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Teaching torts: Rivalry as pedagogy

Anita Bernstein*

This contribution to a Tort Law Academic Workshop considers the 'twin themes' pervading torts pedagogy in the twenty-first century: (1) teaching torts for global practice and (2) teaching the common law in an age of statutes. Manifested at both transnational and national levels, the two themes have in common what may be understood as rivalries, where contrary rules and stances compete for power. The article explores illustrations of this competition that emerge in an American torts classroom, with attention to the interest that a 'pedagogy of rivalry' might hold for torts teachers and scholars working within common law systems outside the United States.

Introduction

In a foundational paper about the common law of torts, Jane Stapleton argued that 'the benefits of resorting to "comparative tort reasoning" vary greatly according to the focus of the legal analysis in issue: outcomes; arguments; principle; or conceptual arrangement'.¹ Professor Stapleton surveyed theory, pedagogy, and forensic perspectives to conclude that although 'tort materials from other English-language jurisdictions may be of value in the work of the domestic practitioner and judge' in numerous contexts, the application of comparative tort reasoning with the strongest 'potential for enrichment' is 'comparative law *argumentation*'.² The argumentation in question for Professor Stapleton applies to the creation and evaluation of decisional law.³

The Torts Academic Workshop held at the University of Sydney in April 2009 offered a forum for Professor Stapleton's 'comparative law argumentation'. Distinguished torts teachers from all over Australia gathered to consider the 'twin themes' of 'teaching torts for global practice and teaching the common law in an age of statutes'.⁴ Participants who engaged with the two themes necessarily had to pursue comparative reasoning. 'Teaching torts for global practice' compels an instructor to convey at least the force of divergent national laws as these divergences arise in transnational disputes or business transactions.

To teach 'the common law in an age of statutes' is to hold up a palimpsest: statutes revise and supersede the common law, which in turn sometimes (in the form of judge-authored decisions that overlook pertinent enactments)

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1 J Stapleton, 'Benefits of Comparative Tort Reasoning: Lost in Translation' (2007) 1(3) *J Tort L* art 6, p 2, at <<http://www.bepress.com/jtl/vol1/iss3/art6>> (accessed 19 April 2010).

2 Ibid.

3 'Remember', Professor Stapleton added in a footnote, 'I am only concerned in this paper with the value of comparative tort law to practitioners and judges': *ibid.*, p 29 n 116.

4 Invitation to the Tort Law Academic Workshop from Professor B McDonald.

resists this modification.⁵ So understood, neither an old common law rule nor a new statutory provision will suffice to convey the point of doctrine.⁶ One who reads a statute that supplanted a common law doctrine or a judge-made rule that stood recalcitrant in the face of a statute must engage in comparative law argumentation. A larger set of statutes — the ones that do not derogate from common law rules, but carry out some other public business — become intelligible in partnership with common law doctrines. The twin themes, as Barbara McDonald observes in her contribution to this volume, thus share ground in common.

Professor McDonald begins by noting the difference on the surface: statutes are parochial — they originate inside geographically delineated regions and few purport to bind the world — while at the same time ‘global practice’ is eroding parochial boundaries.⁷ Yet, Professor McDonald continues, the two come together in torts whenever a topic of universal interest, one that affects parties to torts actions all over the common law world, receives attention from geographically and jurisprudentially diverse legislatures. Professor McDonald remarks that the topic she chose to explore this conjunction of the ‘twin themes’, contributory negligence, is only one of several available for this inquiry. As phenomena in the contemporary common law world, the rise of statutes and the fall of provincial boundaries are at least as congruent as they are at odds with each other.

My part in this conversation about comparative law argumentation originates in the role-status I brought to the Torts Academic Workshop. Trained in the United States and present in Sydney as a visiting professor, I joined the workshop as a foreigner. What I express in this article necessarily will include comparative law argumentation. I start with another point of Professor Stapleton’s, on US tort law as comparative law.

Professor Stapleton notes that the tort law of my country comes from more than 50 jurisdictions, each of them topped with its own legislature and its little high court.⁸ The United States has a national high court, but one of scant interest to this project: Empowered mainly to apply constitutional limits on the federal powers of government and to interpret positive law enacted by the national legislature, the US Supreme Court seldom has jurisdiction to take an appeal in a personal injury case. For most tort litigants their state supreme court has the last word. This state supreme court can also do much what it likes: differing on this point from Australian jurisprudence, courts in the United States say they eschew the formation and recognition of national common law.⁹ American judges who hear tort actions do not, in contrast to their Australian counterparts, hew to interpretations of the common law made

5 J Dietrich, ‘Teaching torts in the age of statutes and globalisation’, elsewhere in this issue of the *TLJ*, at n 42.

6 B McDonald, ‘Teaching torts: Where to start in an age of statutes’, elsewhere in this issue of the *TLJ*, text at n 1.

7 *Ibid*, text at n 3.

