. 256 (1989).

18. *See* Ellen S. Pryor, *The Tort Law Debate, Efficiency, and the Kingdom of the Ill: A Critique of the Insurance Theory of Compensation*, 79 VA. L. REV. 91, 99-104 (1993).

c. Whether damages for nonpecuniary loss "commodify" love, relationships and happiness.

Do such damages serve as a declaration that society deems it possible to value love, relationships and happiness in money terms? Thoughtful and accessible discussions of this appear in the writings of Richard Abel, Leslie Bender and Margaret Radin.[19]

d. If one wished to alter tort's traditional approach to nonpecuniary damages, then why caps and not schedules.

Schedules are in wide use in workers' compensation but, despite some scholarly endorsement, no jurisdiction has adopted any form of schedule for nonpecuniary damages. Good discussions of schedules appear in several sources.[20] You also might consider presenting some of the research findings on the impact of caps, which most books summarize.

e. Valuation: golden rule and per diem arguments, and willingness-to-pay methodology.

The "golden rule" and "per diem" methods of argument frequently are discussed in existing materials. Rather than use a single case to discuss this, I collect short excerpts, from a number of cases, of arguments that were challenged as impermissible. This offers an even richer basis for discussing the interesting valuation questions at stake here. For instance, I ask students whether the problem lies with the suggestion that the jury should use *no standard other than* "do unto others." (Most disallowed arguments don't do this.) Some of the arguments ask the jury to imagine how the plaintiff's loss would feel. Is this the problem? These questions can also take the class into an interesting discussion of willingness-to-pay valuation methodology, discussed in some casebooks and in other materials, including *Mercado v. Ahmed*.[21]

19. *See* Richard A. Abel, *A Critique of Torts*, 37 UCLA L. REV. 785, 803-06 (1990); Leslie Bender, *Feminist (Re)Torts: Thoughts on the Liability Crisis, Mass Torts, Power, and Responsibilities*, 1990 DUKE L.J. 848, 905-06; Margaret Radin, *Compensation and Commensurability*, 43 DUKE L.J. 56, 84-85 (1993).

20. *See* PAUL C. WEILER, MEDICAL MALPRACTICE ON TRIAL 54-61 (1991); Randall Bovbjerg et al., *Valuing Life and Limb in Tort: Scheduling "Pain and Suffering,"* 83 NW. U. L. REV. 908, 920-26 (1989).

21. 974 F.2d 863 (7th Cir. 1992). Good discussions also appear in Mark Geistfield, *Placing a Price on Pain and Suffering: A Method for Helping Juries Determine Tort Damages for Nonmonetary Injuries*, 83 CAL. L. REV. 773 (1995); Ted R. Miller, *Willingness to Pay Comes of Age: Will the System Survive?*, 83 NW. U. L. REV. 876 (1989).

f. Valuation: horizontal and vertical consistency among jury verdicts.

Some basic data about horizontal inconsistency is easily summarized. Several interesting questions can get the class involved in a discussion about the issue. First, would caps address concerns about horizontal consistency? Second, judges reviewing jury verdicts, especially in the federal courts, employ comparative analysis of the jury's verdict and other verdicts; juries, however, aren't given data about other cases. Why is a comparative method acceptable at one level and not another?

g. Litigating under caps.

Under the traditional tort damages rules, characterizing a particular item of damage as pecuniary or nonpecuniary did not matter. Now the distinction is at center stage, given tort reforms enacting caps and limiting joint and several liability as to nonpecuniary damages. Probably some characterization issues will eventually percolate. One good example is *Edmonds v. Murphy*,[22] in which the court explores whether consortium is a nonpecuniary loss, a pecuniary loss, or a bit of both.

The topic of caps also offers some good opportunities to discuss lawyering. Should the jury be advised about the existence of a cap? Why might the plaintiff's lawyer want to mention it? Another fascinating lawyering point relates to insurance considerations. Most liability policies exclude coverage for intentional torts; this creates an incentive for plaintiffs to "underplead" cases as negligent rather than intentional.[23] Caps, however, now provide an incentive to counter this: in many jurisdictions, an award for intentional torts provides an escape from the effects of the cap. This itself, by the way, is another good question: given whatever rationales might support use of the cap, why not have a cap in intentional tort cases as well? This is a good way to revisit distinctions between various levels of wrongfulness in tortious conduct.

h. Tort reform.

This is a vast subject, for which most books already include a good chunk of coverage. Keep in mind that, with a contact by phone or website to ATRA (American Tort Reform Association) or ATLA (Association of Trial Lawyers of America), you can receive the latest headcount of tort reforms in just about any level of detail you want.

22. 573 A.2d 853, 868-71 (Md. Ct. Spec. App. 1990).

23. *See* Ellen S. Pryor, *The Stories We Tell: Intentional Harm and the Quest for Insurance Funding*, 75 TEX. L. REV. 1721, 1722 (1997).

