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

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## **TeachingRealTorts:**UsingBarryWerth's DamagesintheLawSchoolClassroom TomBaker <sup>1</sup>

Myfavoriteinsurancecasedoesnothave insuranceinthecaption,cannotbe foundinanyreporter,hasnowrittenopinions,andsettledbeforetrial. Totheuninitiated, it'snotan'insurance'caseatall. Yet,thankfully,thecase — Sabiav. NorwalkHospital—sufficientlyintriguedBarryWe rththathemadeitthesubjectof Damages, one of the bestbookabouttortsandinsurancesinceLarryRoss's SettledOutofCourt . Sabiaismy favoriteinsurancecasebecauseitshowshowcompletelytortlawinactionistiedupwith insurance.

Sabia v.NorwalkHospital isamedicalmalpracticecasebroughtonbehalfof TonySabia, whonearlydiedshortlybeforehewasborn. Tony's twinbrother Michaeldid die, and whatever caused Michael's death starved Tony's brain of oxygenlongenough to cause profound damage. The defendant sinthe 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.

Theoutlinesofthecaseareea silysummarized.NoonedisputedthatTony sufferedaterribleharm.Whatwasindispute,however,wasalmosteveryotheraspectof anegligencecase:standardofcare,breach,causation,anddamages.Whatwasthe standardofcarethatDr.Humeswasto havefollowedatthetimeofdeliveryanddidshe breachit?Whatwasthestandardofcarethematernityclinicwastohavefollowedinthe monthsleadinguptothebirth,anddidtheclinicbreachit?Eveniftherewasnegligence, didthatnegligenceca useTony'sharm?And,whatisthepropermeasureofthatharm?

Oncethecasewasfullydeveloped,theclaimagainstDr.Humesturnedonthe legalsignificanceofthefactthat,becauseshedidnofetalmonitoring,shedidnotknow thatTony'stwinwasde aduntilhewasborn.Oncethecasewasfullydeveloped,the claimagainstthehospitalturnedontheconductofthenursesinthedeliveryroomand, moreimportantly,onthefactthatthematernityclinichadnotdonetwopre -nataltests. Oncethecase wasfullydeveloped,thecausationdisputeturnedonwhetheranyofthis madeanydifferencetoTony'scondition,andthedamagesdisputeturnedonhowlong Tonywouldlive.

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<sup>&</sup>lt;sup>1</sup>Conn ecticutMutualProfessor,UniversityofConnecticutSchoolofLaw.ThankyoutoMichaelKoskoff, ChrisBernard,AprilHaskell,MaryEllenHumes,BillDoyleandBarryWerthfortakingmystudents(and me)behindthescenesofthe *Sabia*litigation.Thanky outoMarianneSadowskiforresearchassistance. <sup>2</sup>BarryWerth, DAMAGES(1998).

<sup>&</sup>lt;sup>3</sup>H.LaurenceRoss, SETTLED OUTOF COURT(1970).

Withalloftheselemphasizethephrase, "oncethecasewasfullydeveloped."

Damages wonderfullydemonstrates 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 bornout of chaos, and it is trial law yers who give them their shape. How they do that is determined, in important part, by insurance in stitutions.

Icameto *Damages* inaroundaboutwaythattheautobiographicalnatureofthis symposiumallowsmetheluxuryofreporting. In this essay I will (briefly) tell that story and then describe how I use the book in mytorts class, before concluding with some observations on the jurisprudence of *Damages*. As I will argue, the benefits that *Damages* can bring to the lawschool class room gowell beyond my parochial interest in initiating to rts students into the significance of insurance.

#### TheRoadto Damages

Inmyresearch, Iusequalitative methods to explore tort law inaction. This research grewout of my frustration with a highly stylized approach to tort law I first associated with law and economics scholar ship but now associate equally with much of the scholar ship in the corrective justice tradition. I was convinced that tort law was more complicated on the ground and started interviewing personal injury law yers to find out. This research led to a series of articles that taught meagreat deal about the relationship between torts and insurance and that I hope have been helpful to others as well.

Perhapsthemainadvantageofhavinglookedattortsthroughpracticinglawyers' eyesisaclearerviewoftortlawinactionasapragmaticsearchformoneythroughan *institutional*landscape. Thatiscertainlynotallthattortlawis, butitisanaspectthatthe leadingtheoreticalapproaches —lawandeconomics, corrective justi ce, traditional doctrinalanalysis, and critical legal studies —usually ignore. <sup>5</sup> The institutions this perspective highlights are liability insurance, other types of insurance (e.g., Medicare and workers compensation), and 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

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<sup>&</sup>lt;sup>4</sup>SeeTomBaker, *BloodMoney,NewMoneyandtheMoralEconomyofTortLawinAction*, .-- LAW & SOCIETY REVIEW –(forthcoming2 001);TomBaker, *TransformingPunishmentIntoCompensation:Inthe ShadowofPunitiveDamages*, 1998 WIS.L.R EV.101;TomBaker, *ReconsideringInsuranceforPunitive Damages*, 1998 WIS.L.R EV.211;TomBaker, *LiabilityInsuranceConflictsandDefenseLawye rs:From TrianglestoTetrahedrons*, 4 CONN.I NS.L.J .101(1998).Cf.,TomBaker, *InsuranceandtheLaw*, InternationalEncyclopediaofSocialandBehavioralSciences ---(forthcoming2001)(summarizingthe waysthatinsurance"regulates"tortlaw).

<sup>&</sup>lt;sup>5</sup>The lawandeconomicsliteratureespecially, and the corrective justice literature to a less erextent as well, do address in surance. Indeed, the lawande conomics literature on insurance is extensive. See Tom Baker, On the Genealogy of Moral Hazard ,75 Tex. L.R ev. 237 (1996) (reviewing law & economics literature on insurance). But the insurance that appears in this literature is theoretical – a feature less and friction less risk spreading (and sometimes loss preventing) mechanism that operates directly on a tomistic individuals (or organization streated as atomistic individuals) without mediating institutions. This approach to insurance may be fine, even necessary, for economic analysis, but is a very thin view for people seeking to understand the role of law in society.

maybe),butbecausemoney – *damages* –isthemainremedytortlawhastoofferinjured plaintiffsand,asaresult,thefulcrumaround whichtheseinstitutionsturn. <sup>6</sup>

Eventually, this research led to the obvious suggestion that Is witch from teaching contracts to torts. In preparing to teach torts, I decided that if my research high lighted the importance of damages my class would also. But when I realized that the leading torts case books put that to pic 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 these mester. The experience was a good one and what I had learned from my research was helpful. Nevertheless, I was unhappy about not getting to damages, and resolved to start the renext ime, no matter what.

