ESSAYS

A Clinical Textbook?

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Imagine a clinical textbook in torts or contracts. Wait a minute, you’re getting way ahead of me. I didn’t say buy one or rent-to-own, I just said imagine one. All right, I can see that look on your face. You want to ask me all sorts of questions and unless you get them out of your system we’ll never get to imagining. No problem, I know you can’t help it, it’s just your Socratic training. So fire away.

Well, to begin with, what in the world is a clinical textbook? A clinical textbook is a text which presents material so as to explicitly situate the student within the world/context/perspective/schemata of the client and practicing attorney, as contrasted with that of a law professor and appellate justice.

Don’t we already have textbooks like that? Not really. We do have advocacy texts covering pretrial and trial skills, some of which include problem sets and casefiles,¹ and even one in which the hypothetical casefile is circumscribed by the applicable doctrine.² That’s not what I’m talking about. I’m talking about texts for traditional first year doctrinal courses like torts and contracts.³ Increasingly, texts for traditional courses include problems and some infrequent lawyering exercises. But as I’ll discuss later, in a traditional text, “cases come

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¹ See, e.g., MARILYN J. BERGER, ET AL., PRETRIAL ADVOCACY: PLANNING, ANALYSIS, AND STRATEGY (1988); MARILYN J. BERGER, ET AL., TRIAL ADVOCACY: PLANNING, ANALYSIS, AND STRATEGY (1989). See also THOMAS A. MAUET, MATERIALS IN PRETRIAL LITIGATION—PROBLEMS AND CASES (1992); National Institute of Trial Advocacy (NITA) (organization produces numerous casefiles and problem sets, such as DONALD H. BESKIND, ET AL., PROBLEMS AND CASES IN TRIAL ADVOCACY, Vols. I & II (5th ed., 1988)).

² See generally BERGER ET AL., PRETRIAL ADVOCACY, supra note 1.

³ BERGER ET AL., TRIAL ADVOCACY, supra note 1.

What I am saying will apply equally if courses eventually are restructured so as to no longer follow the one course, one doctrinal area model; e.g., combination of related doctrinal courses (con-torts) or subject areas (public law, business law, etc.).
first," both literally and figuratively. The cases are not framed within the context of the client or attorney; rather, the doctrine is disseminated in the context of law professor or appellate justice, and any attorney-client interaction almost always exists as a minor player in a particular case.

Why do you want to do this? Why do I want to imagine? Because then we can know what it might look like, whether it's possible, whether we even want it. You know those old car shows. They always had some "car of the future," made of strange alloys and formed in even stranger shapes. In reality, no such car ever commuted on the American road, but as the ideas evolved, various concepts from those cars were incorporated into actual vehicles. I see imagining a clinical textbook as following that tradition.

No, I mean why would you want a clinical textbook? I didn't say I did. I'm not sure I do want one. I only said I'd like to imagine one. What I am certain of is that a clinical perspective (i.e., centered on practicing attorneys and clients) should be embedded throughout the law school curriculum.

Let me anticipatorily address your question as to why I am so certain. First, the clinical perspective provides a context which is easy for students to understand. Students see movies, watch television, and read books about attorneys. Save The Paper Chase, The Pelican Brief, The Life and Times of Judge Roy Bean, and a few other odd offerings, our culture bears few traces of law professors and judges. Thus, for many students, the clinical perspective is far more accessible than the law professor or appellate justice perspective. At the very least, the clinical perspective provides an additional lens with which to view the material, thus improving overall understanding.

Second, the clinical perspective guides students in transferring the knowledge base that they have acquired in doctrinal courses into practice. Without a clinical context, students confronted with a situation triggering this law school-derived knowledge base often do not recognize the issues or know what to do with what they have learned. Students trained with the clinical perspective have the practical information, understanding, and context necessary to recognize the issues and start solving the problem.

Third, at schools like the one where I teach, a substantial percentage of graduating students enter either a small firm or become

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sole practitioners. New attorneys have to know what they're doing from the moment of graduation; they have to be able to hit the ground running. These students simply do not have the luxury of doing research in a large firm while being slowly mentored, monitored, and weaned over several years until they are capable of safely handling full cases and clients (though, this is not currently even the reality of large firm practice).