B. The Time Issue

Another theme for focus is what we might call the "time issue." As we are aware, a disconnect exists between tort law's traditional "one time" payment feature and the fact that the tort plaintiff experiences her loss over a period of time, sometimes for a lifetime. This raises a host of issues that are usefully considered together under this theme. The issues include: (1) present value and inflation (you might as well toss in the questions relating to taxes, too); (2) pre- and post-judgment interest; (3) proof of future damages, including future lost wage earning capacity and medical-rehabilitation care; (4) periodic payment of judgments; (5) structured settlements and trust arrangements; and (6) defendants' efforts to introduce costs of annuities into evidence.

As to materials and questions, many books contain a main case that is an entry point into this, and all books at least include note material. You might also consider the following materials and lines of questions.

1. Periodic payments and structured settlements.

One way to bring this important topic to life is to ask why a plaintiff's lawyer, or a defendant's lawyer, would be interested in agreeing to a periodic payment scheme of some sort. This is connected to the question of which types of injury scenarios would most lend themselves to treatment via structured settlements.

With respect to periodic payment statutes, a good question for the students is why there is any need for requiring periodic payment, via tort reform statutes, when voluntary arrangements (structured settlements) already are available and heavily used. When students see how the periodic payment schemes work, they realize that periodic payment statutes actually don't reduce the uncertainty of predicting future lost wages or future medical expenses. The key advantage they provide, from defendants' perspective, is that future payments usually are forgiven to some extent if the plaintiff dies earlier than the life expectancy on which the award was premised.

With respect to structured settlements, a terrific issue to discuss with students is the question of calculating the attorney's contingency fee: should it be the contingency percentage of each payment when made, of present value as calculated according to cost, or of present value as calculated according to a present valuation that takes into account the non-taxability of the future payments? This is a real-world issue with ethical overtones, and it also helps the students understand the tax benefits of such arrangements.

A good case for periodic payment statutes is *Smith v. Myers*.[24] The case strikes down, on constitutional grounds, the periodic payment tort reform

24. 887 P.2d 541 (Ariz. 1994).

statute for medical malpractice disputes.[25] The case is fairly short, and doesn't require substantial attention to the underlying constitutional tests. Instead, it gives a good descriptive account of the periodic payment scheme and its drawbacks. A good and accessible discussion of the attorney's fee issue appears in *Nguyen v. Los Angeles County Harbor*.[26]

2. Introducing costs of annuities into evidence.

Defendants are increasingly trying to admit into evidence the cost of an annuity to pay, for instance, for lifetime medical care. For an opinion disallowing such evidence, a good example is *Gregory v. Carey*.[27]

C. Rehabilitation of the Plaintiff (possibly combined with consideration of nontort compensation programs)

It seems axiomatic that tort or any compensation program, to the extent possible, should aim to encourage or at least not interfere with the rehabilitation of the plaintiff. What features of the tort system bear on this topic? Existing casebooks seldom consider this as a separate topic, but they usually contain note materials that one can put together to take up this larger theme. Some issues and possible materials include the following.

1. Practically, how plaintiffs obtain necessary medical or rehabilitative services before settlement or judgment.

You don't need readings to raise this question or to generate discussion on it. The issue is a nice one because it allows you to consider: (1) nontort compensation sources, including the limitations in coverage of existing first-party sources; (2) the concern that the plaintiff's need for interim funding will produce settlements lower than the settlement value of the case; (3) the point that certain exotic and problematic settlement arrangements—such as so-called "Mary Carter" agreements—sometimes are used and justified as a means of obtaining interim funding; and (4) whether plaintiff's lawyers may and do advance funds for medical and rehabilitative expenses.

2. Doctrinally, which types of medical and rehabilitative expenses the plaintiff may recover.

It is interesting to consider this point in light of federal and state legislation requiring accommodation of individuals with disabilities in the workplace, schools and public accommodations. Presumably, expert opinions about the lost earning capacity of the plaintiff could take into account the workplace and transportation accommodations that might be available to the plaintiff. In

25. *Id.* at 548.
26. 48 Cal. Rptr. 2d 301, 306 (Cal. Ct. App. 1995).
27. 791 P.2d 1329 (Kan. 1990).

addition, a few defendants have argued that they should be allowed to admit into evidence the fact that the plaintiff would be able to receive free special education services pursuant to federal law. A few courts have excluded this under the collateral source rule.[28]

3. Mitigation.

Lots of casebooks have materials on this.

4. What about the notion of the "greenback poultice," or of a less conscious reinforcement effect that compensation might have on disability?

The literature remains unclear on whether the litigation process or the prospect of receiving compensation reinforces (consciously or unconsciously) pain and disability.[29] One plaintiff's practice guide supplies a form for the client to use in setting down in a journal the plaintiff's pain every day. Even if rehabilitation professionals might think this is an undesirable practice, should the plaintiff's lawyer drop it?

5. Why not more advance payments?

All rehabilitation professionals agree on the importance of early rehabilitative efforts. Yet it is very uncommon for defendants to "advance" expenses for such services. Why?