8 Stapleton, above n 1, p 29.

9 Federal trial courts in the United States can hear common law claims, but they are supposed to apply the common law of a particular state: *Erie RR Co v Tompkins* 304 US 64 at 92; 82 L Ed 1188; 58 S Ct 817 (1938). Choice of law rules govern the question of which state’s law applies.

in the intermediate appellate courts of other jurisdictions.¹⁰ Jury decision-making, taking the form of black-box deference to whatever a jury may find, increases the unpredictability of tort in the United States and makes case outcomes more divergent.¹¹

Because of this high degree of variation among the states, one might have expected legal educators in the United States, much more than counterpart educators in the Australian federal system who live under Australian common law, to teach the law of their own jurisdiction. Students who, for example, attend one of the dozen or so law schools in New York state would learn New York law, get a New York licence and serve New York clients from a New York office.¹² But American legal education defies this expectation. Non-governmental institutions like the American Bar Association and the Association of American Law Schools have fostered a ‘national’ model of legal training, where a graduate of any accredited school may sit for the bar examination in any state. The magazine *US News & World Report*, publisher of a much-perused set of rankings, each year assigns an ordinal number to each accredited school on a nationwide rather than a regional basis. The job market for law teachers is mostly national rather than regional: being willing to relocate to a distant post sometimes marks a candidate as ‘serious,’ an adjective that American academics use without irony as high praise. Some resistance to the model still lingers — many schools teach the law of their state, enrol students close to home and recruit instructors from their region — but this response is found largely at the bottom of the prestige hierarchy. Under the national approach to legal training in the United States, students are expected to learn the state-based law they need to know mainly after their formal course work, first from a commercial bar-exam preparatory course and later under the supervision of their employers.

To Professor Stapleton, the consequences of this American pattern spread past the perimeter of the country. She suggests that the absence of national tort law may account for the prestige of tort ‘theory’ in this country. Without a shared set of municipal law-material to teach, influence, revise or even argue about, scholars direct their energies to an abstract plane where they enjoy one vocabulary transcending the state in which they live. Tendencies in the waning ‘super-power’¹³ influence legal education outside the United States; Professor Stapleton interprets torts scholarship coming out of Toronto and Israel as pointed toward American readership and priorities.

In this article I propose to move the US-influenced comparative legal reasoning that Professor Stapleton has identified toward an end more congruent with the twin themes that Professor McDonald has named. My

10 Dietrich, above n 5, at n 24, citing *Farah Constructions Pty Ltd v Say-Dee Pty Ltd* (2007) 230 CLR 89; 236 ALR 209; [2007] HCA 22; BC200703851 at [135] and *CAL No 14 Pty Ltd v Motor Accidents Insurance Board* (2009) 260 ALR 606; [2009] HCA 47; 84 ALJR 1; BC200910034 at [48]–[51].

11 Stapleton, above n 1.

12 Almost every US state has at least one law school. The only law teaching I know of in Alaska, the last frontier, is a summertime program sponsored by Seattle University based in Washington state. The *Alaska Law Review* is published out of Duke University in North Carolina.

13 Stapleton, above n 1, p 25.

premise is that 'global practice' and 'the common law in the age of statutes', both of which bring diversity to the teaching of torts (the former going beyond municipal law materials, the latter adding statutory reform to case law), are also suited to what I will call a pedagogy of rivalry. By analogy to a tournament, one of the rivals on a particular point of law can in the torts classroom defeat alternative legal measures. Torts teachers can direct students to seek and defend a winner.

For example, consider what Professor Handford examines in this volume: the law of mental harm in Australia's eight jurisdictions. In 2002 Queensland and the Northern Territory chose to retain the common law while five states and the Australian Capital Territory adopted 'four or five different versions' of statutory reform. Jurisdictions diverge on, *inter alia*, which persons can claim, what injuries are necessary, the standard of fortitude the plaintiff must demonstrate. 'Time is the common enemy', Professor Handford muses,¹⁴ referring to the expansion of new legislative and judge-authored materials along with the tendency in Australia (and elsewhere) toward contracting rather than increasing the amount of time allotted to teaching torts. He wishes 'to give students some awareness of the possibilities of new arguments and new types of claims — in spite of the limitations imposed by Time'.¹⁵ These possibilities are rivals.

Pessimistic readers may take the rivalry construct as a rationalisation or whitewash: we torts teachers are the first to admit we omit and rush past so much more pertinent material than we cover. To call this clangorous pile a rivalry ascribes to it an order that might be present only in the eye of a beholder. For any optimists who may be reading, however, rivalries among common law jurisdictions or between statutes and the common law offer opportunity to teach best practices and optimal rules inside torts.