Formuchofthefollowingsummer, Iavoided mytorts problem. Iwanted 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 aroun dinabook. To make matters worse, the topic I wanted to start with —damages—was buried the deepest inside the book.

Justwhenthisprocrastinationwasthreateningtoruintheendofthesummer, a newpaperback – *Damages* – appearedinmybox. Now *that* was at it let hat really spoke tome! One chapter led to another and, before long, I had decided this book might be the answer tomy problem. To be sure, I asked my research assistant to take a look. When he told methatherea dits traight through, wedged for 20 hours in the back sea to facar, I knew I had something.

BarryWerth's *Damages*turnedouttobeeverythingatortsteacherwouldwant *CivilAction* <sup>7</sup>tobe. *ACivilAction* isagreatstorybecauseitgivesacompellingaccount ofauniquel awyer'sodysseythroughthelegalsystem.Butintellingthelawyer'sstory *ACivilAction* shortsalmosteveryoneelse's.Incontrast, *Damages*offersasynoptic viewofanordinarymedicalmalpracticecase –specialonlybecauseofthesizeofthe damagesanduniqueonlybecauseoftheattentionBarryWerthgivesit.Theverythings thatmade *Damages*lesscommerciallysuccessfulthan *ACivilAction* makeitmore successfulinthelawschoolclassroom.Detaileddescriptionsofsubstantiveand procedurala spectsofthecasethatmightoverwhelmageneralreaderprovidehelpful contextforalawstudentstrugglingtounderstandhowthelawworksinpractice. While

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<sup>&</sup>lt;sup>6</sup> Nooneneedspersuadingthatinsuranceinstitutionsarefocusedonmoney.Norwouldmostlaypeople needpersuadingthatthepersonalinjurybarisalsofocusedonmoney.Forresearchonthepersonalinjury barsee:HerbertM.Kritzer, *TheWagesofRisk:TheReturnsofContingencyFeeLegalPractice* ,47 DEPAUL L.R EV.267(1998);Kritzer,HerbertM.Kritzer, *ContingentFeeLawyersandTheirClients:*SettlementExpectations,SettlementRealities,andIssuesofControlintheLawyer -Client Relationship,23 Law&Soc.Inq. 795(1998);HazelGenn, HARD BARGAINING:O UTOF COURT SETTLEMENTIN PERSONAL INJURY ACTIONS(1987);aswellasmy *Transforming* and *BloodMoney* articles, *supra*note4.

<sup>7</sup>JonathanHaar, AC IVIL ACTION(199?).

perhapsnotasgreatareadas *ACivilAction*, *Damages* certainlyshinesincomparisonto theca sebooks,hornbooks,legaloutlinesandotherthingslawstudentsarereading.

#### DamagesasaTortsTeachingTool: BringingInsuranceintoTorts

Oneofthethingsthatmakes *Damages* aneffectiveteachingtoolisthatBarry Werthdoesn't *tell*thereader thatTony'scaseisaninsurancecase,he *shows*it,andhe doeseventhatwithanunderstatementthatcanlullareaderintothinkingthatinsurance popsupfromtimetotimeonlyasasideline,tangentialtothemainaction.Atorts student,especially, canbeforgivenforthinkingthatway,becausethat'softentheway tortlawistaught.

Tortlawyersalmostneverthinkthatway,andthelawyersin *Damages*areno exception.Collectingliabilityinsurancemoneyisthe *raisond'être* of Tony's lawyers . Liabilityinsurancecompanieshireandfirethedefenselawyers, directthedefense, and decidewhetherandwhentosettle. Evenfirstpartyinsuranceshapes Tony's case. *Damages* showsthatit's notfornothing that the name of the second largest section on of the American Bar Associationisthe *Tortand Insurance* Practice Section.

Yet,theimportanceofinsuranceiseasyfortortsstudentstomiss,evenin *Damages*. From apedagogical perspective, the hidden nature of insurance — hiding in plainview—i saplus, because it allows for a bit of useful magic in the tortsclass room. Before revealing the magic trick, however, I'll first describe how I use *Damages* to teach tort doctrine.

#### Using DamagestoTeachTortDoctrine

Ibeginteachingtortdoctrineb yintroducingthe"fivefingers"ofthenegligence causeofaction —duty,breachofthestandardofcare,causation,defenses,anddamages andIorganizemy(onesemester)coursearoundthesedoctrinalelements,plusstrict liability.Istartwithdama ges,andthenmoveontobreach,followedbydefenses,

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<sup>&</sup>lt;sup>8</sup> Avervimportan tnoteforteachersconsideringusingthebook :What Damagesoffersthatacasebook Damages onlyworks if students develop a detailed and cannotisfactualdepth.Forthisreason, comprehensiveunderstandingofthefacts. That requires encouragement. Is endaletterouttothestudents beforethesemesterbegins, telling them about Damages and asking them to read it before they arrive on campus. Itrytobuildenthusias mabout the book by talking informally to students about it during the orientationeve nts. Typically, Ifindthatthey' vealready beentalking about it among themselves. During the first day of class, I announce that, throughout the semester, I will expect every one to have a detailed and the first day of class. I announce that, throughout the semester, I will expect every one to have a detailed and the first day of class. I announce that, throughout the semester is a detailed and the first day of class. I announce that, throughout the semester is a detailed and the first day of class. I announce that, throughout the semester is a detailed and the first day of class. I announce that, throughout the semester is a detailed and the first day of class. I also detailed a detailed and the first day of class is a detailed and the first day of class. I also detailed a detailed a detailed a detailed and the first day of class and the first day of class. I also detailed a dandcomprehensiveunderstandingofthefactsofthe Sabia case as they relate to the particular doctrinal issuewearestudying, and that we will start with the doctrinal element "damages" the first day of the secondweekofclass.(DuringthefirstweekIfollowFranklinandRabin'sleadindoingacarefulr eading of *Hammontreevs.Jenner* .)Thatisusuallyenoughtogethemtoprepareforthedamagesdiscussion. Sabiacaseduringthatandsucceedingdiscussions, and using the case Askingdetailedquestionsaboutthe asapointofreferenceasoftenasposs ible, keepsthemontrack. <sup>9</sup>Forevidencethattortsisnotalwaystaughtthatway, seeDavidA.FischerandRobertH.Jerry,II, -BestSolution ,45 ST.L OUIS U.L.J. 857(2001), which was TeachingTortsWithoutInsurance:ASecond veryhelpfultomein preparingthisessay.

causation, and duty, before concluding with strict liability and an all to obrief look at alternative compensation systems. <sup>10</sup> Damages helps present almost all of these topics.