D. Other Themes: Death, Punitive Damages, Economic Loss Rule

Because this paper has focused on suggestions for teaching compensatory damages in nondeath cases, I will simply note that other obvious damage themes include damages in fatal contexts, punitive damages, and the economic loss rule. Most casebooks contain extensive material on damages in fatal cases and on punitive damages. Fewer provide extensive materials on the economic loss rule, which is a natural bridge to upper level treatment of economic torts, and which also plays an important role in recoveries under products liability cases.

28. For opposing views on the question, see *Williston v. Ard*, 611 So. 2d 274, 278-79 (Ala. 1992) (disallowing evidence of free public special educational services). *But see* Washington v. Barnes Hosp., 897 S.W.2d 611, 619-21 (Mo. 1995) (allowing such evidence after the plaintiff has introduced evidence that special private schooling will be required).

29. The Institute of Medicine concluded that "[t]he literature is equivocal on this question and neither dispels nor confirms the common perception that compensation has a negative influence on rehabilitation." INSTITUTE OF MEDICINE, PAIN AND DISABILITY: CLINICAL, BEHAVIORAL, AND PUBLIC POLICY PERSPECTIVES 248 (1987).

III. INCORPORATING RECENTLY LITIGATED OR SETTLED CASES

Whether you have only a compressed or a more generous amount of time for damages, one approach that deserves serious consideration is to use a "real" case that has been recently tried or settled. If you have enough time, the class can benefit even more if you invite a plaintiff's lawyer and defense lawyer to discuss the case. My discussions with colleagues reveal mixed reactions to the use of "guest" speakers from the practicing bar. The rap against them is that they "just tell war stories," or that the professor simply does not have the time to yield the podium for a guest performance where the students play a basically passive role.

These are important considerations, but the benefits of presenting a real case study—even in abbreviated form—are tremendous if the material is planned carefully. I also suspect that another reason for not using outside lawyers is that the professor can easily feel upstaged by the lawyer. After all, the students hear from us every class, so naturally the students perk up a bit when a lawyer comes to discuss some exciting case. In addition, the lawyers you can and should bring to your class are wonderful trial lawyers, and they often are spectacularly engaging. The lawyers who have spoken to my class are the finest trial lawyers around. They have produced spellbinding moments: a plaintiff's lawyer discussing how she fits together a practice involving tragic catastrophic injury cases—usually intensely contentious—with a daily life that includes two small children; a defense lawyer explaining how he works to make his practice satisfying and why he believes he can help bring a measure of justice; a plaintiff's lawyer and defense lawyer discussing the role of race and class in the trial and settlement of cases (including statements from the insurance adjusters about the race of the plaintiff, or that "this is more money than this person has ever seen in her dreams," etc.); and discussions of how to deal with a lying client or witness.

Here are the steps I've taken to make use of a case study. First, contacting one or two plaintiff or defense lawyers will usually yield: several cases that clearly and often compellingly raise a number of damages categories and issues; a lawyer who is willing and often eager to send you pictures, video settlement brochures, the actual jury charge (or proposed jury charge) that includes the damages questions; and other demonstrative materials used in settlement or trial, such as Powerpoint presentations or blow-up exhibits. Some recent cases I've obtained in this fashion include: (1) a wrongful death case in which a teenage girl burned to death in a natural gas explosion resulting from a leak in a corroded pipeline; the girl had jumped into her father's truck to warn the local authorities about the smell of leaking gas, and a spark from the truck ignited the gas that had pooled in a low culvert through which she drove the truck; the father ran up to the explosion and witnessed his daughter in the moments after she had burned to death; (2) a medical malpractice case

involving a boy with mental retardation who had gone to the hospital for a once-yearly MRI test; because the boy tended to get agitated during the test, he usually was given a form of a conscious sedation; this time, however, he was oversedated and suffered permanent brain damage, and was removed from life support systems two days after the incident.

Second, boil down the materials about the case to the essentials that fit the time you have in the class. The lawyers often will have a video or Powerpoint presentation that was used in settlement discussions; the lawyer certainly will have pictures that can be scanned and used with various overhead display technologies. For instance, in the pipeline case, the class saw pictures of the low culvert, the burned truck and the corroded split in the pipeline.

Third, you can explain the breach aspects of the case in a truncated fashion, so that the discussion of the case will be aimed at damages. Keep in mind, also, that you can use the case study either as a framework for the entire damages presentation, or as a capstone for the damages discussion. For instance, I've used the pipeline case at the beginning of a damages segment, and then have referred to the case as seems appropriate while we are covering the textual materials in the casebook.

Fourth, if you have time, consider having the plaintiff's lawyer and the defense lawyer come talk to your class, preferably together. I've been surprised at how often both lawyers are willing to come and discuss the case, settlement and trial problems, etc. Obviously, the lawyers are unable to reveal a number of confidences—often the amount of settlement is a secret as well—but this still leaves a tremendous amount of rich material.

IV. CONCLUSION

Not surprisingly, after years of revising damages materials and adding to the number of real case studies and problems-exercises based on these studies, my pile of supplemental damages teaching materials has grown substantially. Feel free to contact me, and I'll be happy to share ideas or materials with you.[30]

30. epryor@mail.smu.edu