Torts rivals in the US classroom

'Comparative tort law', writes Professor Stapleton, 'stretches from theoretical issues such as the possible relationship of a tort system's vitality and prominence with the relative paralysis of its legislature, to procedural matters such as how facts are discovered and dealt with, to empirical issues . . . So I must be extremely selective'.¹⁶ Similar richness on the menu pervades American tort law for the instructor. The material compels an intra-comparative pedagogy.

Minority versus majority rules: some usages

Large numbers of American jurisdictions may favour one rule or approach that an almost equally large number of jurisdictions reject. In other areas of law, the majority cohort may be tiny and the majority rule cohesive.

An overt fight: status categories for land visitors

For torts instructors, one important divide among the US states concerns duties of care that land possessors owe visitors. Long superseded in Australia,

¹⁴ P Handford, 'Teaching psychiatric injury in a post-CLA world', elsewhere in this issue of the *TLJ*, text between nn 5 and 6.

¹⁵ *Ibid.*, in conclusion.

¹⁶ Stapleton, above n 1, p 1.

Britain and Canada, the common law categories of trespasser, licensee and invitee persist in many US states. Almost half have kept all three classifications. Nine jurisdictions have merged the three into a unitary category owed reasonable care under the circumstances. Nine is a small numerator over the denominator of 51 (all states + the District of Columbia), but the nine include big California, New York and Illinois. About half the jurisdictions merge licensee and invitee, the two ‘lawful visitor’ categories where the defendant welcomed or at least condoned the presence of the plaintiff, while withholding from trespassers an entitlement to reasonable care. This centrist position comes closest to that of the American Law Institute, whose *Restatement (Third) of Torts* provides that as a general matter, a possessor owes visitors reasonable care with respect to conditions on the land, but ‘[t]he only duty a land possessor owes to flagrant trespassers is the duty not to act in an intentional, willful, or wanton manner to cause physical harm’.¹⁷

Merger, partial merger (licensee and invitee only) and retention of the traditional categories do not exhaust the options open to US jurisdictions. In Colorado, the Supreme Court adopted a unitary standard and then the legislature reinstated the status categories. The New Jersey Supreme Court refuses to say what the New Jersey rule might be. ‘Flagrant trespassers’, the *Restatement’s* term for visitors not entitled to reasonable care, does not come from case law; the reporters made it up, hoping to limit the number of precluded plaintiffs. In short, for the last half-century US jurisdictions have divided on the question of status categories for land visitors; this law has become more fragmented.

It thus becomes almost impossible to escape a pedagogy of rivalry when covering this topic. The first American common law decision to merge the status categories, *Rowland v Christian*,¹⁸ opened strife when it claimed that progressive politics had made the old common law classifications obsolete. *Rowland* as received around the country might refute a linear narrative of anti-feudalist progress: a few state supreme courts adopted it for their own jurisdictions in the 1970s; none did so during the 1980s. A few more hopped aboard in the 1990s, but during that same period a thoughtful decision from a state supreme court opted for retention rather than merger.¹⁹ American scholarly commentary on the subject is divided. ‘What’s the right rule?’ pervades all materials that consider the question.

Thesis/antithesis/synthesis: auditors’ liability

Whereas the status-category fight remains unresolved, other rivalries among jurisdictions have settled on a compromise between two extremes. The best illustration for this point comes from US case law on the liability of accountants and other auditors who negligently report on the well-being of a

17 American Law Institute, *Restatement of the Law (Third): Torts: Liability for Physical and Emotional Harm*, Tent Draft No 6, March 2009, § 52.

18 69 Cal 2d 108; 443 P 2d 561 (Cal, 1968). Outside the common law, before *Rowland* the US Supreme Court had applied a unitary standard for admiralty cases: *Kermarec v Compagnie Generale Transatlantique* 358 US 625; 79 S Ct 406 (1959).

19 *Gladon v Greater Cleveland Regional Transit Authority* 662 NE 2d 287; 662 NE 2d 287 (Ohio, 1996).

business, thereby injuring investors who, though not in privity of contract with the auditors, relied on the accuracy of their examinations and lost money. At the defendant-favouring end of this spectrum, with doctrine similar to that of Britain,²⁰ stands New York state, home to the nation's largest concentration of corporate accountants, attorneys, brokers and investment bankers. New York courts find a duty of care to non-privity parties only when the defendants knew that their financial reports had a particular purpose, recognised that the reports were to be used by the plaintiff and had manifested their understanding of this reliance.²¹ Across the river in New Jersey the state Supreme Court staked out the opposite end of the spectrum, holding that accountants would be liable if financial loss to the plaintiffs was (merely) foreseeable.²² Now that New Jersey's state legislature has overruled this decision,²³ the current leader of the antithesis jurisdictions is Wisconsin, whose Supreme Court held in 1983 that a negligent auditor must be 'fully liable for all foreseeable consequences of his act'.²⁴

A middle position, recommended in *Restatement (Second) of Torts*, has proved the most popular among American jurisdictions: an accountant or auditor is liable to the 'limited group of persons' whom this supplier knows will gain access to the information and for whose benefit the supplier provides the information.²⁵ The central distinction between the Restatement rule and the 'near privity' rule of New York is New York's demand that the plaintiff show a 'nexus or linking conduct between the accountant and the third party'.²⁶ The *Restatement* differs from the foreseeability rule pioneered in New Jersey by insisting that the plaintiff show membership in 'a limited group of persons'.