<u>Damages</u>. Itmayseema smallthing, but *Damages* beginshelping meby legitimating the choice to begin the course by studying tort damages even though case books, horn books and study aid sput that topic toward the back. *Damages* is the title of the book, one of the first books the students are required to read for laws chool. The potential size of Tony's damages explains the enormouse ffort devoted on all sides to the case. And the dispute over the size of the damages dominates the settlement dance featured in the last third of the estory. *Damages* signals strongly that emphasizing damages is a sensible thing to do in a tort sclass.

IprefertobeginwithdamagesforsomeofthesamereasonsthatWerthchosethat titleforhisbook.Damagesbringtortsdowntoearth —everyone thinkstheyunderstand money—whileatthesametimeraisingprofoundquestions.Whatarethepurposesof tortlawandhowshouldthoseaffecttortremedies?Whyismoneythedominant remedy?Howcanwepossibledecidetherightamountofmoneyforag ivenharm? Shouldtortlawcalibratethedamagesaccordingtothemoralwrongfulnessofthe defendant'sconduct?Cantortlawinpracticeavoidthatcalibration?Whydowe compensateinalumpsumfashion?Whatarethepracticalconsequencesofthatan d otheraspectsofdamagesdoctrine?Howdoesthemoney -dominatedrealityoftortlawin actionaffectwhichcasesarebroughtandhowtheyarehandled?Towhatdegreeshould weacknowledgetheshapingpowerofmoneyinthedevelopmentoftortdoctrine?

Damageshelpsframethediscussionoftheseandotheropen -ended,potentially vagueanddifficulttocontainquestions,sothatstudentscanexploreinarealisticand concretesituationsomeofthemoralandpracticalcomplexitiesoftortlaw. The fact ual depthofthebookallowsstudentstoconsidereachofthesequestionsfrommany different yetfactually grounded perspectives. The following is just one example

Thecasebookluse,FranklinandRabin, <sup>11</sup>containsawonderfulcasethat addressestheq uestionofjudicialcontroloverdamagesforpainandsuffering: *Seffertv. LosAngelesTransitLines* . <sup>12</sup>Inthatcase,abuscompany(LosAngelesTransitLines) askedtheCaliforniaSupremeCourttoreverseatrialverdictinwhichthepainand sufferingd amageswereseveralmultiplesofthemedicalexpensesandlostwages. <sup>13</sup>In affirmingtheverdict,the *Seffert* majoritytakesaclassicindividualjusticeperspectivein whichthepurposeoftortlawisrightingindividualwrongs,andthepropermeasureof damagesturnsonthesubjectiveexperienceofthepersonwhowaswronged.Inthis view,tortlawisabouttheobligationsaparticulardefendantowesaparticularplaintiff,

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<sup>&</sup>lt;sup>10</sup>Icoverdefensesimmediatelyafterbreachofthestandardofcarefortworeasons. Somanyoftheleading "breach" casesinvolvecontributorynegligence, and Iampersuaded that most of the "defenses" cases are better understood in contemporary tort doctrine as either "no breach" or "comparative fault" cases. Icover duty after causation because mystudent sunderstand always found duty the most difficult aspect of tort law.

<sup>&</sup>lt;sup>11</sup> ---Fran klinandRobertRabin,[torttextbookcite]

<sup>&</sup>lt;sup>12</sup>364P.2d337(Cal.1961).

<sup>&</sup>lt;sup>13</sup>Notetostudenteditors:pleasecheckthis.

and the goal of tort damages is to restore the moral balance between these two. the trier of fact is in a much better position to evaluate unique, individual situations, appellate judges should not second guess damages decisions.

Because

14

of

JusticeTraynorindissentpresentsanalternative, actuarial perspective in which, consistent with his famous concurrence in *Escolav. Coca Cola Bottling Co. of Fresno* the purpose of tortlawis distributing the costs of the misfortunes that are the inevitable consequence of modern life. Tortlawis about establishing social norms, and the goal 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. Traynorwants appellate judges to exercise greater control over pain and suffering damages, because he believes juries (and perhapse ventrial judges) are too easily affected by the particular needs of the particular plaintiff.

Theproblemwithdiscussingtheconflictbetweenthese"individualist"and "actuarial"conceptionsoftortlawi nthecontextofthe *Seffert*caseisthatwecan't possiblyknowenoughaboutthepartiestoprovidemorethanacaricatureoftheir particularsituations,andTraynordoesnotprovideajustificationforhisviewthatthe damagesaretoohighbeyondwhat amountstoaconclusory"IknowitwhenIseeit." *Damages*providesamuchrichersettinginwhichtoapplythephilosophicalpositions underlyingthetwo *Seffert*opinionsandtodemonstratethatthesepositionsarerelevant, notonlytothequestionofj udicialcontroloverjuryawards,butalsotothedecisionsof juries,themselves.

Themaindamagesquestioninthe Sabiacaseis"HowlongwillTonylive?"The disputebetweentheplaintiffsandthedefenseovertheanswertothisquestionturnsout toalmostpreciselymirrorthedisputebetweenTraynorand the *Seffert*majority.The defensewantstotreatTonyfromTraynor'sperspective:asastatistic,a"badbaby"with apredictably shortlifespandetermined on the basis of actuarial experience. The Sabia defenseprovidesabettercontextthan Seffert for understanding this actuarial perspective, however, because there is expert testimony (not simply Traynor's intuition) anchoring it. Fortheirpart, Tony's lawyerse chothe Seffert majority: treatingTonyasaunique individual,trappedinsideanenormouscognitive,emotionalandphysicaldisability.If Tony's lawyers succeed, they believe (and the defense fears) that the jury will identify withTony,discountthestatistics,andbasetheird amagesonthelifespanthatTony's familywantshimtohave,ratherthanonwhatanactuarywouldpredict.Again, Sabia providesabettercontextthan Seffertbecausewecometobelievethatwereallyknow Tonyandhisfamily.

Thefactualdepthof *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 individual is to sition. I drive this final point home by showing the class excerpts from a nunder stated "day in the life" vide of rom the *Sabia* litigation. 15

<sup>&</sup>lt;sup>14</sup>150P.2d436(Cal.1944).