*Do you need a clinical textbook to impart this clinical perspective?*
No. There are a number of other alternatives. Many professors are creating their own problems and exercises. Also, standard texts have increasingly begun to include problems and exercises which you can use. And there are companion or supplementary materials—casefiles, exercises,⁵ and even novels⁶ which professors can assign to add a lawyering perspective to a doctrinal course.

*What do you think of these alternatives?* I think the trend of individual professors creating their own exercises and materials is an excellent one.⁷ The professor understands what she wishes to do with the material and appreciates how it fits into her overall course.

Materials within standard casebooks have come a long way since I was in law school when all they contained was edited cases, case notes, and questions the students had absolutely no idea how to answer. In preparing this Essay, I reviewed fourteen torts casebooks and twenty contracts casebooks. These casebooks are filled with a wide variety of "stuff": law review articles, excerpts from academic books, excerpts from novels, jurisprudential material, economic analyses, photographs, history, sociology, political theory, treatise-like

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⁶ *See, e.g., JONATHAN HARR, A CIVIL ACTION (1995) (offering rich hypotheticals for exploring the doctrinal, strategic, and ethical dimensions of civil practice, in general, and civil procedure, in particular).

⁷ *See, e.g., Philip G. Schrag, The Serpent Strikes: Simulation in a Large First-Year Course, 39 J. LEGAL EDUC. 555, nn. 1-10 (1989) (reciting the range of first year subjects incorporating a simulation component). See also Symposium on Simulations, 45 J. LEGAL EDUC. 469 (1995); ABA COORD. COMM. ON LEGAL EDUCATION; TEAM-TEACHING OF SUBSTANTIVE LAW AND PRACTICE SKILLS IN SUBSTANTIVE LAW CONTEXTS (1996).
offerings, essays, other materials that guide students through the
doctrine, "stories" about the various players in the case (before, during,
and after), and on and on. Increasingly, this stuff also includes
problems and some lawyering exercises. However, most of the
problems are what I'd call "doctrinal"—i.e., they ask for a doctrinal
response (e.g., "Does H have a claim?" or "How would you expect the
court to rule?") and do not require students to engage in role-play
with a client or participate in any other lawyering activity.

There are significant differences from a clinical perspective,
however, even among these various doctrinal problem sets. Specifical-
ly, there are two basic types of doctrinal problem sets. The first type
situates students in an appellate case context, using abstracted case
facts and sometimes citing an actual case which can be looked up to
find the "answer." The second type places the student in the world
of practice, coming alive within the rhetorical context of the practicing
attorney. Messages are left, phone calls come in, meetings are had
with clients, and associates are asked to carry out assignments and
come up with answers. By placing doctrinal analysis into a context
where students are functioning in a lawyering role, this latter type of
doctrinal problems generally advances what I've termed a clinical
perspective.

Some texts contain lawyering exercises in addition to doctrinal
problems. Most are advice and counseling exercises which, since the
questions usually consist of whether or not a client should pursue some
legal course of action, are but a small step from the analysis in
doctrinal problems. A few texts go beyond this and require actual
activity—arguing to a court, drafting and redrafting complaints,
answers, jury instructions, opinions, and planning factual investiga-
tion. These are all well come and important steps towards bringing a

8. See, e.g., IAN R. MCNEIL, CONTRACTS: EXCHANGE TRANSACTIONS AND RELATIONS
(1978); JOSEPH W. LITTLE, TORTS: THE CIVIL LAW OF REPARATION FOR HARM DONE BY
WRONGFUL ACT (1985).

