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WHOM TO BLAME? A LACK OF DEFENDANTS AND PERSONAL RESPONSIBILITY

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A VIEW FROM WITHIN THE FOREST

Of all the courses students typically take during their first year of law school, Torts may be the most easily criticized.[1] From a first-year law student's perspective, it may not be an appropriate counterpart to other first-year courses, such as Contracts, Civil Procedure, Property and Constitutional Law, which purport to teach law students to "think like lawyers" and appreciate legal foundations. Instead, the personal injury focus of much of the tort material invites the disfavor of some, especially those students who are convinced they will never practice *that* kind of law.

In addition to lacking the noble feel of other first-year classes, Torts has a tendency to mislead students into oversimplification. A first-year student who begins studying the various intentional torts may suspect that mastering the material requires only memorizing the various elements of the different causes of action. For instance, I still recall with ease that assault occurs where one acts with intent to cause harmful or offensive contact or the imminent apprehension thereof and such apprehension results.[2]

Initial discussions about negligence also seem relatively straightforward. Students may be tempted to believe that once they have located duty, breach, causation and damage, the matter is settled. The "check the appropriate boxes for your cause of action" nature of some of the tort material may lead students to develop an oversimplified notion of the practice of law. After finishing my first year of law school, I had these and other negative feelings about the value

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1. One of the professors at Saint Louis University School of Law, when informed of my opportunity to write this essay on a student's perspective of the value of Torts, responded, "is there any?"

2. *See* Castiglione v. Galpin, 325 So. 2d 725, 726 (La. Ct. App. 1976) (holding that assault occurs where threats are coupled with the present ability to carry out threats).

of the course. I concluded that Torts must have been placed in the first-year curriculum to get it out of the way early.[3]

STEPPING OUT OF THE TREES

My opinion on the value of Torts would eventually improve. While working for a law firm during the summer following my first year, I began to see glimpses of just how much the practice of law required knowledge of what I had learned in Torts. I was particularly impacted while researching issues relevant to a wrongful death suit arising from a car accident. The suit included negligence, negligence *per se* and product liability claims. Although researching these claims took me back to the days of memorizing elements and hunting for duty, because I was personally involved in *that* sort of case,[4] I was forced to consider deeper issues of recovery. The plaintiffs, parents of the decedent, were fairly affluent, so I was intrigued by their need for recovery.[5] This intrigue led me to more intimately consider the goals of the torts system than I had previously.

Ultimately, it was not until the end of my third semester of law school that I was convinced Torts had actually contributed something valuable to my legal education. An upper-division course in Admiralty was primarily responsible for my change of opinion regarding the value of the class. I enrolled in Admiralty because I thought it was a quirky area of the law, it is practiced predominantly in federal court, and it has some practical appeal in St. Louis, near the convergence of the Missouri, Ohio and Mississippi Rivers. In addition to satisfying my curiosity about maritime law, the course ultimately forced me to think more deeply about tort matters generally. This should not be surprising. Due to the nature of a substantial portion of the material covered, Admiralty could be renamed "Water Torts."[6]

3. Perhaps it is also offered early with the hope that students would have a better appreciation of discussions in Contracts about "returning to the womb" of tort.

4. *See supra* text accompanying notes 1-2.

5. That is, their financial need. I am sure that recovery in some sense assisted their need for closure in light of this family tragedy.

6. Admiralty cases often serve as the Torts student's introduction to negligence. *See* Joel K. Goldstein, *Reconceptualizing Admiralty: A Pedagogical Approach*, 29 J. MAR. L. & COM. 625, 631 (1998) (noting that many students are introduced to Judge Learned Hand's economics of negligence test when studying *United States v. Carroll Towing Co.*, 149 F.2d 169 (2d. Cir. 1947)). Other Admiralty cases highlight significant themes and doctrines within torts: *Vincent v. Lake Erie Transp. Co.*, 124 N.W. 221 (Minn. 1910) (necessity); *The T.J. Hooper*, 60 F.2d 737 (2d Cir. 1932) (customary practice); *East River S.S. Corp. v. Transamerica Delaval, Inc.*, 476 U.S. 858 (1986) (limits of product liability). *See* Goldstein, *supra*, at 631-32. Professor Goldstein suggests that Admiralty cases are useful for learning about other areas of the law, as well. *See id.* at 632-34.

QUESTIONS OF RECOVERABILITY

By the end of the first semester, if not the first month, of law school, torts students may have resigned themselves to the common belief that anyone can be sued for anything. In situations where the accidents are largely unpredictable and unpreventable, however, determining against whom to pursue an action requires more advanced calculus. Students faced with such incidents must seriously consider whether *any* defendant can be liable, the extent to which the plaintiff should be forced to bear the burden of her circumstances and the student's position on the role of "chance" or, to put it more plainly, "bad luck."