<sup>&</sup>lt;sup>15</sup>ThankyoutoChrisBernardforobtainingpermissionfromTony'sfamilyformetousethevideo. Althought hevideoishelpful,itisnotnecessary.IunderstandthatfacultyattheUniversityofMissouri

EvenstudentswhohadstronglyadvocatedtheTraynorpositionimmediatelyshift(even ifmomentarily)totheindividualistperspective. This provides the perfect opportunity to discuss,ifweha venotalreadydoneso,the"problem"(fromautilitarianorefficiency perspective)ofallowingjuriestodecidethateveryonewilllivelongerthanexpected.On agoodday,thiswillleadto(orfollowfrom)adiscussionofthepossiblecompensation, deterrenceandretributiongoalsoftortdamages, adiscussion that will also be anchored inthefactualdepthofthe Sabiacase. Mygoal, which Damageshelpsmetoaccomplish moreoftenthanIwouldotherwise,istoconnecttorttheorytopractice,sothat eventhe mostpractically -mindedstudentsseehowtorttheoryexplainssomeofthedynamicsof personalinjurylitigation. <sup>16</sup>

**Breachofthestandardofcare** .Damages helpspresentthe"breach"elementof negligencebyshowinghowstandardofcareisdevel opedinamedicalmalpracticecase. As Damages demonstrates, standard of care is a legal concept, developed by and for courtsforthepurposeofassessingblame. Courtsandtheirpurposesoperateinavery differentsocialuniversethandoctorsandhospi tals, and Damagesnicely illustrates how awkwardlythetwomeet. Inacloseddoor, clubbysetting the hospital peerreview <sup>17</sup>Yet,Dr.Humes'lawyerscan't committeedecidesthatDr.Humesdidnothingwrong. findadoctorwillingtotakethatpositionin court.AndoneofTony'smostimportant experts is convinced that Dr. Humes did the best things he could with a bad situation. Therightthingtodo -thestandardofcare -ishighlysituational, difficult to determine, andattimessubjecttoequally persuasivebutmutualexclusiveopinions.

Studentsdon't need Damages to be convinced that determining the standard of carerequires a detailed understanding of facts and, therefore, that appellate courts should treadlightly.Alltortscasebooksdoa goodjobwiththat.Where *Damages*improveson thecasebooksisingoingbehindthisclassicappellateissuetoseehowanegligencecase isputtogetheratthetriallevel.Howdoyouestablishastandardofcare?Whatkindsof evidencearerelevant?Wh eredoexpertscomefrom?Howdolawyersworkwiththem? Howdoexpertsdeveloptheiropinions?

Damages shows that plaintiffs' lawyers don't first determine the standard of care and the nexamine whether the doctor breached it. They first figure out wha tthedoctor didandthentrytoseeiftheycanmakeacasethatwhatshedidbreachedastandardof care. The defense is no less disinterested. The valso start with what the doctor did and

havereceived agrant to prepare teaching material susing the thevideoavailabletothosewhowantit.Fori

Sabiacase.Perhapstheywillbeabletomake nformation,pleasecontact:[getnamefromBobJerry].

<sup>&</sup>lt;sup>16</sup>Anotheraspectofthe SabiacasethatcanraisesomeofthesameissuesisthedecisionbyTony's lawyers nottobringacaseonbehalfofhisdeadtwinbrother(becausetherelativelysmallamount of additional damages did not, in their view, justify the complications the claim would create on the liability

<sup>&</sup>lt;sup>17</sup>ForDr.MaryellenHumes,awomaninwhatsheperceivedasaman'sworld,"clubby"was nota comfortablething. Theroleofwomen and otheroutsidersinlawandmedicine -includingtheJewishand IrishlawyersdisproportionatelyrepresentedinConnecticut'spersonalinjurybar -isanintriguingthemeof thebook.

workbackward,simplytowardadifferentgoal.As Damages shows, noone involved in thelitigation cares anything about standard of care in the abstract.

Standingupinfrontofaclassand telling studentsthingslikethisisonething. Havingthem seehowtortlawworksinactionisquiteanother.Exposingstu dentstothe realworldapplication of tort doctrine can lead them to critically examine what they are learninginawaythattheymightotherwiseresist.Forexample,ifthediscussionstarts goinginaverypro -deterrencedirection, Iaskwhether, based onwhattheyhaveseenin Damages, they think tort litigation is a method of truth finding that is well suited to providingaccuratedeterrencesignalstodoctors and hospitals? Conversely, if deterrence seemsadifficultandunrealisticgoal, Iaskwhy dothelawyers'appealstomakingthe clinicsaferforthenextpatientseemsocompelling?Whatmightwegainfromactingas iftortlawdeterredharm? These and other open -ended,impossiblyvagueandhardto ldepthofthe Sabiacase.Indeed,almost focusquestionscanbeanchoredtothefactua any student observation or comment can usefully be brought to ground by asking thestudenttotieittothesituationin Sabia.

Causation. Notwithstanding the title of the book, causation is the central issue n Sabia. Muchoftheaction in the middle part of the book comes from Tony's lawyers' continuing, sometimes desperate efforts to find experts who can connect the defendants' mistakestotheharmtoTony.Bythetimewegettocausation,thestudentscanr eciteby hearttheoutlinesofTony'snegligenceclaims. <sup>19</sup>Yet,as *Damages* dramatically demonstrates, negligenceall by itself net saplaint if fnothing, even assuming there is a defendantabletopay.ForTonyandhislawyers,themulti -milliondollarque stionis "Didthissupposednegligence causetheharmtoTony?"

Damages makes causation come alive on two levels. At a simple narrative level, Damages shows students the importance of causation, the analytical and practical differencebetweencausatio nandbreachofthestandardofcare, and the relationship <sup>20</sup>Itmaybehardtobelieve,butBarry between expert evidence and causation in fact.

