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### Teaching Real Torts: Using Barry Werth's Damages in the Law School Classroom

Tom Baker

*University of Pennsylvania Carey Law School*

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# TEACHING REAL TORTS: USING BARRY WERTH'S *DAMAGES* IN THE LAW SCHOOL CLASSROOM

Tom Baker\*

My favorite insurance case does not have insurance in the caption, cannot be found in any reporter, has no written opinions, and was settled before trial. To the uninitiated, it's not an "insurance" case at all. Yet, thankfully, the case – *Sabia v. Norwalk Hospital* – sufficiently intrigued Barry Werth that he made it the subject of *Damages*.<sup>1</sup> one of the best books about torts and insurance since Larry Ross's *Settled Out of Court*.<sup>2</sup> *Sabia* is my favorite insurance case because it shows how completely tort law in action is tied up with insurance.

*Sabia v. Norwalk Hospital* is a medical malpractice case brought on behalf of Tony Sabia, who almost died shortly before he was born. Tony's twin brother Michael did die, and whatever caused Michael's death starved Tony's brain of oxygen long enough to cause profound damage. The defendants in the case are Mary Ellen Humes, the doctor who delivered Tony and Michael, and Norwalk Hospital, the hospital where Tony was born and that ran the maternity clinic that treated Tony's mother.

The outlines of the case are easily summarized. No one disputed that Tony suffered a terrible harm. What was in dispute, however, was almost every other aspect of a negligence case: standard of care, breach, causation, and damages. What was the standard of care that Dr. Humes was to have followed at the time of delivery and did she breach it? What was the standard of care the maternity clinic was to have followed in the months leading up to the birth, and did the clinic breach it? Even if there was negligence, did that negligence cause Tony's harm? And, what is the proper measure of that harm?

Once the case was fully developed, the claim against Dr. Humes turned on the legal significance of the fact that, because she did no fetal monitoring, she did not know that Tony's twin was dead until he was born. Once the case was fully developed, the claim against the hospital turned on the conduct of the nurses in the delivery room and, more importantly, on the fact that the maternity clinic had not done two pre-natal tests. Once the case was fully developed, the causation dispute turned on whether any of this made any difference to

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\* Connecticut Mutual Professor, University of Connecticut School of Law. Thank you to Michael Koskoff, Chris Bernard, April Haskell, Mary Ellen Humes, Bill Doyle and Barry Werth for taking my students (and me) behind the scenes of the *Sabia* litigation. Thank you to Marianne Sadowski for research assistance, and to Leslie Levin, Hugh Macgill, Francis Mootz, Jeremy Paul, and Jim Stark for helpful comment on an earlier draft of this article.

<sup>1</sup> BARRY WERTH, *DAMAGES* (1998).

<sup>2</sup> H. LAURENCE ROSS, *SETTLED OUT OF COURT: THE SOCIAL PROCESS OF INSURANCE CLAIMS ADJUSTMENTS* (Aldine Pub. 1970).

Tony's condition, and the damages dispute turned on how long Tony would live.

With all of these I emphasize the phrase, "once the case was fully developed." *Damages* wonderfully demonstrates that cases do not spring into life fully formed and easily summarized in a few paragraphs in an appellate opinion (or law professor's essay). Cases are born out of chaos, and it is trial lawyers who give them their shape. How they do that is determined, in important part, by insurance institutions.

I came to *Damages* in a roundabout way that the autobiographical nature of this Symposium allows me the luxury of reporting. In this essay I will (briefly) tell that story and then describe how I use the book in my torts class, before concluding with some observations on the jurisprudence of *Damages*. As I will argue, the benefits that *Damages* can bring to the law school classroom go well beyond my parochial interest in initiating torts students into the significance of insurance.

### I. THE ROAD TO *DAMAGES*

In my research, I use qualitative methods to explore tort law in action. This research grew out of my frustration with a highly stylized approach to tort law I first associated with law and economics scholarship but now associate equally with much of the scholarship in the corrective justice tradition. I suspected that tort law was more complicated on the ground and started interviewing personal injury lawyers to find out. This research led to a series of articles that taught me a great deal about the relationship between torts and insurance and that I hope have been helpful to others as well.<sup>3</sup>

Perhaps the main advantage of having looked at torts through practicing lawyers' eyes is a clearer view of tort law in action as a pragmatic search for money through an *institutional* landscape. That is certainly not all that tort law is, but it is an aspect that the leading theoretical approaches – law and economics, corrective justice, traditional doctrinal analysis, and critical legal studies – usually ignore.<sup>4</sup> The institutions this perspective highlights are liability insurance, other types of insurance (e.g., Medicare and workers compensation), and

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<sup>3</sup> See Tom Baker, *Blood Money, New Money and the Moral Economy of Tort Law in Action*, 35 LAW & SOC. REV. 275 (2001); Tom Baker, *Transforming Punishment Into Compensation: In the Shadow of Punitive Damages*, 1998 WIS. L. REV. 211; Tom Baker, *Reconsidering Insurance for Punitive Damages*, 1998 WIS. L. REV. 101; Tom Baker, *Liability Insurance Conflicts and Defense Lawyers: From Triangles to Tetrahedrons*, 4 CONN. INS. L.J. 101 (1997/1998). Cf. TOM BAKER, *Insurance and the Law*, in 11 INTERNATIONAL ENCYCLOPEDIA OF SOCIAL AND BEHAVIORAL SCIENCES, 7587 (2001) (summarizing the ways that insurance "regulates" tort law).