9. See, e.g., ARTHUR ROSETT, CONTRACT LAW AND ITS APPLICATION (5th ed. 1994)
a few drafting exercises); ROBERT S. SUMMERS & ROBERT A. HILLMAN, CONTRACT AND
RELATED OBLIGATION: THEORY AND PRACTICE (2d ed. 1992) (problems requiring giving
advice and drafting); DAVID H. VERNON, CONTRACTS: THEORY AND PRACTICE (2d ed. 1991)
(314 problems in areas including counseling, negotiation, fact investigation, and settlement);
CHARLES L. KNAPP & NATHAN M. CRYSTAL, PROBLEMS IN CONTRACT LAW, CASES AND
MATERIALS (2d ed. 1987) (many problems, putting students in lawyering role by providing
detailed context, including giving advice, drafting, and argumentation); JAMES A. HENDERSON,
context including ethics, argument, drafting, summary motions, and negotiations); JERRY J.
PHILLIPS ET AL., TORTS LAW, CASES, MATERIALS, PROBLEMS (1991) (a few problems requiring
adversary arguments and strategy regarding jury instructions); LITTLE, supra note 8 (problems
clinical context into the traditional classroom. Nowhere, however, does any text ask a student to interview a client, put a witness on the stand, or cross-examine an opposing witness. In only one text could I find anything resembling materials which could be used for a negotiation.¹⁰

I have an even greater concern, however, with any approach in which a few exercises are dotted among the cases and other stuff. This approach leads to what I call the “Emily Factor”.

Emily is my goddaughter who lives in L.A. Many years ago when Emily was in the middle of sixth grade I paid a visit. Sitting around the living room, I happened to notice her reading book. It was a brand new textbook that her school had just begun to use, and hoping to get ideas for my own teaching materials, I began to leaf through the book. It contained the standard reading paragraphs and comprehensive questions (“What did Claude buy for his dog?”), but it also had a “thought” section—“Claude is from France; do you think that helps explain what he did? Why? What would you have thought if someone from your school had done the same thing? Do you think we should buy frills for dogs when people do not have enough food?” Here was the authors’ innovation, their great achievement. I couldn’t wait to ask Emily about the excitement of dealing with these types of questions.

When I finally cornered her later that day and asked her if she found these questions interesting, she looked at me and rather matter-of-factly said, “Oh, we don’t do those questions.” My point is that unless the exercises are central to the structure of the text,¹¹ so that those choosing the text select it for those exercises, my best guess is that the Emily Factor will prevail, and the teacher just “won’t do those questions.” They’ll teach what they are comfortable with, be led by the perceived need to accomplish coverage, and skip most of the exercises.

In contrast to the limited narrative provided by the problems and exercises in current casebooks, the companion or supplementary materials offer casefiles from which rich, multifaceted narratives can be

¹⁰ See Henderson, Jr. ET AL., supra note 9, at 719-730. See also Vernon, supra note 9 (providing a number of problems in a settlement/negotiation context in which the students are asked to come up with arguments for their position, anticipate counter arguments, and plan certain aspects of their strategy).

¹¹ See, e.g., Henderson, Jr. ET AL., supra note 9 (39 problems central to structure of text); Vernon, supra note 9 (a problem-based text with 314 problems).
derived. These casefiles can then be used in conjunction with a few of the carefully structured and circumscribed exercises which accompany them, or as the basis for an ongoing hypothetical throughout the course. Unlike doctrinal problems, these exercises require not only a performance activity (interview, argument, negotiation, witness exam), but also a full adversarial problem-solving analysis incorporating the student's judgment and tactics, while requiring the resolution of ethical considerations. Also, because the narrative is embedded in the casefile, students learn to piece together documents and derive information from the very types of sources they will rely upon in practice. But these supplemental materials must be purchased in addition to the standard casebook, and thus will cause anxiety for any professor who is concerned about the cost of books for her students or is obsessed with coverage.

Are you saying that everyone should devote their entire class to this clinical perspective? Of course not. What's important is the "total" experience students have by the time they graduate. If every class devoted ten or fifteen percent of class time to this perspective, students would get a significant dose of the clinical. Also, training in important skills like case reading and analysis doesn't need to be continually tied to how these skills will ultimately be used in practice. Just practicing the skill in isolation is productive. They do not always need be learned within a clinical perspective. A swimmer preparing for the Olympics may spend endless hours refining just one aspect of a stroke, kick, or breathing technique without any attempt at the time to incorporate it into their full, competitive racing form. The same applies to legal skills.