The dangers of the high seas present circumstances where damage to person or property may be unpredictable or unpreventable. In some cases, the damage may even be unexplainable. In *Stevens v. The White City*, the plaintiff's boat, the *Drifter*, sustained damage while being towed by the defendant.[7] The damage occurred at a time when the defendant was in complete control of the *Drifter* and no one representing the plaintiff was available to observe the manner in which the defendant handled the tow.[8] The Supreme Court ruled the defendant was not liable for the damage to the *Drifter*.[9]

Students considering whether they agree with the Court's decision in *Stevens* must confront the fact that there were forces at work on the high seas that were beyond the defendant's control. The *Drifter*'s damage may have been sustained due to contact with a large piece of driftwood or a hungry shark. On the other hand, the defendant may have negligently maneuvered the *Drifter* into port, striking her against numerous objects as she made her way past buoys, piers and other boats.[10] To what extent should the plaintiff's recovery be diminished by his failure to supervise the tow? Should the defendant be held liable for the damage to the *Drifter* notwithstanding the numerous dangers on the high seas?

A HEALTHY DOSE OF PERSONAL RESPONSIBILITY

Admiralty cases also offer an opportunity to consider matters of personal responsibility. Historically, seamen[11] have enjoyed "favored status" in the

7. Stevens v. The White City, 285 U.S. 195, 199 (1932).

8. One of the questions considered by the Court was whether towage contracts created a bailment, through which the defendant would have been strictly liable for any damage to the *Drifter*. *Id.* at 200-01. The Court ruled towage contracts did not create a bailment. *Id.*

9. *Id.* at 203-04.

10. It is likely, however, that there would be witnesses to this sort of damage.

11. For clarifications of "seaman" status, see *Harbor Tug and Barge Co. v. Papai*, 520 U.S. 548 (1997), *Chandris, Inc. v. Latsis*, 515 U.S. 347 (1995) and *McDermott Int'l, Inc. v. Wilander*, 498 U.S. 337 (1991).

courts.[12] Injured seamen[13] have access to a wide range of remedies, including maintenance and cure,[14] unseaworthiness actions[15] and those available under the Jones Act.[16] When a seaman is injured, a court must weigh the duty owed the seaman by the shipowner against the seaman's obligation to act in a reasonably prudent manner.[17] In light of their protected status, considering whether a seaman can be held personally responsible for his injuries requires special consideration.

In *Mitchell v. Trawler Racer, Inc.*, a seaman was injured when he attempted to disembark a fishing vessel on which he was employed.[18] The seaman slipped as he stepped onto the ship's rail because it had become covered with "slime and fish gurry" from earlier unloading operations.[19] At trial, the question arose whether the boat owner could be held liable for the unseaworthy condition present—the fish slime—if he had no notice thereof. The Supreme Court held the owner could be held liable despite lack of notice.[20]

The fact pattern in *Mitchell* invites one to consider the extent to which the seaman was responsible for his own actions. Was he not free to make his own decision about whether it was wise to step on a rail that was covered with fish slime? The Court's opinion noted that it was customary for seamen to disembark in this manner, but the first-year torts student should be aware that even custom is not dispositive of whether action is proper.[21] Furthermore, the seaman could have undertaken to remove the slime. Nonetheless, arguments exist which support the Court's opinion. Some may be quick to fault the owner of the ship for not providing a reasonably safe means by which to exit the vessel. Was the owner not responsible for the safety of those he employed?

12. *See, e.g.*, The Osceola, 189 U.S. 158 (1903) (outlining historic remedies available for seamen, including seaworthiness and maintenance and cure).

13. The law goes so far as to protect seamen who are injured while on shore leave and those not historically thought of as sailors. *See, e.g.*, McDermott Int'l, Inc. v. Wilander, 498 U.S. 337 (1991); Warren v. United States, 340 U.S. 523 (1951).

14. Maintenance and cure entitles an injured or ill seaman to a living allowance and compensation for medical expenses. The employer's obligation ends once the seaman has been "cured" to the maximum extent possible. *See, e.g.*, Farrell v. United States, 336 U.S. 511 (1949) (holding seaman not entitled to continued maintenance and cure once he reached maximum cure).

15. For a discussion of seaworthiness, see *Mitchell v. Trawler Racer, Inc.*, 362 U.S. 539 (1960). *See also* Usner v. Luckenbach Overseas Corp., 400 U.S. 494 (1971) (discussing the evolution of seaworthiness).

16. *See* Jones Act, 46 U.S.C. § 688 (1994).

17. With respect to seaworthiness, for instance, a shipowner must provide a vessel that is reasonably suited for its intended purpose. Satisfaction of this standard does not require perfection. *See Mitchell*, 362 U.S. at 550.

18. *See id.* at 539-40.

19. *Id.*

20. *Id.* at 550.

21. *See* The T.J. Hooper, 60 F.2d 737 (2d Cir. 1932).

How compelling was the duty he owed the seaman to provide a seaworthy vessel?