<sup>4</sup> The law and economics literature especially, and the corrective justice literature to a lesser extent as well, do address insurance. Indeed, the law and economics literature on insurance is extensive. See Tom Baker, *On the Genealogy of Moral Hazard*, 75 TEX. L. REV. 237 (1996) (reviewing law and economics literature on insurance). But the insurance that appears in this literature is theoretical – a featureless and frictionless risk spreading (and sometimes loss preventing) mechanism that operates directly on atomistic individuals (or organizations treated as atomistic individuals) without mediating institutions. This approach to insurance may be fine, even necessary, for economic analysis, but it is a very thin view for people seeking to understand the role of law in society.

the norms and practices of the personal injury bar. Above all, these institutions focus on money. Not because they are cold and heartless (though they may be), but because money – *damages* – is the main remedy tort law offers injured plaintiffs and, as a result, the fulcrum around which these institutions turn.<sup>5</sup>

Eventually, this research led to the obvious suggestion that I switch from teaching contracts to torts. In preparing to teach torts, I decided that if my research highlighted the importance of damages, my class would also. But when I realized that the leading torts casebooks put that topic well towards the back, my resolve faded. I wasn't about to go out of order the first time I taught the class, so I took the torts book most of my other colleagues were using and went more or less straight through until I ran out of time at the end of the semester. The experience was a good one and what I had learned from my research was helpful to me in teaching the class. Nevertheless, I was unhappy about not getting to damages, and resolved to start there next time, no matter what.

For much of the following summer, I avoided my torts problem. I wanted to teach the course in a very different order than the casebook, which I otherwise liked; but I knew from experience that students are unhappy about bouncing around in a book. To make matters worse, the topic I wanted to start with – damages – was buried deep inside the book.

Just when this procrastination was threatening to ruin the end of the summer, a new paperback – *Damages* – appeared in my box. Now *that* was a title that really spoke to me! One chapter led to another and, before long, I had decided this book might be the answer to my problem. To be sure, I asked my research assistant to take a look. When he told me that he read it straight through, wedged for twenty hours in the back seat of a car, I knew I had something.

Barry Werth's *Damages* turned out to be everything a torts teacher would want *A Civil Action*<sup>6</sup> to be. *A Civil Action* is a great story because it gives a compelling account of a unique lawyer's odyssey through the legal system. But in telling the lawyer's story, *A Civil Action* shorts almost everyone else's. In contrast, *Damages* offers a synoptic view of an ordinary medical malpractice case – special only because of the size of the damages and unique only because of the attention Barry Werth gives it. The very things that made *Damages* less commercially successful than *A Civil Action* make it more successful in the law school classroom. Detailed descriptions of substantive and procedural aspects of the case that might overwhelm a general reader provide helpful context for a law student struggling to understand how the law works in practice. While perhaps not as great a read as *A Civil Action*, *Damages* certainly shines in

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<sup>5</sup> No one needs persuading that insurance institutions are focused on money. Nor would most lay people need persuading that the personal injury bar is also focused on money. For research on the personal injury bar, see Herbert M. Kritzer, *The Wages of Risk: The Returns of Contingency Fee Legal Practice*, 47 DEPAUL L. REV. 267 (1998); Herbert M. Kritzer, *Contingent Fee – Lawyers and Their Clients: Settlement Expectations, Settlement Realities, and Issues of Control in the Lawyer-Client Relationship*, 23 LAW & SOC. INQUIRY. 795 (1998); HAZEL GENN, *HARD BARGAINING: OUT OF COURT SETTLEMENT IN PERSONAL INJURY ACTIONS* (1987); as well as my *Transforming* and *Blood Money* articles. *supra* note 3.

<sup>6</sup> JONATHAN HAAR, *A CIVIL ACTION* (Vintage Books 1996).

comparison to the casebooks, hornbooks, legal outlines, and other things law students are reading.<sup>7</sup>

## II. DAMAGES AS A TORTS TEACHING TOOL: BRINGING INSURANCE INTO TORTS

One of the things that makes *Damages* an effective teaching tool is that Barry Werth doesn't *tell* the reader that Tony's case is an insurance case. He *shows* it, and he does even that with an understatement that can lull a reader into thinking that insurance pops up from time to time only as a sideline, tangential to the main action. A torts student, especially, can be forgiven for thinking that way, because that's often the way tort law is taught.<sup>8</sup>

Tort lawyers almost never think that way, and the lawyers in *Damages* are no exception. Collecting liability insurance money is the *raison d'être* of Tony's lawyers.<sup>9</sup> Liability insurance companies hire and fire the defense lawyers, direct the defense, and decide whether and when to settle. Even first-party insurance shapes Tony's case. *Damages* shows that it's not for nothing that the name of the second largest section of the American Bar Association is the *Tort and Insurance Practice Section*.

Yet, the importance of insurance is easy for torts students to miss, even in *Damages*. From a pedagogical perspective, the hidden nature of insurance – hiding in plain view – is a plus, because it allows for a bit of useful magic in the torts classroom. Before revealing the magic trick, however, I'll first describe how I use *Damages* to teach tort doctrine.

### A. Using *Damages* to Teach Tort Doctrine

I begin teaching tort doctrine by introducing the “five fingers” of the negligence cause of action – duty, breach of the standard of care, causation, defenses, and damages – and I organize my (one semester) course around these doctrinal elements, plus strict liability. I start with damages, and then move on to breach, followed by defenses, causation, and duty, before concluding with

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<sup>7</sup> A VERY IMPORTANT NOTE FOR TEACHERS CONSIDERING USING THE BOOK: What *Damages* offers that a casebook cannot is factual depth. For this reason, *Damages* only works if students develop a detailed and comprehensive understanding of the facts. That requires encouragement. I send a letter out to the students before the semester begins, telling them about *Damages* and asking them to read it before they arrive on campus. I try to build enthusiasm about the book by talking informally to students about it during the orientation events. Typically, I find that they've already been talking about it among themselves. During the first day of class, I announce that, throughout the semester, I will expect everyone to have a detailed and comprehensive understanding of the facts of the *Sabia* case as they relate to the particular doctrinal issue we are studying, and that we will start with the doctrinal element “damages” the first day of the second week of class. That is usually enough to get them to prepare for the damages discussion. Asking detailed questions about the *Sabia* case during that and succeeding discussions, and using the case as a point of reference as often as possible, keeps them on track.

<sup>8</sup> For evidence that torts is not always taught that way, see David A. Fischer & Robert H. Jerry, II, *Teaching Torts Without Insurance: A Second-Best Solution*, 45 ST. LOUIS U. L.J. 857 (2001), which was very helpful to me in preparing this essay.

<sup>9</sup> Tony Sabia was ably represented in the case by the law firm of Koskoff, Koskoff and Bieder of Bridgeport, Connecticut.

strict liability and an all too brief look at alternative compensation systems.<sup>10</sup> *Damages* helps present almost all of these topics.