This centrist compromise invites an instructor to ask whether the truth really does lie in the middle between two extremes, as students may tend to believe. Even if it does, one may continue, what is extreme about either the New York or the New Jersey/Wisconsin position? Clinging to a privity approach that its high court had famously tossed out in 1916 for personal injury claims,²⁷ New York puts privity reasoning to an arguably good use: whereas courts should not deploy protective contract doctrines to encourage behaviour that endangers human bodies, for accountants' liability the duty of care originates in a contract. The New York approach puts plaintiffs in the category of third-party beneficiary, a reasonable status for contract-based claims. Treating duty as coterminous with foreseeability, the other 'extreme', has familiar counterparts in other areas of negligence liability.

20 *Caparo Industries Plc v Dickman* [1990] 2 AC 605 (HL); [1990] 1 All ER 568.

21 *Credit Alliance Corp v Arthur Andersen & Co* 65 NY 2d 536; 493 NYS 2d 435 (1985).

22 *H Rosenblum Inc v Adler* 93 NJ 324; 461 A 2d 138 (1993).

23 NJS 2A:53A-25.

24 *Citizens State Bank v Timm, Schmidt & Co* 113 Wis 2d 376 at 386; 335 NW 2d 361 at 366 (1983).

25 American Law Institute, *Restatement (Second) of Torts*, § 552(a) (1977).

26 J M Feinman, *Professional Liability to Third Parties*, ABA Torts and Insurance Practice Section, 2000, p 127.

27 *MacPherson v Buick Motor Co* 217 NY 382, 111 NE 1050 (1916).

Including foreign comparative law: punitive damages

Whereas land-visitor categories demonstrate one type of the majority-minority rivalry in American tort law — the roaring hordes, you might say, with all three positions embraced by a sizeable fraction of jurisdictions — the question of punitive or exemplary damages presents a different type of rivalry that makes separate pedagogical points.²⁸ Five US states either prohibit or severely limit the awarding of punitive damages. In 90% of the jurisdictions, then, injured plaintiffs can collect these extra-compensatory moneys. Teaching the subject and pressed for time, an instructor might reasonably choose to ignore what the five outlier states provide.

These outlier states, however, bring to the study of domestic tort law a soupcon of debate about punitive damages not found in American decisional law, but important outside the United States. Controversies about punitive damages that US courts consider are framed in terms of defendants' rights not to suffer a deprivation of property without due process. Corporate wrongdoers complain that punitive awards are too high, or lack an appropriate relationship to compensatory awards, or impose punishment for acts not subject to the court's jurisdiction. This case law, which has burgeoned in the US Supreme Court since 1989, has remained mono-national: it cannot be understood without reference to two Americanisms — (1) civil jury trials and (2) the Fifth and Fourteenth Amendments to the US Constitution — which declare the due process right in question.

States that refuse to accept punitive damages altogether, however, join a discussion intelligible around the world, because the legal systems of many other affluent nations lack any provision for this payment to plaintiffs. Some have refused to enforce American judgments because of the inclusion of this redress.²⁹ Including this eccentric-for-the-US choice in one's coverage of punitive damages demonstrates how a minority rule inside the country enjoys dominance outside. Students engaged by this debate can explore punitive damages as a rivalry in which the American position, though gaining influence in other countries,³⁰ lacks the ascendancy that the domestic focus of American torts casebooks takes for granted.

Regionalism: isolating one's home jurisdiction

Minority-majority divisions among tort rules give instructors a chance to present their own jurisdiction as at most a dissenter, if not a loser, within a national rivalry. Having taught torts in four US jurisdictions (New York, Michigan, Illinois and Georgia), I have found it salubrious to tell students about the deviant stance that 'our' state takes, or once took, on a point of tort law. The slight discomfiture they feel makes a pedagogical base. 'Other states disagree with us. Are we wrong? Did we rightly lose a battle of ideas, a rivalry? Or are we a lonely prophet leading a reform? Who's this "we" anyway?'

²⁸ In American discourse these damages are 'punitive'; I will use that word here, out of habit.

²⁹ J Y Gotanda, 'Charting Developments Concerning Punitive Damages: Is the Tide Changing?' (2007) 45 *Colum J Transnat'l Law* 507 at 514.

³⁰ G Cavalier and J-S Quéguinier, 'Punitive Damages and French Public Policy', 2007, pp 4–5, at <http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1174363> (accessed 20 April 2010).