<sup>&</sup>lt;sup>18</sup>Anexceptionmightbeautocasesinwhichinsuranceadjustersandlawy ersdevelop"rulesofthumb" aboutwhatkindsofconductconstitutenegligence.SeeH.LaurenceRoss, SETTLEDOUTOF COURT(1970). Theserulesofthumbare "law" onlytoacertaindegree, soifthed amages are large enough, lawyers and liabilityinsuranc ecompaniesmaybewillingtolitigateacasethatwouldbeclearundertheruleofthumb. <sup>19</sup>Dr.Humesdidn'tknowTony'stwinMichaelwasdeaduntilshedeliveredhim;sheeasilycouldhave knownhewasdeadmomentsaftershewalkedintothedeliveryroom ;and,ifshehadknown,shewould haveimmediatelydeliveredTonybyC -section. The Norwalk Hospital clinic did not perform repeat ultrasoundsoranon -stresstestonTonyduringthepregnancy(proceduresthattheynowperformroutinely intwincases),a ndthehospitalnurseinthedeliveryroominexplicablydidnottellDr.Humesthevery importantfactthatshecouldonlyhearoneheartbeat(healthytwinsshouldhavetwoheartbeats). <sup>20</sup>Anoteofcaution:theauthorandsomeofthelawyersinthecases ometimesusetheterm"proximate cause"whereIthinkthepropertermwouldbe"causeinfact."Whenwegettoproximatecause,thiscan beconfusing to students. Once I clarify how we will use the term, and how our used iffers from that in Damages.thec onfusionactually can be reassuring. Clearly, the lawyers in Damages arehighlycompetent and successful, so confusing one legal term for another -somethingbeginninglawstudentsdoallthetime -isnottheendoftheworld.Itellthestudentsthat,a lthoughthelawyersuseofthetermisnotconsistent with the way we will use it, their use of the term usefully emphasizes that causation in the law is not always thesamethingascausationinotherfields. For example, ascientist might need to be 95% surebefore concluding that one thing causes another, while a jury just need stobe more sure than not. Thus, an

Werthmakesthesearchforcausationexpertsexciting, and the deposition of the plaintiffs' keycausation experts exciting, and the deposition of the plaintiffs' keycausation experts exciting, and the deposition of the plaintiffs' keycausation experts exciting, and the deposition of the plaintiffs' keycausation experts exciting, and the deposition of the plaintiffs' keycausation experts exciting, and the deposition of the plaintiffs' keycausation experts exciting and the deposition of the plaintiffs' keycausation experts exciting and the deposition of the plaintiffs' keycausation experts exciting and the deposition of the plaintiffs' keycausation experts exciting and the deposition of the plaintiffs' keycausation experts exciting and the deposition of the plaintiffs' keycausation experts exciting and the deposition of the plaintiffs' keycausation experts exciting and the deposition of the plaintiffs' keycausation experts exciting and the deposition of the plaintiffs' keycausation experts excited and the deposition of the plaintiff excited excited and the deposition of the plaintiff excited ex

Atamoresophisticatedlevel, *Damages*showsthesociallyconstructednatureof causationand,therefore,responsibility. <sup>21</sup>Inanimportantsense,Tony'sinjurieshadno causeuntilachancemeetingwithanotherm otherledTony'smothertotalktoalawyer. Beforethatmeeting,Tony'sparentshadnooccasiontodetermineacause:Tony's injuriesexistedandtheyhadtodealwiththem.IthadneveroccurredtothemthatDr. Humesorthehospital"caused"Tony'scon dition.

Thatmeetingstartedachainofeventsthatcreatedaneedtoestablishacausefor Tony'sinjuriesandthatprovidedanenormousincentivetomakeDr.Humes,andthen NorwalkHospital,thecause.Ithinkitisfairtosaythattortandinsuran ceinstitutions *made*Dr.HumesandNorwalkHospitalthecauseofTony'sharm.Indeed,ifweimagine aworldinwhichgettingmoneytotakecareofTonyrequiredprovingthattheinjuries werean "actofGod" beyondanyone scontrol, wecaneasilyimagine thelawyers provingthat.Atleastinthiscase, causationfollowsfrominstitutional procedures and incentives. <sup>22</sup>I will return to this topic in the section on insurance below.

<u>DutyandStrictLiability</u>. *Damages* doesnotdiscusseitherdutyorstrict liability. Thedefendants' dutytoTonyissimplyassumed, and strictliabilityissoclearly inapplicable to medical malpractice that the lawyers never even think about it. Yet, *Damages* helpspresent both of these doctrinal areas.

Withduty, 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 contract stomake this aworth while exercise), the decision or edress breaches of that relationship throught or tlaw 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 windour way through the case book in anything but linear fashion.

Damageshelpsmoreconcretelywithstrictliability. It provides a context for discussing the practical differences between "truly" strictliability, products liability, a

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expert's view that the failure to do the tests did not ``cause'' the harm to Tonywould not be logically inconsistent with a jury's conclusion that it did (though it would be logically inconsistent with a contrary expert opinion).

<sup>&</sup>lt;sup>21</sup> Seegenerally TomBaker, Risk, Insurance and the Social Construction of Responsibility, in TomBaker & Jonathan Simon (eds.), EMBRACING RISK (2002) (exploring the role eof insurance in the social construction of responsibility).

Forempiricalresearchmakingthispointwithregardtocausalrelationshipbetweenworkandinjury,see Butler,RichardJ.Butleretal HMOs,MoralHazardandCostShiftinginWorkersCompens ation16 *J. HealthEcon.* 191 -206(1997)(documentingthatdoctors'decisiontolabelaninjuryas''work -related''was affectedbyfinancialincentives;doctorswhowerepaidmoreiftheinjurywasworkrelatedweremore likelytodecidethattheinjurywas workrelatedthanweredoctorswhowerepaidmoreiftheinjurywas notworkrelated).

negligence. Afterwecoverthestrictliabilitymaterials in the case book, Iask 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 cau sation. 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 is sue against the hospital in Sabia turns entirely on whether tests which are now routine at Norwalk Hospitals hould have been routine when Tony was born; that is essentially the same question raised by a state of the art defense to a product sliability 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 in volved that it puts every one in a better position to think about what it might mean to adopt strict liability, or some other approach, for medical injuries.

#### Using Damagesto Teach Torts Students about Insurance

Althoughinsuranceisveryimportanttothe developmentofthe *Sabia*case, Itry nottotalkabouttheroleofinsuranceinthecaseuntilwegettocausation. This does not meanignoring insuranceinthecourse until then, simply using other materials. As my students can report, we discuss some a spectofin suranceinal most every torts class, starting the first day.

Webeginthesemesterwithanextendedlookat Hammontreev.Jenner, which . <sup>23</sup> *Hammontree*considersandthen servesasthevehicleforanoverviewofthecourse rejectsthepossibili tyofapplyingsomeformofstrictliabilitytoautomobileaccidents. Alongwithintroducing tortlaw generally, the case provides a good opportunity to begin talkingabouttherelationshipbetweentortsandinsurance. Theopinionimplicitlytreats tortsandinsuranceasverydifferentfields, andrejects theideathat the risk spreading possibilities of liability in surance should be imputed to tortlaw. This allows meto introducetheconceptoftortlaw asinsurancethat Ilearned from reading George P riest andRichardEpstein. <sup>24</sup>Forthemomenthowever, we confine the application of that idea toproductsliability. Iam content to have students understand the *internal*riskspreading possibilities of a manufacturer (i.e. among the consumers of the produ ct)andto distinguishbetweenproductsliabilityandautomobileaccidentsonthatground.