### 1. *Damages*

It may seem a small thing, but *Damages* starts helping me by legitimating the choice to begin the course by studying tort damages even though casebooks, hornbooks and study aids put that topic toward the back. *Damages* is the title of the book – one of the first books the students are required to read for law school. The potential size of Tony's damages explains the enormous effort devoted on all sides to the case. Moreover, the dispute over the size of the damages dominates the settlement dance featured in the last third of the story. *Damages* signals strongly that emphasizing damages is a sensible thing to do in a torts class.

I prefer to begin with damages for some of the same reasons that Werth chose that title for his book. Damages bring torts down to earth – everyone thinks they understand money – while at the same time raising profound questions. What are the purposes of tort law and how should those affect tort remedies? Why is money the dominant remedy? How can we possibly decide the right amount of money for a given harm? Should tort law calibrate the damages according to the moral wrongfulness of the defendant's conduct? Can tort law, in practice, avoid that calibration? Why do we compensate in a lump sum fashion? What are the practical consequences of that and other aspects of damages doctrine? How does the money-dominated reality of tort law in action affect which cases are brought and how they are handled? To what degree should we acknowledge the shaping power of money in the development of tort doctrine?

*Damages* helps frame the discussion of these and other open-ended, potentially vague and difficult to contain questions, so that students can explore in a realistic and concrete situation some of the moral and practical complexities of tort law. The factual depth of the book allows students to consider each of these questions from many different yet factually grounded perspectives. The following is just one example.

The casebook I use, by Franklin and Rabin,<sup>11</sup> contains a wonderful case that addresses the question of judicial control over damages for pain and suffering: *Seffert v. Los Angeles Transit Lines*.<sup>12</sup> In that case, a bus company (Los Angeles Transit Lines) asked the California Supreme Court to reverse a trial verdict in which the pain and suffering damages were several multiples of the medical expenses and lost wages.<sup>13</sup> In affirming the verdict, the *Seffert* majority takes a classic individual justice perspective in which the purpose of tort law

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<sup>10</sup> I cover defenses immediately after breach of the standard of care for two reasons. So many of the leading "breach" cases involve contributory negligence, and I am persuaded that most of the "defenses" cases are better understood in contemporary tort doctrine as either "no breach" or "comparative fault" cases. I cover duty after causation because my students understand *Palsgraf* better that way and also because I have always found duty the most difficult aspect of tort law.

<sup>11</sup> MARK A. FRANKLIN & ROBERT L. RABIN, TORT LAW AND ALTERNATIVES (David L. Shapiro et al. eds., Foundation Press, 5th ed. 1992).

<sup>12</sup> 364 P.2d 337 (Cal. 1961).

<sup>13</sup> *Id.* at 340-41.

is righting individual wrongs, and the proper measure of damages turns on the subjective experience of the person who was wronged. In this view, tort law is about the obligations a particular defendant owes a particular plaintiff, and the goal of tort damages is to restore the moral balance between these two. Because the trier of fact is in a much better position to evaluate unique, individual situations, appellate judges should not second guess damages decisions.

Justice Traynor, in dissent, presents an alternative, actuarial perspective in which, consistent with his famous concurrence in *Escola v. Coca Cola Bottling Co. of Fresno*,<sup>14</sup> the purpose of tort law is distributing the costs of the misfortunes that are the inevitable consequence of modern life. Tort law is about establishing social norms, and the goal of tort damages is to set a price for violating those norms – a price that satisfies the reasonable needs of injured victims at minimal administrative and other expense. Traynor wants appellate judges to exercise greater control over pain and suffering damages, because he believes juries (and perhaps even trial judges) are too easily affected by the particular needs of the particular plaintiff.

The problem with discussing the conflict between these “individualist” and “actuarial” conceptions of tort law in the context of the *Seffert* case is that we can’t possibly know enough about the parties to provide more than a caricature of their particular situations, and Traynor does not provide a justification for his view that the damages are too high beyond what amounts to a conclusory “I know it when I see it.” *Damages* provides a much richer setting in which to apply the philosophical positions underlying the two *Seffert* opinions and to demonstrate that these positions are relevant, not only to the question of judicial control over jury awards, but also to the decisions of juries, themselves.

The main damages question in the *Sabia* case is “How long will Tony live?” The dispute between the plaintiffs and the defense over the answer to this question turns out to almost precisely mirror the dispute between Traynor and the *Seffert* majority. The defense wants to treat Tony from Traynor’s perspective: as a statistic, a “bad baby” with a predictably short lifespan determined on the basis of actuarial experience. The *Sabia* defense provides a better context than *Seffert* for understanding this actuarial perspective, however, because there is expert testimony (not simply Traynor’s intuition) anchoring it. For their part, Tony’s lawyers echo the *Seffert* majority: treating Tony as a unique individual, trapped inside an enormous cognitive, emotional, and physical disability. If Tony’s lawyers succeed, they believe (and the defense fears) that the jury will identify with Tony, discount the statistics, and base their damages on the lifespan that Tony’s family wants him to have, rather than on what an actuary would predict. Again, *Sabia* provides a better context than *Seffert* because we come to believe that we really know Tony and his family.

The factual depth of *Damages* allows students to see and understand the very practical differences that these theoretical positions make, and it helps them see the narrative power of the individualist position. I drive this final point home by showing the class excerpts from an understated “day in the life”

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<sup>14</sup> 150 P.2d 436 (Cal. 1944).

video from the *Sabia* litigation.<sup>15</sup> Even students who strongly advocated the Traynor position immediately shift (even if momentarily) to the individualist perspective. This provides the perfect opportunity to discuss, if we have not already done so, the “problem” (from a utilitarian or efficiency perspective) of allowing juries to decide that everyone will live longer than expected. On a good day, this will lead to (or follow from) a discussion of the possible compensation, deterrence, and retribution goals of tort damages, a discussion that will also be anchored in the factual depth of the *Sabia* case. My goal, which *Damages* helps me to accomplish more often than I would otherwise, is to connect tort theory to practice, so that even the most practically-minded students see how tort theory explains some of the dynamics of personal injury litigation.<sup>16</sup>

## 2. *Breach of the Standard of Care*

*Damages* helps present the “breach” element of negligence by showing how standard of care is developed in a medical malpractice case. As *Damages* demonstrates, standard of care is a legal concept, developed by and for courts for the purpose of assessing blame. Courts and their purposes operate in a very different social universe than doctors and hospitals, and *Damages* nicely illustrates how awkwardly the two meet. In a closed door, clubby setting, the hospital peer review committee decides that Dr. Humes did nothing wrong.<sup>17</sup> Yet, Dr. Humes’ lawyers can’t find a doctor willing to take that position in court. And one of Tony’s most important experts is convinced that Dr. Humes did the best thing she could with a bad situation. The right thing to do – the standard of care – is highly situational, difficult to determine, and at times subject to equally persuasive but mutually exclusive opinions.