Finally, there is real value to professors and students in a noninstrumental, aesthetic approach to ideas. The practice of law is a pursuit guided by the instrumental; in contrast, the study of law leaves the teacher-scholar free to pursue a path defined only by intellectual curiosity, unattached to any need to find an immediate use. Students should experience this "poetry of ideas"; they should see where thought can go if left free to soar. It nourishes the human soul, and has a practical aspect as well—similar to abstract and applied sciences, sooner or later the abstract finds practical use.

12. See, e.g., SKILLS DEVELOPMENT SERIES, supra note 5. See also Schrag, supra note 7.
13. See, e.g., SKILLS DEVELOPMENT SERIES, supra note 5.
14. Ironically, we do not really teach case analysis, at least not in the context within which practicing attorneys use that skill. For an advocate, a case is itself a piece of rhetoric and argument. The skill required is line by line, step by step, argument by argument analysis.
Then, does everyone need to teach at least some of their course from a clinical perspective? Again, no. Every teacher has a "gift," something they bring to their class that hundreds of others who could teach the doctrine as well do not. If your gift is grand theory, minute explication of doctrine, in-depth statutory analysis, jurisprudential theory, or the like, and you have no affinity for the clinical perspective, fine, so long as students get a reasonable exposure to the clinical context elsewhere. Also, don't be confused. The clinical perspective has nothing to do with whether or not you use the Socratic method in teaching. The clinical perspective is a function of the "text" (role-play simulation or live-client) and the context of the dialogue, not the method of student-teacher interaction. While I mix small group exercises, lecture, discussion, modeling, and critique into my teaching, at the core of my methodology is questioning which forces students to clearly develop and justify their positions.

All right, that answers my questions, at least for the moment. So, I'm ready. How about imagining a clinical textbook? You bet. I had practiced criminal law for ten years before I began teaching. All I had was a clinical perspective. From the start, I had to wrestle with the existing criminal texts to teach the course I wanted to give the students. The only alternative was to create my own materials—a Clinical Criminal Law Textbook that was constructed using the following ideas:

- I shifted the "field-ground" of the standard casebook: In my text, the client situation became the rhetorical forefront, while cases were placed in the background (i.e., appendix) as the "library."
- From the start, the students were placed in the role of an attorney and immersed in the dialogue of practice.\(^{15}\)
- Each chapter was organized around a client-centered story (i.e., a case), rather than a single doctrinal area. Doctrine would arise within the narrative. As in practice, a single narrative could raise several different areas of doctrine. Thus, one chapter might raise manslaughter, strict liability and causation, while aiding and abetting, reckless homicide, and diminished capacity could arise in another. The students did not get all of the doctrine of homicide in one piece, but kept cycling back to the concepts as they arose within aspects of subsequent client "cases."

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\(^{15}\) The class was taught as an immersion language course. From day number one, I spoke to them like practicing attorneys.
The meta-story was a soap opera which took place in Nettletown, a community where people were forever doing unpleasant things to each other. The characters appeared, reappeared, and interacted. Past events gave motives for future actions, and after a while, the students came to know the characters, their backgrounds and relationships, and accordingly began to bring a more discrete, reality-based construction to their analysis.

The documents students would encounter in practice were incorporated into the materials (police reports, interviews, transcripts, instructions).

Students were required to apply case analysis to lawyering activities (interviewing, drafting declarations, court argumentation).

With these lawyering activities, the primary purpose of the text was not to teach skills, as one would in a traditional advocacy course. Rather, the text provided a link between the doctrine and practice by focusing upon how attorneys think about the doctrine. Nevertheless, in the process, students learned the skills. This raises important questions: How do you make this experience worthwhile with only limited time to devote to the actual skill? How do you avoid future harm that would result if the training were simplistic or misleading? The response is that any skills training objectives underlying the text are very basic and narrowly circumscribed. The necessary background information is provided through select articles, excerpts from texts, tapes, novels, modeling, critique, and, occasionally, explicit training correlated with the substantive context.