Insurancecomesupagaininthefirstdoctrinalunit:damages.Thediscussion focusesagainontheconceptoftortlawasariskspreadingmechanism —asakindo f insurance.Thecontextnowisthe Seffert v.LosAngelesTransitLines casediscussed earlier,inwhichstudentseasilyseethebuscompany'sliabilitybeingborne(andspread) byconsumersasapartofthepriceofthebusticket —an"insurancepremiu m"ofsorts. Fromthisperspective,itisasmallsteptospeculatethatTraynormayhavewantedto

<sup>&</sup>lt;sup>23</sup>20Cal.App.3d528(1971).

<sup>&</sup>lt;sup>24</sup>RichardEpstein, *ProductsLiabilityasanInsuranceMarket* ,14J. LEGAL STUDIES645(1985);George Priest, *ATheoryoftheConsumerProduc* tWarranty ,90 YALE L.J.1297(1981).

limitpainandsufferingdamagesbecausehedidn'tthinkconsumersshouldbemadeto payforlargeamountsofthatkindof'insurance."

Followingupon thisspeculation, 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 intort. 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* caseremains 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 within surance companies, but the application of tort law to a complex factual situation.

ThebreachanddefensesunitsaretheonlypartsofthecourseinwhichIusually stayawayfrominsurancealmostentirely. <sup>26</sup>It's enoughtouse *Damages*toillustratethe conceptuallybackwardswayinwhichstandardofcareisapproachedinlitigation(i.e.,as discussedabove,lawyersbeginwithwhathappenedandthentrytoderiveastandardof carethatservestheirpurpose s,ratherthanstartingwithsomegeneralstandardofcare). Introducingtheroleofinsuranceinshapingthisexercisewouldconfusemorethan enlightenatthispoint.Inanyevent, *Sabia*illustratestheunderlyingideamoreclearlyin thecontextofca usation,soIwaituntilthatunit.

#### InsuranceandCausationinthe SabiaCase

The causation dispute in Sabia sonicely 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 a way to omuch of the story.

Asthelawyersin *Damages* explain,thestandardmove ina"badbaby"caseisto provethatabotcheddeliveryirreparablydamagedanotherwisehealthybaby. The defenselawyersexpectTony'slawyerstodothesamein *Sabia* fortwomainreasons. First,Dr.HumesnevermetTony'smotheruntilthemorningof thedelivery,sothecase againstherrestsentirelyonwhathappenedthatday. Second, the casefornegligencein thedeliveryroomismuchstrongerthanthecasefornegligenceearlierintheclinic.

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 $<sup>^{25}</sup>$ ForthisreasonIholdoffonmakingthepointthattheamountofdamagescollected,andoftenthe amountclaimed,islinkedtotheamountofinsurancethatisavailable. This is precisely the situation in Sabia. The plaintiffs' first offer of judgment is fortheamount of the policy limits. This is a simple enough point to make laterand is conceptually distinct from the damages doctrine I am focusing on at this point in the semester.

<sup>&</sup>lt;sup>26</sup>Iteachimmunitiesinthe "duty"section.WereItoteachimmunitiesasdefenses,itwouldbe irresponsibletoignoreinsurance.See,e.g. *Ardv.Ard* ,414So.2d1066(Fla.1982)(liftingintra -family immunityonlytotheextentofavailableliabilityinsurancecoverage).

Allt helawyersinthecasethoughtthatitwasshockingthatDr.Humesdidn'tknowthatTony'stwin wasdeaduntilhewasdelivered.Dr.Humesclaimedthatitwasnotherfaultbecausethehospital'snurses wereresponsibleformakingsuretheyheardtwohear tsbeatingwhenTony'smotherarrivedatthehospital. Whethersheisrightornot,somebodyclearlymadeaseriousmistake.Bycontrast,whetherthehospital's

Forthesereasons, the defense lawyers as semble a causationdefensethatpushes theharmbackintime, so that whatever happened in the delivery room did not "cause" Tony'sinjuries.ButTony'slawyersdonotmakethestandardmove.Likethedefense lawyers, the yalso start building a case that pushes To ny'sinjuriesbackintime.The reasonissimple:Dr.Humesonlyhas\$2millionininsurancecoverage -farlessthan Tonyneeds.Likemanyotherlawyers,Tony'slawyersgenerallywillnotpursuedoctors' personal assets, <sup>28</sup> and they don't think the jury w illholdthehospitalresponsiblefor mistakesinthedeliveryroomwhenDr.Humeswassoclearlythe"captainoftheship" thatday.So,theydon'twanttofocusonthedelivery,either.Unlikethedefenselawyers, however,(atleast,unlikethehospital 'slawyers)theywanttoholdthehospital responsible:thehospital's\$17millioninsurancepolicyistheirmaintarget.

Atthesametime,theydonotwanttogiveupthe\$2millionincoveragefromDr. Humes.Sotheywalkatightrope.Theyneedtoper suadeDr.Humes'insurancecarrier thattheycanprovehermistakescausedtheharm,withoutcompletelycommitting themselvestothatposition.Why?Becauseitisevenmoreimportanttopersuade NorwalkHospital'sinsurancecarrierthatthematernitycli nic'searliermistakescaused theharm.(Ofcourse,bothcouldhavecontributedtotheharm,butthat'samore complicatedstorythanthelawyerswantto,orintheendneedto,tell.)

Theycan'twalkthistightropeforever. One of the most dramatic mome ntsin DamagescomesshortlybeforethedepositionofTony's causationexpert. AsTony's lawyers'know, the expertisgoing to testify that Tonywasinjured during the weekend beforethedelivery -essentiallylettingDr.Humesoffthehook.Butthedefe nselawyers allthinkthattheexpertisgoingtotestifythatTonywasinjured *during*thedelivery (otherwise, why would the plaint iff she offering him as a witness in a case against Dr. Humes?). The combination of Tony's lawyers's ecret knowledge and Dr .Humes' lawyers' fearproduces a fever is hround of negotiations. Just before the deposition, Tony's lawyers reduce their demands othat the liability in surance company has to pay ttles.<sup>29</sup>Dr. lessthanthefulllimitsofDr.Humes'policy,andthecompanypromptlyse Humesisoutofthecase.