Students don’t need *Damages* to be convinced that determining the standard of care requires a detailed understanding of facts and, therefore, that appellate courts should tread lightly. All torts casebooks do a good job with that. Where *Damages* improves on the casebooks is in going behind this classic appellate issue to see how a negligence case is put together at the trial level. How do you establish a standard of care? What kinds of evidence are relevant? Where do experts come from? How do lawyers work with them? How do experts develop their opinions?

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<sup>15</sup> Thank you to Chris Bernard for obtaining permission from Tony’s family for me to use the video. Although the video is helpful, it is not necessary. I understand that faculty at the University of Missouri have received a grant to prepare teaching materials using the *Sabia* case. Perhaps they will be able to make the video available to those who want it. For information, please contact: James Levin, Assistant Director, or Len Riskin, Director of Center for the Study of Dispute Resolution.

<sup>16</sup> Another aspect of the *Sabia* case that can raise some of the same issues is the decision by Tony’s lawyers not to bring a case on behalf of his dead twin brother (because the relatively small amount of additional damages did not, in their view, justify the complications the claim would create on the liability side).

<sup>17</sup> For Dr. Maryellen Humes, a woman in what she perceived as a man’s world, “clubby” was not a comfortable thing. The role of women and other outsiders in law and medicine – including the Jewish and Irish lawyers disproportionately represented in Connecticut’s personal injury bar – is an intriguing theme of the book.



*Damages* shows that plaintiffs' lawyers don't first determine the standard of care and then examine whether the doctor breached it. They first figure out what the doctor did and then try to see if they can make a case that what she did breached a standard of care. The defense is no less disinterested. They also start with what the doctor did and work backward, simply toward a different goal. As *Damages* shows, no one involved in the litigation cares anything about standard of care in the abstract.<sup>18</sup>

Standing up in front of a class and *telling* students things like this is one thing. Having them *see* how tort law works in action is quite another. Exposing students to the real world application of tort doctrine can lead them to critically examine what they are learning in a way that they might otherwise resist. For example, if the discussion starts going in a very pro-deterrence direction, I ask whether, based on what they have seen in *Damages*, they think tort litigation is a method of truth finding that is well suited to providing accurate deterrence signals to doctors and hospitals? Conversely, if deterrence seems a difficult and unrealistic goal, I ask why do the lawyers' appeals to making the clinic safer for the next patient seem so compelling? What might we gain from acting as if tort law deterred harm? These and other open-ended, impossibly vague, and hard to focus questions can be anchored to the factual depth of the *Sabia* case. Indeed, almost any student observation or comment can usefully be brought to ground by asking the student to tie it to the situation in *Sabia*.

### 3. Causation

Notwithstanding the title of the book, causation is the central issue in *Sabia*. Much of the action in the middle part of the book comes from Tony's lawyers' continuing, sometimes desperate efforts to find experts who can connect the defendants' mistakes to Tony's harm. By the time we get to causation, the students can recite by heart the outlines of Tony's negligence claims.<sup>19</sup> Yet, as *Damages* dramatically demonstrates, negligence all by itself nets a plaintiff nothing, even assuming there is a defendant able to pay. For Tony and his lawyers, the multi-million dollar question is "did this supposed negligence *cause* the harm to Tony?"

*Damages* makes causation come alive on two levels. At a simple narrative level, *Damages* shows students the importance of causation, the analytical and practical difference between causation and breach of the standard of care,

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<sup>18</sup> An exception might be auto cases in which insurance adjusters and lawyers develop "rules of thumb" about what kinds of conduct constitute negligence. See Ross, *supra* note 2, at 1. These rules of thumb are "law" only to a certain degree, so if the damages are large enough, lawyers and liability insurance companies may be willing to litigate a case that would be clear under the rule of thumb.

<sup>19</sup> Dr. Humes didn't know Tony's twin Michael was dead until she delivered him; she easily could have known he was dead moments after she walked into the delivery room; and, if she had known, she would have immediately delivered Tony by C-section. The Norwalk Hospital clinic did not perform repeat ultrasounds or a non-stress test on Tony during the pregnancy (procedures that they now perform routinely in twin cases), and the hospital nurse in the delivery room inexplicably did not tell Dr. Humes the very important fact that she could only hear one heartbeat (healthy twins should have two heartbeats).

and the relationship between expert evidence and causation in fact.<sup>20</sup> It may be hard to believe, but Barry Werth makes the search for causation experts exciting, and the deposition of the plaintiffs' key causation expert is one of the high points of the book.

At a more sophisticated level, *Damages* shows the socially constructed nature of causation and, therefore, responsibility.<sup>21</sup> In an important sense, Tony's injuries had no cause until a chance meeting with another mother led Tony's mother to talk to a lawyer. Before that meeting, Tony's parents had no occasion to determine a cause: Tony's injuries existed and they had to deal with them. It had never occurred to them that Dr. Humes or the hospital "caused" Tony's condition.

That meeting started a chain of events that created a need to establish a cause for Tony's injuries and that provided an enormous incentive to make Dr. Humes, and then Norwalk Hospital, the cause. I think it is fair to say that tort and insurance institutions *made* Dr. Humes and Norwalk Hospital the cause of Tony's harm. Indeed, if we imagine a world in which getting money to take care of Tony required proving that the injuries were an "act of God" beyond anyone's control, we can easily imagine the lawyers proving that. At least in this case, causation follows from institutional procedures and incentives.<sup>22</sup> I will return to this topic in the section on insurance below.