Quirky tort rules that prevail in New York, emerging in well-spaced intervals, integrate my semester teaching New York torts; they also inform the question of ‘we’. ‘There we go again’, the New York teacher can say, ‘once again we veer from the rest of the nation’. Contrary to the rule in most states, in New York a disappointed legatee may not bring a negligence action against a preparer (ie, an attorney) whose carelessness with respect to formation or attestation caused the will to be invalid and thus made the legatee forfeit a bequest that the testator intended to give. New York once followed its unique ‘first leap’ proximate cause rule when negligence caused a fire to spread: the defendant would be liable only to the owners of the first structure damaged by the fire and not other buildings down the line that were destroyed. New York has the nation’s most defendant-friendly rules on liability to bystanders for psychological harm and, as we have seen, on the duty owed to non-clients by accountants or auditors who report on a business investment prospect.

Intra-US comparativism suggests that a state with these rules on its books has looked out for the welfare of discrete sectors. White-collar professionals who give advice to wealthy clients enjoy favourable common law precepts that limit their duty of care. The ‘first fire’ rule is a boon to railroads, which back when they were all private companies tended to house their headquarters in New York. One popular American torts text speaks wryly of *Atchison, T & SF R Co v Stanford*,³¹ an 1874 decision from the Kansas Supreme Court holding a railroad liable for damage that the plaintiff experienced nearly 4 miles from the location of a fire occasioned by the defendant’s negligence: ‘Kansas had, at the time of the decision, many miles of uninsured grain, and its community attitude toward railroads is not necessarily the same as that of New York.’³² An entrepôt jurisdiction, solicitous of its resident businesses and the managerial-professional classes that have long flocked to live there, has used duty doctrines repeatedly to insulate careless actors from the consequences of their inattention.³³

Institutional rivals

Going beyond disagreements over doctrine among the US jurisdictions, an American pedagogy of rivalry necessarily reports on fights over institutional control. Courts and legislatures constitute the chief rivals here, although an instructor can invite other players — perhaps administrative agencies and the market — into the torts tournament. Examples of doctrines on which both high courts and state legislatures have declared rules can animate instruction. For students who enjoyed the civics or politics studies of their past, these references to institutional rivalry make the study of torts welcoming. Students who had been bored or alienated by civics and politics receive a fresh take on

31 12 Kan 354 (1874).

32 V E Schwartz, K Kelly and D F Partlett, *Prosser, Wade & Schwartz’s Torts*, 10th ed, Foundation Press, NY, 2000, p 292.

33 Eg, rejecting a claim for bodily injury that ensued after a utility’s ‘gross negligence’ caused a catastrophic power failure: *Strauss v Belle Realty Co* 65 NY 2d 399; 482 NE 2d 34 (1985); holding that a public accounting firm not in privity of contract with the plaintiff owed no duty of care in the preparation of its financial statements: *Ultramares Corp v Touche, Niven & Co* 255 NY 170; 174 NE 441 (1931) (Cardozo J); and denying recovery to a ‘DES grandchild,’ *Enright v Eli Lilly & Co* 77 NY 2d 377; 568 NYS 2d 550 (1991).

this old material. Legislative supremacy *vel non*, for instance, might not have mattered to some of them as theory, but within torts a winning argument about judicial competence or incompetence could mean victory for a client. It could also move money from one cohort to another.

Examples abound. As Professor McDonald documents in this volume, the topic of contributory negligence and apportionment presents legislatures and courts as rivals to each other. Instructors cannot know for sure whether a statute or the common law is prior to the other (at the analytical or pedagogical plane, I mean to say; the common law is historically anterior); the rivalry runs that deep. My own longstanding interest in gender issues and products liability leads me to pick illustrations from those categories to depict power struggles between legislatures and courts.

In the early and middle twentieth century, most American states enacted statutes abolishing common law causes of action for disappointments related to courtship and marriage. A smaller number of these abolitions occurred at the hands of judges. Because the text that I am using these days gives early placement to an Ohio decision holding that a man owed a duty of care to the plaintiff, the husband of his lover who brought an action complaining about having been infected with a sexually transmitted disease,³⁴ a discussion about judicial meddling into marriages emerges. Convenient for a rivalry-pedagogy, this case includes an unsuccessful argument from the defendant that the statutory abolition in Ohio of what the American literature sometimes calls ‘amatory torts’ or ‘heart-balm claims’ precluded the plaintiff’s claim.

From the case, students learn about this type of claim as both American legal history and a locus of contemporary dispute. A brief note in the text tells them that courts have recognised seduction, alienation of affections, breach of promise of marriage and criminal conversation as tortious conduct. All but the last of these causes of action are alive today in a small number of US states. My students tend to associate the abolition-legislation with progress and the common law causes of action with a dim-witted patriarchy of yore, in their opinion now superseded. (In response, sometimes I accept their conclusion; sometimes I push back.) For teaching purposes, the value of amatory torts to describe the rivalry between statute-writers and the authors of decisional law is that, early on, it gives a memorable illustration to which I can return when other collisions between these two forces turn up in our cases.