 $maternity clinic should or should not have done some extratests during the pregnancy seemed \ lawyers to involve many more shades of gray.$ 

toallthe

<sup>28</sup>Werthreports:

Koskoffproudlymadeapointofnotgoingafterdoctors' assets exceptinc as es in which they were not "responsible en ough" to buyade quate coverage. A certain fellow -feeling for the mas 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. (p. 158).

Foranextendedanalysisofplaintiffs'lawyersdistasteforcollectingrealmoneyfromrealpeople,see Baker, *BloodMoney*, *supra*note4.

<sup>29</sup>Althoughthereisnottimeinaonesemestertortscasetoaddressthesignificanceofinsurancelaw 's "dutytosettle," itisworthobservingthat *Damages* doesanexcellentjobillustratingthedynamicsofthe dutytosettleandotheraspectsoftheconflictofinterestthatisbuiltintotheliabilityinsurancerelationship. Foroneentrypointintot heextensiveliteratureoninsuranceconflicts, *see* Ellen Pryorand Charles Silver [recentarticle]. Myforayintothisliterature is Baker, *Tetrahedrons*, *supra*.

Atthedeposition, the expert testifies that Tonywas 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 lawye rshave 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. <sup>30</sup> After receiving that education, the insurer promptly exercises its right sunder the insurance policy to direct the defense, sacks the hospital's defense lawyers, and hir esits favorite Connecticut medical mal practice defense lawyer to take over the case.

Insurance *institutions* are alloverhere. 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. Tony's parents view the defendants almost as abstractions, without moral connection to their claim. They use the Norwalk Hospita Imaternity clinic for their next baby and do not seem to blame Dr. Humes.

[S]hewassickenedtothinkthatshecouldn'tbackdownnowevenifshewantedto.Her professionallife,herlivelihood,wereatstake,butwhethertheycouldbesalvagednolongerwas inhercontrol.Shecouldn 'tevensacrificeherselfShewaswillingtodothemostdistasteful thingshecouldimagine,surrenderforthesakeofexpediencytopeopleshedespised —the Koskoffs—onagravechargesheconsideredbaseless.Yeteventhatexcruciatingself —betrayal wasdeniedher.Again,shewasremindedthatitwasnotherbutherinsurancepolicythatthe Sabiaswanted,andthusitwastheownerofthatpolicywhomadethedecisions.(166)

#### <sup>32</sup>Werthwritesat210 -11:

Theymadenoassociationbetweenthemoney and Humesasanindividual. In eightyears 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 awell-offstranger with whose Merce desthey had collided.... Donnabore 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 ,'s he says. 'I felt, okay, now we can payour bills.'

Tony, though they seldomtal ked about it, felt the same. He though Humes was an unfortunate by stander, which made her, regrettably for her, a convenient target. He considered the suit, and the settlement, innow a ypersonal. "I'm not resent ful of Humes, 'he would say. 'She stepped in the middle of it. But, what do you do?"

<sup>&</sup>lt;sup>30</sup>Surprisingly,thisisoneaspectofthecasethatTony'sverycompetentlawyersdidnotsee mto understand.WerthreportsthatTony'slawyersexpectedthatthepresentationtothetrusteeswouldbethe preludetoanimmediatesettlementconference.Whentheonlyresultofthepresentationwasachangingof thedefenseguard,theyregardedthe presentationasawasteoftime.Theydidn'tunderstandenoughabout thedynamicsonthedefenseside.Thehospital'sleadlawyerrealizedthatthecaseneededtobesettled,but heknewthatbecausehehadnotbeenchosenbytheinsurancecompanyandh adneverhadanearlier opportunitytowintheconfidenceoftheseniormembersoftheclaimsdepartment,theywouldneverpay onhisrecommendationenoughmoneytosettlethecase.Theyneededto"own"thedefense,andheknew thatTony'slawyerswouldp utonagoodenoughshowtoscarethemintotakingownershipnowthatDr. Humeswasoutofthecase.Tony'slawyers'disappointmentnotwithstanding,thepresentation accomplishedagreatdeal.

<sup>&</sup>lt;sup>31</sup> Forexample, Werthreportsthat when Humes finally wanted se ttlement, she couldn't make it happen:

SomestudentsareoutragedonbehalfofDr.Humes: "Tony's own expertte stified that she wasn't responsible." "She was dragged around in the mudforn ogo odreason." "They trick edher lawyers." And so on.

Onagoodday,thisemotioncanbedirectedtowardarealteachingmoment.I learnedhowfromTony'slawyerChrisBernard,whovisitedtheclassmidwaythrough thefirstsemesterIused *Damages*.Thedayhecametwostudents recalledourearlier causationdiscussionsandchallengedhim."HowcouldyoudothattoDr.Humes?"one studentasked. "Itwasn'therfault," saidanother. That's when the teaching moment came:

"YouthinkMaryellenHumeswasn'tresponsiblebecauset hatwas ourcase, when itwasusagainstthehospital,"Chrisbegan."Weallworkedtogetheronthat Maryellen's lawyers, us, even the hospital's lawyers. We couldn't ignore the delivery, butweneverhadtolookatittoohard. Itwasneverinanyone 'sinteresttoprove MaryellenHumescausedtheharm .Certainlynotinherinterest,andnotinours.Even thehospitalhadtostayawayfromitbecausetheirnurseswereinthedeliveryroom,too. Believeme, if we had to prove she caused the harm, we couldhave .Gettingshoved through the birth can alisa punishing process for even a healthy baby, and Tonywas practicallydead. You'llneverpersuademethatdidn'thurtTony. Sheshouldhavedone anemergencyCsectionassoonasshegotintheroom. Didthatcausefivepercentof Tony's disability or tenpercent? More? Less? Whoknows? Whocares? All we had to doisprovethatshecaused someoftheharm.Jointandseveralliabilitytakescareofthe rest., 33

Inotherwords, what causes what inatort cased epends on what *needs* to cause what inorder for a plaint iff to be paid, or, from a defense lawyer's perspective, for a defendant to be relieved of responsibility. For the plaint iff, what needs to cause what depends on who has money. The depends of the state of the stat

With insurance claims, size is destiny. Humes had ceased to be the Koskoffs' [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 Hospital, 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

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<sup>&</sup>lt;sup>33</sup>I'mwritingthisfrommemory,soit'sundoubtedlyembellished –butthat'sthewayIuseitnowsinceI can'taskChristo comebackeveryyear,and,evenifIcould,Ican'texpectthesamemagicalmomenteach time.