#### 4. *Duty and Strict Liability*

*Damages* does not discuss either duty or strict liability. The defendants' duty to Tony is simply assumed, and strict liability is so clearly inapplicable to medical malpractice that the lawyers never even think about it. Yet, *Damages* helps present both of these doctrinal areas.

With duty, the *Sabia* case provides a context for discussing the "special relationship" between doctors and patients that is the source of the duty and, if there is time (and if the students are far enough along in contracts to make this

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<sup>20</sup> A note of caution: the author and some of the lawyers in the case sometimes use the term "proximate cause" where I think the proper term would be "cause in fact." When we get to proximate cause, this can be confusing to students. Once I clarify how we will use the term, and how our use differs from that in *Damages*, the confusion actually can be reassuring. Clearly, the lawyers in *Damages* are highly competent and successful, so confusing one legal term for another – something beginning law students do all the time – is not the end of the world. I tell the students that, although the lawyers use of the term is not consistent with the way we will use it, their use of the term emphasizes that causation in the law is not always the same thing as causation in other fields. For example, a scientist might need to be ninety-five percent sure before concluding that one thing causes another, while a jury just needs to be more sure than not. Thus, an expert's view that the failure to do the tests did not "cause" the harm to Tony would not be logically inconsistent with a jury's conclusion that it did (though it would be logically inconsistent with a contrary expert opinion).

<sup>21</sup> See generally Tom Baker, *Risk, Insurance and the Social Construction of Responsibility*, in TOM BAKER & JONATHAN SIMON, *EMBRACING RISK* (Tom Baker et al. eds., 2002) (exploring the role of insurance in the social construction of responsibility).

<sup>22</sup> For empirical research making this point with regard to causal relationship between work and injury, see Richard J. Butler et al., *HMOs, Moral Hazard and Cost Shifting in Workers Compensation*, 16 J. HEALTH ECON. 191-206 (1997) (documenting that doctors' decision to label an injury as "work-related" was affected by financial incentives; doctors who were paid more if the injury was work related were more likely to decide that the injury was work related than were doctors who were paid more if the injury was not work related).

a worthwhile exercise), the decision to redress breaches of that relationship through tort law rather than contract law. We easily could have this same discussion without reference to *Damages*, but by this time in the semester, the *Sabia* case has become a comfortable old friend who accompanies the class as we wind our way through the casebook in anything but a linear fashion.

*Damages* helps more concretely with strict liability. It provides a context for discussing the practical differences between “truly” strict liability, products liability, and negligence. After we cover the strict liability materials in the casebook, I ask the students to apply these approaches to the *Sabia* case. The students quickly see that with truly strict liability the only liability question in *Sabia* would have been causation. It takes a bit longer, but they also see that with a “state of the art” products liability approach, the case against the hospital (but not the doctor) would have been exactly the same as it was in the book. The standard of care issue against the hospital in *Sabia* turns entirely on whether tests which are now routine at Norwalk Hospital should have been routine when Tony was born; that is essentially the same question raised by a state of the art defense to a products liability suit.

*Damages* also provides a context for discussing whether malpractice liability *should* be based on negligence. Again, we could certainly have this discussion without *Damages*. But the book provides such a rich understanding of what the *Sabia* case meant to the people involved that it puts everyone in a better position to think about what it might mean to adopt strict liability, or some other approach, for medical injuries.

### B. Using Damages to Teach Torts Students about Insurance

Although insurance is very important to the development of the *Sabia* case, I try not to talk about the role of insurance in the case until we get to causation. This does not mean ignoring insurance in the course until then, simply using other materials. As my students can report, we discuss some aspect of insurance in almost every torts class, starting the first day.

We begin the semester with an extended look at *Hammontree v. Jenner*,<sup>23</sup> which serves as the vehicle for an overview of the course. *Hammontree* considers and then rejects the possibility of applying some form of strict liability to automobile accidents. Along with introducing tort law generally, the case provides a good opportunity to begin talking about the relationship between torts and insurance. The opinion implicitly treats torts and insurance as very different fields, and rejects the idea that the risk spreading possibilities of liability insurance should be imputed to tort law. This allows me to introduce the concept of tort law *as* insurance that I learned from reading George Priest and Richard Epstein.<sup>24</sup> For the moment, however, we confine the application of that idea to products liability. I am content to have students understand the *internal* risk spreading possibilities of a manufacturer (i.e. among the consum-

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<sup>23</sup> 20 Cal. App. 3d 528 (1971).

<sup>24</sup> Richard Epstein, *Products Liability as an Insurance Market*, 14 J. LEGAL STUD. 645 (1985); George Priest, *A Theory of the Consumer Product Warranty*, 90 YALE L.J. 1297 (1981).

ers of the product) and to distinguish between products liability and automobile accidents on that ground.

Insurance comes up again in the first doctrinal unit: damages. The discussion focuses again on the concept of tort law as a risk spreading mechanism – as a kind of insurance. The context now is the *Seffert v. Los Angeles Transit Lines* case discussed earlier, in which students easily see the bus company's liability being borne (and spread) by consumers as a part of the price of the bus ticket – an “insurance premium” of sorts. From this perspective, it is a small step to speculate that Traynor may have wanted to limit pain and suffering damages because he didn't think consumers should be made to pay for large amounts of that kind of “insurance.”

Following up on this speculation, we discuss what kinds of insurance are available on the market and what relevance, if any, the insurance market should have to the question of what damages should be available in tort. By now usually at least some students are prepared to discuss this and other consequences of thinking about tort law as insurance. But the *Sabia* case remains separate from this exercise. *Sabia* is a morality play involving real people, with unique identities and life stories. Some of those real people have to deal with insurance companies, but the *Sabia* case itself involves the application of tort law to a complex factual situation.<sup>25</sup>

The breach and defenses units are the only parts of the course in which I usually stay away from insurance almost entirely.<sup>26</sup> It's enough to use *Damages* to illustrate the conceptually backwards way in which standard of care is approached in litigation (i.e., as discussed above, lawyers begin with what happened and then try to derive a standard of care that serves their purposes, rather than starting with some general standard of care). Introducing the role of insurance in shaping this exercise would confuse more than enlighten at this point. In any event, *Sabia* illustrates the underlying idea more clearly in the context of causation, so I wait until that unit.