Courts and legislatures have also tussled over limitation periods. American legislatures fix the periods of time to file based on the category of claim. Tort statutes tend to be short compared to those governing contract and property disputes. Judicial input comes in the form of decisional law on when the statutes start to run and which conditions permit tolling (suspension); although those questions are within the purview of the state legislatures, courts may speak to them too.

Disputes over tolling statutes of limitation give a torts instructor several opportunities to broach the subject of gender. American courts and legislatures have disagreed over whether adults alleging childhood sexual abuse ought to receive additional time to accommodate the possibility of repression of their memories. Having decided that it would be better not to remind students

³⁴ *Mussivand v David* 45 Ohio St 3d 314; 544 NE 2d 265 (1989).

inadvertently of their own past traumas, nor open an ill-informed debate over the reliability of recovered memory,³⁵ I omit classroom discussion of this group of claims, but do mention it briefly when tolling comes up. Other illustrations of gendered statutes of limitation that I have been able to consider are the New York ‘revival statute’ of 1986, in which plaintiffs alleging injury from the hormone DES were given a year in which to file claims that had otherwise been time-barred, and the variety of extensions and other leniencies with respect to timing that American courts gave to asbestos plaintiffs.³⁶

Tort reform

If minority-against-majority rules establish the American states as one another’s rivals, and comparisons of statutory and common law developments pit legislatures against courts, then studies of tort reform in the United States set up a third axis of rivalry: institutional defendants against individual plaintiffs — a belief that tort liability has deleterious social effects versus an older understanding of tort law as furnishing the redress of wrongs. The pedagogy of rivalry could go deeper — for example, one might explore the conflicts between players on the same side, such as insurers versus medical providers — but because I regard American tort reform as a well-coordinated and centralised endeavour, in my torts classes when this rivalry comes up, I teach it as a binary: institutional defendants on one side and individuals who bring claims for physical injury, along with their lawyers, on the other. Even with this admittedly crude divide in place, the pedagogy has room for nuance.

Over a standard 14-week semester, tort reforms sprinkle the syllabus at well-spaced intervals. My teaching from the Goldberg, Sebok and Zipursky text,³⁷ which puts duty at the beginning, allows me to tell students about the act of Congress that in 2005 immunised manufacturers and dealers from negligence claims following the criminal misuse of handguns.³⁸ Tort reformers thus did away with most of the duty of care that an industry could have been held to have vis-à-vis gunshot victims. To cover the intersection of tort reform and the breach element, medical malpractice offers several useful examples; for example, one state statute provides that a physician’s compliance with practice guidelines is conclusive evidence that the physician acted with reasonable care.³⁹ Some states require medical malpractice plaintiffs to present their claim to an expert panel before adjudication (which, in this country, enlists a jury).⁴⁰

35 The debate would be peripheral too, because a litigant might belatedly remember an assault that took place in her childhood without the intervention of any recovered-memory therapies.

36 I discuss these and other categories of aggregate litigation where plaintiffs were dominantly either male or female in A Bernstein, ‘Fellow-Feeling and Gender in the Law of Personal Injury’ (2009) 31 *J L & Pol’y* 295.

37 J C Goldberg, A J Sebok and B C Zipursky, *Tort Law: Responsibilities and Redress*, 2nd ed, Wolters Kluwer Law & Business/Aspen Publishers, Boston, 2008.

38 S G Stolberg, ‘Congress Passes New Shield for Gun Industry’, *NY Times*, 21 October 2005.

39 24 Me Rev Stats Ann § 2795. The Maine provision is one-sided in that non-compliance with these guidelines does not establish a failure of due care.

40 The provisions vary: in some states the expert conclusion is admissible at trial on the question of liability. As of 2004, 20 states mandated the use of such panels while another 11,

The law of damages contains numerous examples of reformers' success in changing American tort law. More than half the states have enacted statutory caps on the amount of money plaintiffs can recover for a particular personal injury claim. A few states cap the recoverable amount for all tort claims.⁴¹ Modifications to the common law collateral source rule, also on the books in a majority of states, have had the effect of reducing damages because the old collateral source rule had kept from juries the information that plaintiffs had already received part of the sums they sought. Because most lawyers who represent plaintiffs in tort cases receive their fee as a fraction of what they recover for their clients — civil legal assistance of any kind is scarce in the United States and almost totally unavailable for the filing of personal injury claims — caps on damages have the effect not only of reducing what plaintiffs collect, but discouraging litigation altogether. If a claim is costly to prosecute and not likely to yield enough damages or settlement income to satisfy a personal injury lawyer, then the injured person will have trouble finding counsel.