<sup>&</sup>lt;sup>34</sup>MyfavoritecommentonthispointisfromalawyerIinterviewedinMiami: [threethings –I'magoodlawyer,I'llproveliability]

defend her more vigorously. Now it was the inadequacy of her coverage that decided her fate. (205 -06)

Thejurisprudentialpoint isthesameonetouchedonearlier:causationandresponsibility are *created*,notrevealed. <sup>35</sup>Evenifwecanimaginethatthereissome"real"or "essential"causeforaninjury(oranythingelseforthatmatter),wecanneverevenhope toseeitexceptth roughtheperspectivesourhistoryandinstitutionsofferus. Whether studentsgraspthislargerphilosophicalpointornotdoesnotmatter. <sup>36</sup>Itisenoughtosee therelationshipbetweeninsuranceandcausationinthe *Sabia*caseandtorealizethat similardynamicsareatworkinotheraspectsoflaw.

Attheendofthecausationdiscussion, weturntheinsurancelensonotheraspects of the *Sabia* case. Itellthestudents 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 dramaticast he famous drawing sin which changing perspective reveals an entirely differ entsubject. But, rereading *Damages* within surance firmly in mind gives students an ewperspective that supplements their growing confidence with doctrine and legal reasoning. All the students bring back specific examples of the control that liability in surance exercises over tort practice.

37 Some students are even able to identify the more subtlerole of first party in surance.

### Conclusion: TheBroaderCaseforUsing Damages

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<sup>&</sup>lt;sup>35</sup> SeeTAN21 supra. Weare usedtoobservingthat judgescreate legal rules, soft. Univ. of Cal. .,551P.2d334,342 (Cal. 1976) ("legal duties are not discoverable facts of nature, but merely conclusory expressions that, in cases of a particular type, lia bility should be imposed for damage done"), and that proximate cause is a legal invention, see Palsgrafv. Long Island Railroad [need cite and quote from dissent on proximate cause — I will supply this once my case book arrives here]. Observing that causation in fact can also be a creation of the legal process takes students as tep further in understanding the role of law in the social construction of reality.

<sup>&</sup>lt;sup>36</sup>Foranilluminatingexpositionofperspectivism, *see*AlexanderNehamas, NIETZSCHE:L IFEAS LITERATURE(1987).Cf.RobertoUnger, KNOWLEDGEAND POLITICS31 -36(1975)(ontheantinomy betweenfactandtheory).

<sup>&</sup>lt;sup>37</sup>Forexample:Inpractice, liability insurance is an element of tortliability, at least for ordinary individual or small business defendants. Liability insurance policy limits are defacto capson tort damages. Tort claims are shaped to match the available liability insurance coverage. Liability insurance companies control the defense and settlement of tortclaims with an eye toward the long terminterests 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 plaint if of ten come to share common interests, and work to get her 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>&</sup>lt;sup>38</sup>Tony'sparents *need*thelawsuitbecausetheydon'thaveenoughfirstpartyinsurance. Thecoinsurance ontheirhealthin suranceisa"blackhole"inthehouseholdbudgetandthereareexpenseslikehomecare thatarenotcoveredbyinsuranceatall. Atthesametime, the presence of this, admittedly inadequate, first partyinsurancemeans that Tony's parents can be madene arly as whole as money can make them by a settlement that gives the mnothing for pain and sufferingless 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).

Clearly, this discussion does not be gintoex haust the ways to use *Damages* in a tortsclass. Other torts teachers would no doubt use the book in other, more effective ways. Mygoalhere has been to convey a sense of what is possible.

Inconcluding, I would like to emphasize one benefit of using Damages that transcends torts or insurance: the opportunity towork over the course of many weeks with a complicated factual situation. Lawschools are very good atteaching students to be gint oth ink 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, lawschools dovery little to teach students to think critically about facts — what they are, how they are developed, how lawyers work with them.

Manycasebooksdemonstrate(someintentionally,othersnot)whatCLSscholars have called the indeterminacy thesis: legal rules and standards as well as their application are indeterminate (always at the margins and sometimes elsewhere). <sup>39</sup>But the indeterminacy casebooks typically demonstrate is that of "law" not "facts" (recognizing that there is no clear ground between the setwo). The indeterminacy the law -in-action demonstrates is farmore profound, because it extends to facts. Stud ying law in action reveals the insubstantial, made -upnature of the many of the supposedly solid, hard facts the appellate case method usually takes for granted.

Thatstudentsintuitivelygraspatleastsomedegreeoffactualindeterminacyis demonstratedbyhowoftentheyattemptto"arguethefacts"duringthediscussionofan appellateopinion,especiallyinfirstyearcourses. Astheyknowfromtheirownlives, if peoplearewillingtodisagreepubliclyaboutasituation, thefactsofthatsituationa re almostneverclearcut. "Eventhethinnestpancakehastwosides," asonetriallawyerput it.

Bytheendofthefirstsemesterweusuallyhavetrainedthetendencytoarguethe factsoutofourstudents. This training improves their ability towor kwithlegald octrine, but it comes at a cost. The cost is the lost opportunity to teach them how to train their emerging critical facilities on the facts of a case as well as the law.

Theresultisthatevengoodstudentstoooftenareleftwithoneof twonaïve approachestofacts –approachesthatmirrormistakesweareaccustomedtoaddressing directlywhenitcomestolegalrules. Eithertheypersistinthinkingthatlegaldisputes canalwaysberesolvedonthebasisofsolid, knowablefacts –much assomestudents persistinthinkingthatdisputesalwayscanberesolvedthroughtheapplicationof determinablerules. Or, they flip to the (even more mistaken) view that anything goes, that "lawyers are liars," and that the legal process has nothing odowith truth –much as

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<sup>&</sup>lt;sup>39</sup>Mypurposehereisnottotakeastrongstandonindeterminacy. Cf.,StevenWinter, *Indeterminacyand IncommensurabilityinConstitutional Law*,78 CAL.L.R EV.441(1990).Mybasicpointworksequally wellforpeoplewhoprefertothinkthatlegalrulesandstandardsare"underdetermined." *See*,e.g., *LawrenceSolum*, *OntheIndeterminacyCrisis:CritiquingCriticalDogma*, 54 U.C HI.L.R EV.462(1987).

somestudentsfliptotheviewthat,becauselawisreallyallaboutpower,legalrulesand standardsneverdetermineanything.

Many,ifnotmostlawyersinpracticespendfarmoretimeunderstandingand developingfactsthanthe ydodevelopingorresearchinglegaltheories. Litigators developfactsretrospectively. Transactionallawyersdevelopfactsprospectively. 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 class room takes a small, but important step in that direction.