### C. Insurance and Causation in the *Sabia* Case

The causation dispute in *Sabia* nicely illustrates the shaping power of insurance because of the relationship between causation and the relative liability of the doctor and the hospital. Demonstrating this requires going a bit deeper into the *Damages* story than we have so far. To those who have not yet read *Damages*, I apologize if this gives away too much of the story.

As the lawyers in *Damages* explain, the standard move in a “bad baby” case is to prove that a botched delivery irreparably damaged an otherwise healthy baby. The defense lawyers expect Tony's lawyers to do the same in

<sup>25</sup> For this reason, I hold off on making the point that the amount of damages collected, and often the amount claimed, is linked to the amount of insurance that is available. This is precisely the situation in *Sabia*. The plaintiffs' first offer of judgment is for the amount of the policy limits. This is a simple enough point to make later and is conceptually distinct from the damages doctrine I am focusing on at this point in the semester.

<sup>26</sup> I teach immunities in the “duty” section. Were I to teach immunities as defenses, it would be irresponsible to ignore insurance. See, e.g., *Ard v. Ard*, 414 So. 2d 1066 (Fla. 1982) (lifting intra-family immunity only to the extent of available liability insurance coverage).

*Sabia* for two main reasons. First, Dr. Humes never met Tony's mother until the morning of the delivery, so the case against her rests entirely on what happened that day. Second, the case for negligence in the delivery room is much stronger than the case for negligence earlier in the clinic.<sup>27</sup>

For these reasons, the defense lawyers assemble a causation defense that pushes the harm back in time, so that whatever happened in the delivery room did not "cause" Tony's injuries. But Tony's lawyers do not make the standard move. Like the defense lawyers, they also start building a case that pushes Tony's injuries back in time. The reason is simple: Dr. Humes only has \$2 million in insurance coverage – far less than Tony needs. Like many other lawyers, Tony's lawyers generally will not pursue doctors' personal assets,<sup>28</sup> and they don't think the jury will hold the hospital responsible for mistakes in the delivery room when Dr. Humes was so clearly the "captain of the ship" that day. So, they don't want to focus on the delivery, either. Unlike the defense lawyers, however, (at least, unlike the hospital's lawyers) they want to hold the hospital responsible: the hospital's \$17 million insurance policy is their main target.

At the same time, they do not want to give up the \$2 million in coverage from Dr. Humes. So they walk a tightrope. They need to persuade Dr. Humes' insurance carrier that they can prove her mistakes caused the harm, without completely committing themselves to that position. Why? Because it is even more important to persuade Norwalk Hospital's insurance carrier that the maternity clinic's earlier mistakes caused the harm. (Of course, both could have contributed to the harm, but that's a more complicated story than the lawyers want to, or in the end need to, tell.)

They can't walk this tightrope forever. One of the most dramatic moments in *Damages* comes shortly before the deposition of Tony's causation expert. As Tony's lawyers know, the expert is going to testify that Tony was injured during the weekend *before* the delivery – essentially letting Dr. Humes off the hook. But the defense lawyers all think that the expert is going to testify that Tony was injured *during* the delivery (otherwise, why would the plaintiffs be offering him as a witness in a case against Dr. Humes?). The combination of Tony's lawyers' secret knowledge and Dr. Humes' lawyers' fear produces a feverish round of negotiations. Just before the deposition, Tony's lawyers

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<sup>27</sup> All the lawyers in the case thought that it was shocking that Dr. Humes didn't know that Tony's twin was dead until he was delivered. Dr. Humes claimed that it was not her fault because the hospital's nurses were responsible for making sure they heard two hearts beating when Tony's mother arrived at the hospital. Whether she is right or not, somebody clearly made a serious mistake. By contrast, whether the hospital's maternity clinic should or should not have done some extra tests during the pregnancy seemed to all the lawyers to involve many more shades of gray.

<sup>28</sup> Werth reports:

Koskoff proudly made a point of not going after doctors' assets except in cases in which they were not "responsible enough" to buy adequate coverage. A certain fellow-feeling for them as professionals and a distaste for the messy business of inflicting financial ruin on respected individuals, particularly from one's own community, precluded his trying to attach Humes' house and other possessions, much as Koskoff thought she deserved it.

WERTH, *supra* note 1, at 158. For an extended analysis of plaintiffs' lawyers distaste for collecting real money from people, see Baker, *Blood Money*, *supra* note 3.

reduce their demand so that the liability insurance company has to pay less than the full limits of Dr. Humes' policy, and the company promptly settles.<sup>29</sup> Dr. Humes is out of the case.

At the deposition, the expert testifies that Tony was injured well before the delivery. At first, the lawyer for the hospital taking the deposition is pleased, but she quickly realizes that this means Tony's lawyers have set their sights on her client's insurance coverage. When the implications of this sink in, the hospital invites Tony's lawyers to make a presentation to the hospital trustees, the real purpose of which is to educate the hospital's insurer about the potential exposure in the case. After receiving that education, the insurer promptly exercises its rights under the insurance policy to direct the defense, sacks the hospital's defense lawyers, and hires its favorite Connecticut medical malpractice defense lawyer to take over the case.<sup>30</sup>

Insurance *institutions* are all over at this point. The relative size of the defendants' liability insurance policies determines the direction of the plaintiffs' causation efforts. Insurance companies, not individual or even institutional defendants, control the defense and settlement of the case.<sup>31</sup> And because insurance companies are the real targets, Tony's parents view the defendants almost as abstractions, without moral connection to their claim. They use the Norwalk Hospital maternity clinic for their next baby and do not seem to blame Dr. Humes.<sup>32</sup>

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<sup>29</sup> Although there is not time in a one semester torts case to address the significance of insurance law's "duty to settle," it is worth observing that *Damages* does an excellent job illustrating the dynamics of the duty to settle and other aspects of the conflict of interest that is built into the liability insurance relationship. For one entry point into the extensive literature on insurance conflicts, see Ellen S. Pryor & Charles Silver, *Defense Lawyers' Professional Responsibilities: Part I – Excess Exposure Cases*, 78 TEX. L. REV. 599 (2000). My foray into this literature is Baker, *Tetrahedrons*, *supra* note 3, at 3.