A selection of case law from the California Supreme Court, decided from the 1960s to the mid-1980s, gives students a mirror image of this tort reform undertaking on behalf of defendants. In these bygone decades, California expanded liability in the name of progress. *Greenman v Yuba Power Products Inc* (which I do not teach in my torts class, lacking time) set forth in 1963 to free products liability plaintiffs from the straits of negligence and warranty law;⁴² this decision buttressed the American Law Institute when it decided 2 years later to provide for strict products liability, in *Restatement (Second) of Torts § 402A*. *Rowland v Christian*,⁴³ full of rhetoric against deferring too much to the laird when visitors suffered physical injury, continued this 'tort reform' of attacking categories that protected defendants. *Tarasoff v Regents of the University of California*⁴⁴ created a duty of care that psychotherapists owed to foreseeable victims of violence at the hands of their patients; *J'Aire Corp v Gregory*⁴⁵ similarly united a defendant with a remote plaintiff when the court held that a renovating contractor could be liable to a restaurant for lost revenue after the contractor failed to complete its work on time.

Consistent with these plaintiff-favouring reassessments of duty, the California Supreme Court during this period also took a capacious view of proximate cause. Tortious conduct by third parties did not stop the court from accepting the liability of a telephone company liable for negligent siting of its phone booth too close to the highway, within reach of a drunk driver.⁴⁶ The court also upheld a judgment against a radio station after a jury concluded that the 'catch me if you can announcement' by its disc jockey, followed by updates over the airwaves about where this man had been seen, had led to a

including my own New York, had tried this tort reform measure and abandoned it: C T Struve, 'Improving the Medical Malpractice Litigation Process' (2004) 23 *Health Affairs* 33 at 35 n 8.

41 D B Dobbs, *The Law of Torts*, West Group, St Paul, Minn, 2000, pp 1071–2.

42 59 Cal 2d 57; 377 P 2d 897 (Cal, 1963).

43 69 Cal 2d 108; 443 P 2d 561 (Cal, 1968).

44 17 Cal 3d 425; 551 P 2d 334 (Cal, 1976).

45 24 Cal 3d 799; 598 P 2d 60 (Cal, 1979).

46 *Bigbee v Pacific Tel & Tel Co* 34 Cal 3d 49; 665 P 2d 947 (Cal, 1983).

fatal automobile accident.⁴⁷ In 1989 the court had had enough: ‘there are clear judicial days on which a court can foresee forever’,⁴⁸ it wrote in a decision narrowing liability to bystanders for negligent infliction of emotional distress, and those days had ended.⁴⁹

Any discussion of tort reform — which can address the defence-protecting measures now associated with the term, the old California expansions of duty and proximate cause, or something else (eg, the installation and rejection of immunities) — presents a struggle between (too much) liability as a problem and (more) liability as a solution. The binary nature of the rivalry can be embraced or resisted. An instructor might, on the one hand, side most of the time with the plaintiff cohort, yet think one or more of the expansionist California decisions reached the wrong result or used the wrong reasoning. Believing that the problem is too much liability, on the other hand, opens rather than resolves the question of which tort reform measures to favour and which to mistrust.

Variations of evidence and procedure

This final illustration of rivalry as a torts teaching device exploits the relations between other bodies of law, especially evidence and procedure, and the common law of torts. Like other rivalries within tort, this one has several manifestations. The most obvious of them are the different rules of procedure and evidence that jurisdictions have adopted; for example, in a majority of US states, violation of a pertinent statute constitutes negligence per se, whereas in a minority this violation is merely evidence of negligence. Some states have adopted a heeding presumption for claims of failure to warn: they presume that if the defendant had supplied the missing warning, then the plaintiff would have heeded it, and so this claimed breach of duty does not fail on the element of causation, even though actual cause here depends on conjecture. The rule that a medical malpractice plaintiff must offer at least one physician-witness to testify that the defendant’s behaviour was not consistent with standards of care, dominant among the US jurisdictions, is more of a procedural or evidentiary rule than a substantive standard; one could imagine relying on a learned treatise rather than a live witness, but most courts would not permit a plaintiff to do so.

Spoliation adds another dimension of rivalry for torts instructors interested in evidence and procedure. In a spoliation claim the plaintiff depicts the defendant as, in effect, a bailee. The defendant held personal property that was needed for the plaintiff to prosecute a personal injury claim; for example, a manufactured product that had injured him. The defendant’s carelessness or intentional wrongdoing caused the property to be lost or destroyed, thereby spoiling the claim and causing economic loss to the plaintiff.⁵⁰

Here an evidentiary approach has proved more attractive to courts than a doctrinal fix; and the benefits and detriments of each solution can inform a

47 *Weirum v RKO General, Inc* 15 Cal 3d 40; 539 P 2d 36 (Cal, 1975).

48 *Thing v La Chusa* 48 Cal 3d 644 at 668; 771 P 2d 814 at 830 (Cal, 1989).