CONCLUSION: WHAT TORTS CAN TEACH ABOUT RECOVERABILITY AND PERSONAL RESPONSIBILITY

After discovering that Admiralty provided me an opportunity to consider issues of recoverability and personal responsibility,[22] I realized that this same opportunity was available in my first-year torts class. The fact patterns I encountered there raised many of the same issues.[23] Unfortunately, I had been too busy memorizing elements and locating breach to notice the greater issues inviting my attention.

Topics to which I was introduced in Torts have much to do with recoverability. Res ipsa loquitur, the notion that certain incidents do not happen in the absence of negligence, is implicit recognition that some things *do* happen without negligence. Concerns with proximate cause require courts to consider whether they will allow a chain of causation to continue ad infinitum.[24] By acknowledging that a chain of causation must be terminated at some point, courts are cautious about not extending liability to those who are not truly responsible.

Likewise, tort topics invite students to consider the role of personal responsibility. The proliferation of comparative fault liability was not only a step away from the harshness of contributory negligence for recovery's sake, but also recognition that defendants should only be penalized to the extent they are at fault. Liability without fault, or strict liability, allows damages to be recovered even where a defendant has taken great precautions. Strict liability

22. Some may argue that these two issues are inextricably bound to each other. This may be. I have separated them herein, however, to highlight the specific issues to which I was drawn in *Stevens* and *Mitchell*.

23. *See, e.g.*, Lopez v. McDonald's, 238 Cal. Rptr. 436, 440 (Cal. Ct. App. 1987). *Lopez* presents an opportunity to consider both recoverability and personal responsibility. There, after a lone gunman killed twenty-one people and injured eleven in a shoot-out at a McDonald's restaurant in San Ysidro, California, a police sharpshooter killed him. *Id.* at 438. Without the gunman alive to face the consequences of his actions, some would argue no responsible party remained to be named a defendant. The plaintiffs, however, representing patrons and employees of the restaurant, alleged McDonald's should have known of the dangerous conditions in the surrounding neighborhood and provided security. *Id.* at 440. The court characterized the issue as whether McDonald's had a duty to protect patrons and employees against "once-in-a-lifetime massacres." *Id.* With the issue so characterized, it is difficult to arrive at a judgment other than that which the court handed down—recovery denied for the plaintiffs. *Id.* at 450. From a personal responsibility standpoint, the court might have questioned the plaintiffs regarding why they chose to be employed at or to patronize a restaurant located in such an allegedly dangerous neighborhood. *See id.* at 445.

24. *See, e.g.*, Palsgraf v. Long Island R.R. Co., 162 N.E. 99 (N.Y. 1928).

is often imposed when the defendant is handling dangerous materials[25] or engaging in dangerous[26] or uncontrollable activities.[27] Finally, insurance, omnipresent in tort law, provides a safety net for situations where there may be no one to hold responsible.

I now realize that Torts is more than a laundry list of causes of action and a collection of darkly humorous cases.[28] Torts requires more of students than merely understanding the distinction between contributory and comparative negligence and the significance of the reasonably prudent person. Torts offers students an opportunity to consider deeper policy-related matters. The process of deliberating the merits of courts' opinions forces consideration of, to state it simply, how far the law should go. Moving beyond the elements and into the policy will assist students as they seek to more clearly understand courts' rationales. This is the greatest contribution of Torts, especially as a first-year course.

Among the secondary benefits Torts offers is providing law students an opportunity to consider what *their* role will be in shaping policy. Placing students in situations that compel them to consider whether recovery is proper allows them to evaluate the goals of the tort system and to grapple with the proper role for those providing legal representation. Likewise, students should not depart law school without having considered just how much burden the law should place on people with respect to personal responsibility. It would be unfortunate, indeed, if the downward-creeping standards to which society holds itself were accepted merely because its members had not considered the issue and were willing to simply accept the status quo.

Although I am convinced that formulating a position on issues such as personal responsibility should be undertaken by all, it is especially critical that today's law students do so. The conclusion we reach after such an exercise governs how we will conduct ourselves as a profession, how we will interact with our colleagues and what we will expect of our adversaries as twenty-first century lawyers.

25. *See, e.g.*, Siegler v. Kuhlman, 502 P.2d 1181 (Wash. 1972) (finding "[h]auling gasoline in great quantities as freight, we think, is an activity that calls for the application of principles of strict liability").

26. *See, e.g.*, Hay v. Cohoes Co., 2 N.Y. 159 (1849) (holding defendant strictly liable for damage from blasting).

27. *See, e.g.*, Isaacs v. Powell, 267 So. 2d 864 (Fla. Dist. Ct. App. 1972) (discussing strict liability for animals); Fletcher v. Rylands, 1 L.R.-Ex. 265 (Ex. 1866) (holding defendant liable for building reservoirs which damaged plaintiff).

28. One case I recall telling the family about is *Jefferson v. United States*, 77 F. Supp. 706 (D. Md. 1948), where surgeons failed to remove a large surgical towel from the patient's abdomen before stitching him up. More than eight months passed before the linen was removed. *Id.* at 708.