<sup>30</sup> Surprisingly, this is one aspect of the case that Tony's very competent lawyers did not seem to understand. Werth reports that Tony's lawyers expected that the presentation to the trustees would be the prelude to an immediate settlement conference. When the only result of the presentation was a changing of the defense guard, they regarded the presentation as a waste of time. They didn't understand enough about the dynamics on the defense side. The hospital's lead lawyer realized that the case needed to be settled, but he knew that because he had not been chosen by the insurance company and had never had an earlier opportunity to win the confidence of the senior members of the claims department, they would never pay, on his recommendation, enough money to settle the case. They needed to "own" the defense, and he knew that Tony's lawyers would put on a good enough show to scare them into taking ownership now that Dr. Humes was out of the case. Tony's lawyers' disappointment notwithstanding, the presentation accomplished a great deal.

<sup>31</sup> For example, Werth reports that when Humes finally wanted settlement, she couldn't make it happen:

[S]he was sickened to think that she couldn't back down now even if she wanted to. Her professional life, her livelihood, were at stake, but whether they could be salvaged no longer was in her control. She couldn't even sacrifice herself. She was willing to do the most distasteful thing she could imagine, surrender for the sake of expediency to people she despised – the Koskoffs – on a grave charge she considered baseless. Yet even that excruciating self-betrayal was denied her. Again, she was reminded that it was not her but her insurance policy that the Sabias wanted, and thus it was the owner of that policy who made the decisions.

WERTH, *supra* note 1, at 166.

<sup>32</sup> Werth writes:

Some students are outraged on behalf of Dr. Humes: “Tony’s own expert testified that she wasn’t responsible.” “She was dragged around in the mud for no good reason.” “They tricked her lawyers.” And so on.

On a good day, this emotion can be directed toward a real teaching moment. I learned how from one of Tony’s lawyers, Chris Bernard, who visited the class midway through the first semester I used *Damages*. The day he came, two students recalled our earlier causation discussions and challenged him. “How could you do that to Dr. Humes?” one student asked. “It wasn’t her fault,” said another. That’s when the teaching moment came. Chris explained:

You think Maryellen Humes wasn’t responsible because that was *our* case, when it was us against the hospital. We all worked together on that – Maryellen’s lawyers, us, even the hospital’s lawyers. We couldn’t ignore the delivery, but we never had to look at it too hard. *It was never in anyone’s interest to prove Maryellen Humes caused the harm.* Certainly not in her interest, and not in ours. Even the hospital had to stay away from it because their nurses were in the delivery room, too. Believe me, *if we had to prove she caused the harm, we could have.* Getting shoved through the birth canal is a punishing process for even a healthy baby, and Tony was practically dead. You’ll never persuade me that didn’t hurt Tony. She should have done an emergency C-section as soon as she got in the room. Did that cause five percent of Tony’s disability or ten percent? More? Less? Who knows? Who cares? All we had to do is prove that she caused *some* of the harm. Joint and several liability takes care of the rest.<sup>33</sup>

In other words, what causes what in a tort case depends on what *needs* to cause what in order for a plaintiff to be paid, or, from a defense lawyer’s perspective, for a defendant to be relieved of responsibility. For the plaintiff, what needs to cause what, depends on who has money.<sup>34</sup> And that depends – often – on insurance. Barry Werth puts this nicely:

With insurance claims, size is destiny. Humes had ceased to be the Koskoff’s [Tony’s law firm’s] main target as soon as they realized she couldn’t afford to take care of Little Tony for the rest of his life. They reset their sights on Norwalk Hospi-

They made no association between the money and Humes as an individual. In eight years they had only seen her three times – during the birth: the day after, when she’d come to console Donna; and in Ryan’s office at their deposition – and their feelings about her were abstract, as if Humes were a well-off stranger with whose Mercedes they had collided. . . Donna bore her no malice, nor did she blame her for what happened to Little Tony. Though she wanted to know the truth, she was happy to get the money without it. “I didn’t feel like we had answers,” she says. “I felt, okay, now we can pay our bills.”

Tony, though they seldom talked about it, felt the same. He thought Humes was an unfortunate bystander, which made her, regrettably for her, a convenient target. He considered the suit, and the settlement, in no way personal. “I’m not resentful of Humes,” he would say. “She stepped in the middle of it. But, what do you do?”

*Id.* at 210-11.

<sup>33</sup> I’m writing this from memory, so it’s undoubtedly embellished – but that’s the way I use it now since I can’t ask Chris to come back every year, and, even if I could, I can’t expect the same magical moment each time.

<sup>34</sup> My favorite comment on this point is from a lawyer I interviewed in Miami: “I was taught on my first day of practice there are three things: liability, damages, collectibility. I need collectibility first. I need damages second. I’m a good lawyer, I’ll prove liability.” Taken from Tom Baker, *Transforming Punishment Into Compensation*, 1998 Wis. L. Rev. 211, 222 (1998).

tal, which could afford it. If she had carried more insurance, Humes would have been more attractive as a defendant and the Koskoffs would have had more incentive to keep her in the case. She'd also have had more clout as an insured. St. Paul [her insurance company], with more to lose, might have been compelled to defend her more vigorously. Now it was the inadequacy of her coverage that decided her fate.<sup>35</sup>

The jurisprudential point is the same one touched on earlier: causation and responsibility are *created*, not revealed. We are used to observing that judges create legal rules,<sup>36</sup> and that proximate cause is a legal invention.<sup>37</sup> Observing that causation *in fact* can also be a creation of the legal process takes students a step further in understanding the role of law in the social construction of reality.

Even if we can imagine that there is some "real" or "essential" cause for an injury (or anything else for that matter), we can never even hope to see it except through the perspectives our history and institutions offer us. Whether students grasp this larger philosophical point or not does not matter.<sup>38</sup> It is enough to see the relationship between insurance and causation in the *Sabia* case and to realize that similar dynamics are at work in other aspects of law.