49 See D P Owen, ‘Duty Rules’ (2001) 54 *Vand L Rev* 767 at 776.

50 I elaborate in A Bernstein, ‘Keep It Simple: An Explanation of the Rule of No Recovery for Pure Economic Loss’ (2006) 48 *Ariz L Rev* 773.

larger consideration of procedure versus substance. When the destroyer of the property in question was a party to litigation — for example, a product manufacturer or seller that had had custody of the injuring object — courts have bestowed on plaintiffs a presumption or permissible inference that this evidence was ‘favorable to her and unfavorable to the evidence-destroyer’.⁵¹ Because the plaintiff regards the chattel not as a thing in itself but the means to proving liability, the inference or presumption measures her loss roughly as she herself would measure it.

The spoliation problem grows more difficult when the quasi-bailee is not a party, because the evidentiary solution disappears. Intentional loss or destruction of the property would probably fulfil the elements of conversion, but damages rules will not recognise the full evidentiary value of the lost chattel; careless loss or destruction begs the question of whether the defendant owed the plaintiff any duty of care.⁵² Although spoliation as a tort has occasionally succeeded for plaintiffs, most US courts decline to recognise the cause of action. Courts that do recognise it leave plaintiffs with daunting challenges relating to proximate cause and proof. This example of an injury that an evidentiary rule can repair more effectively than an entire new cause of action (if only for a small fraction of cases, the ones where the destroyer is a party) conveys to students the potency of ground rules.

Conclusion

Cinema aficionados may remember William Wyler, the acclaimed American film director who worked in the middle of the twentieth century, as a notorious taskmaster. Wyler would do take after take and never explain what he wanted. Laurence Olivier once reminisced about Wyler’s relentless demands:

‘For God’s sake, I did it standing up. I did it sitting down. I did it fast. I did it slow. I did it with a smile. I did it with a smirk. I did it scratching my ear. I did it with my back to the camera. How do you want me to do it?’

Wyler said, ‘I want it better.’⁵³

Students and teachers of torts know the task that Wyler undertook. Torts strives for ‘better’ by jettisoning and revising its old stances. Fixative rules like legislative supremacy notwithstanding, its results are always only provisional.

Torts teachers can work with this rivalry by focusing on either (temporary) doctrinal outcomes — analogous to Wyler’s final cuts — or the destabilising struggle. Referring to divergence in US law as examples, I have spoken of ‘rivalry as pedagogy’ in a prescriptive sense. A torts teacher seeking enhancement might do this, can try that. But rivalry also describes. Two major categories of classroom techniques used to teach common law material, the lecture and the discussion or tutorial, always invoke disagreement and struggle. Rivalry is as integral to common law teaching as retakes are to the work of William Wyler, or as conflict is to fiction.

⁵¹ Dobbs, above n 41, p 1280.

⁵² Ibid, pp 1280–1.

⁵³ J Herman, *A Talent for Trouble: The Life of Hollywood’s Most Acclaimed Director, William Wyler*, G P Putnam’s Sons, New York, 1996, p 196.

One who lectures on the contemporary law of torts might present this material as historical. An example of history in torts pedagogy is the jagged path in accident law from strict liability to fault. Alternatively, this lecturer might teach torts hewing to forensics, where a particular doctrinal or statutory stance imposes recurrent obligations on judges and will probably favour plaintiffs or defendants. A lecturer could seek to align tort doctrine with jurisprudential ends or structures that are external to the rules in question. Other possibilities are available to anyone seeking to integrate decisional law, with or without statutes, into the narrative of a lecture. The possibility that is not available — at least to the lecturer who wants to engage an audience or even keep it awake — is a recitation devoid of rivalry. No torts teacher would work that way, at least not by design. Similarly, the tutorial or discussion mode of learning and teaching has unifiers like those of a lecture — chronology or history, jurisprudence, forensics and the like — but here students contribute their own perspectives and questions about the rivalries that suffuse this material.

Every major provision of tort law had to vanquish challengers. And uneasy lies its head: a more compelling alternative can supersede it at any time. In focusing on two theatres of this rivalry — statutes versus judicial decisions and transnational comparative law — the Torts Academic Workshop has found the centre of our pedagogy. Whether we torts teachers choose to note them or not, rivalries breathe life into the doctrine we convey.⁵⁴

⁵⁴ For example, when Professor McDonald reports her classroom uses of the Law Reform (Contributory Negligence) and Tortfeasors Contribution Act 1947, which provides for apportionment in the state of Western Australia, she notes that this statute demands efforts of interpretation, which in turn depend on, *inter alia*, the common law. After working through some interpretive basics, Professor McDonald (above n 6, text after n 23) asks, ‘What was the problem that this Act was intended to remedy?’ In other words, which rival did it defeat? ‘Contributory negligence [was] a complete defence at common law. What justification could there be for such a rule?’ The vanquished rival gains its hearing.