At the end of the causation discussion, we turn the insurance lens on other aspects of the *Sabia* case. I tell the students that I have been avoiding making the connection between insurance and *Sabia* and ask them to prepare for the next class by identifying all the other ways insurance affects Tony's case. For many students, this exercise is a revelation. It is not as dramatic as the famous drawings in which changing perspective reveals an entirely different subject. But, rereading *Damages* with insurance firmly in mind gives students a new perspective that supplements their growing confidence with doctrine and legal reasoning. All the students bring back specific examples of the control that liability insurance exercises over tort practice.<sup>39</sup> Some students are even able to identify the more subtle role of first party insurance.<sup>40</sup> Mission accomplished.

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<sup>35</sup> WERTH, *supra* note 1, at 205-06.

<sup>36</sup> See, e.g., *Tarasoff v. Regents of Univ. of Cal.*, 551 P.2d 334, 342 (Cal. 1976) ("legal duties are not discoverable facts of nature, but merely conclusory expressions that, in cases of a particular type, liability should be imposed for damage done").

<sup>37</sup> See *Palsgraff v. Long Island R.R. Co.*, 162 N.E. 99 (N.Y. 1928).

<sup>38</sup> For an illuminating exposition of perspectivism, see ALEXANDER NEHAMAS, *NIETZSCHE: LIFE AS LITERATURE* (1987). Cf. ROBERTO UNGER, *KNOWLEDGE AND POLITICS* 31-36 (1975) (on the antinomy between fact and theory).

<sup>39</sup> For example: In practice, liability insurance is an element of tort liability, at least for ordinary individual or small business defendants. Liability insurance policy limits are *de facto* caps on tort damages. Tort claims are shaped to match the available liability insurance coverage. Liability insurance companies control the defense and settlement of tort claims with an eye toward the long term interests of the insurance company, which are not always the same as those of the defendant. At least with respect to the settlement of a claim, the defendant and the plaintiff often come to share common interests, and work together to get the insurance company to pay, so that the dispute becomes one between the insurance company and the litigants on both sides of the tort case.

<sup>40</sup> Tony's parents *need* the lawsuit because they don't have enough first party insurance. The coinsurance on their health insurance is a "black hole" in the household budget and there are expenses like home care that are not covered by insurance at all. At the same time, the presence of this, admittedly inadequate, first party insurance means that Tony's parents can be made nearly as whole as money can make them by a settlement that gives them



III. CONCLUSION: THE BROADER CASE FOR USING *DAMAGES*

Clearly, this discussion does not begin to exhaust the ways to use *Damages* in a torts class. Other torts teachers would no doubt use the book in other, more effective ways. My goal here has been to convey a sense of what is possible.

In concluding, I would like to emphasize one benefit of using *Damages* that transcends torts or insurance: the opportunity to work over the course of many weeks with a complicated factual situation. Law schools are very good at teaching students to begin to think in remarkably sophisticated ways about rules and standards, common law reasoning, and various theoretical approaches to law and policy. Outside of clinics and some simulation classes, however, law schools do very little to teach students to think critically about facts – what they are, how they are developed, how lawyers work with them.

Many casebooks demonstrate (some intentionally, others not) what critical legal studies scholars have called the indeterminacy thesis: legal rules and standards as well as their application are indeterminate (always at the margins and sometimes elsewhere).<sup>41</sup> But the indeterminacy casebooks typically demonstrate is the indeterminacy of “law” not “facts” (recognizing that there is no clear ground between these two). The indeterminacy the law in action demonstrates is far more profound, because it extends to facts. Studying law in action reveals the insubstantial, made-up nature of many of the supposedly solid, hard facts the appellate case method usually takes for granted.

That students intuitively grasp at least some degree of factual indeterminacy is demonstrated by how often they attempt to “argue the facts” during the discussion of an appellate opinion, especially in first year courses. As they know from their own lives, if people are willing to disagree publicly about a situation, the facts of that situation are almost never clear cut. “Even the thinnest pancake has two sides,” as one trial lawyer put it.

By the end of the first semester we usually have trained the tendency to argue the facts out of our students. This training improves their ability to work with legal doctrine, but it comes at a cost. The cost is the lost opportunity to teach them how to train their emerging critical faculties on the facts of a case as well as the law.

The result is that even good students too often are left with one of two naïve approaches to facts – approaches that mirror mistakes we are accustomed to addressing directly when it comes to legal rules. Either they persist in thinking that legal disputes can always be resolved on the basis of solid, knowable facts – much as some students persist in thinking that disputes always can be resolved through the application of determinable rules. Or, they flip to the

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nothing for pain and suffering less than all Tony’s medical costs and lost wages. Why? Because they get to count as damages *all* the costs of Tony’s care, even though a very large part of the past expenses were covered by insurance (and most likely a large part of the future expenses will be as well).

<sup>41</sup> My purpose here is not to take a strong stand on indeterminacy. Cf. Steven Winter, *Indeterminacy and Incommensurability in Constitutional Law*, 78 CAL. L. REV. 1441 (1990). My basic point works equally well for people who prefer to think that legal rules and standards are “underdetermined.” See, e.g., Lawrence Solum, *On the Indeterminacy Crisis: Critiquing Critical Dogma*, 54 U. CHI. L. REV. 462 (1987).

(even more mistaken) view that anything goes, that “lawyers are liars,” and that the legal process has nothing to do with truth – much as some students flip to the view that, because law is really all about power, legal rules and standards never determine anything.

Many, if not most lawyers in practice spend far more time understanding and developing facts than they do developing or researching legal theories. Litigators develop facts retrospectively. Transactional lawyers develop facts prospectively. With the exception of appellate and a few other kinds of specialists, this focus on facts increases with the number of years in practice. As a result, the working lawyer’s craft has more in common with that of the modern historian (in the case of a litigator) or business analyst (in the case of a transactional lawyer) than that of the judges whose opinions we spend so much time teaching. In practice, lawyers are connoisseurs of facts, even more than law. We owe it to our students to prepare them for this situation. Using *Damages* in the law school classroom takes a small, but important step in that direction.