You may then ask whether merely meeting these "basic" objectives is worth the time? Absolutely. With some very basic lessons and the insight that results (e.g., be patient and really listen to your client when interviewing rather than continually probing with directive questions), students can be advanced to a significantly different plateau in their understanding.

In the clinical criminal textbook, the information was provided to students in sequence with frequent "do not proceed until you've completed the proceeding section" notations. This facilitated the addition of new information requiring renewed analysis, the development of the student's own answers and ideas to theoretical questions before reading any authorities, and permitted sudden, dramatic shifts in the story.

16. For a discussion of the concept of "plateauing," see Mitchell et al., supra note 4, at 24-25.
At the end of each chapter, I provided a "vocabulary list" of concepts that were covered in the chapter. Students were expected to provide simple explanations of the concepts, as well as understand their use and significance in practice. This ensured that the students had a good grasp of doctrine (expert attorneys, after all, have stored a large amount of doctrine; albeit, in a schemata from which it can be readily retrieved), and the list also provided an excellent mechanism for review during the last week of class.

Using this set of ideas, a clinical text can be constructed for any standard subject, such as torts or contracts. The Appendix of this Essay is a series of "excerpts" from a hypothetical clinical torts text. In an actual text, the students would have sufficient space following each question to write out their answers, and each "do not proceed" warning would be on a separate page so that students would really have to stop before going on. This mock textbook does not purport to represent the ideal presentation of the doctrine and issues. You would no doubt do it totally differently and ask different or additional questions. This example is merely an attempt to provide a somewhat coherent set of bits and snatches that will give a good feel for what such a text would be like. So take a look...

So, that's a clinical textbook? Yes, at least what my imagination could conjure. And, yes, I know it seems a little strange, but you get used to it.

But don't you lose a lot of coverage and really have to short change students on theory? No. I don't think I lost any coverage in the criminal law class. I raised all the same points as a traditional course, they were just brought out in a lawyering context. As for theory, the materials required students to develop underlying policy rationales, recognize countervailing policies, and then connect this analysis to their lawyering task. They saw that this theoretical underpinning gave them control of argumentation to the court and offered a key to the types of images that would be most effective in persuading a jury. As for so-called "grand theory," I acknowledge that it played a minor role in the text, but, candidly, it would play a minor role in any course I'd teach.

Well, I've never practiced before, and frankly I don't really feel that comfortable with these clinical texts. What do you think? I think you're right. This is not the book for you. But try a few exercises, or one of the companion, supplementary materials. I think you'll enjoy it and so will your students. Have someone from your clinic work with you and team-teach the exercise. Have lunch with some practitioners you know and discuss how the exercise would "really"
play out in practice. You'll be surprised to find how much you can assimilate about practice in a few of these conversations.

*I think I can imagine that.* Well, that's a good beginning. Imagining doesn't cost anything. It's just imagining.
APPENDICES: Excerpts From Mock Torts Casebook

I. APPENDIX A

A. CASE #1: "The Case of the Fragile Fishbowl"17

[Early afternoon] Marilou Boxner has just come into your office. You remember Marilou. She had amnesia when she was injured during a kidnapping by her father—well, he wasn’t really her father, he was her father’s twin who nobody knew about. Anyway, she regained her memory when she was in the convent under the care of Sister Emanuel, who was really her cousin, Ed Sibner, who had that operation and became a nun. [Ed. note—as you may recall, Ed Sibner paid for the operation with the proceeds from the settlement of his suit against the Grayson family for injuries when four year old Tami shot him in the ear with her older brother’s Nerf® BB gun.] Marilou was doing pretty well after that. She’d bought the stationary store, and business was picking up when Fate again stepped in. To keep her company, she had bought some fish, and a fishbowl manufactured by Mr. Fishbowl, Inc. A little over a year after she bought the fishbowl, it shattered while she was cleaning it. She was severely cut, lacerating a tendon in her wrist. After several operations, she still does not have full use of her hand. She came to see you to find out what she can do to get some money out of all this. Her medical bills were only partially covered by insurance, she has suffered a great deal of pain, and can no longer engage in her favorite pastime, curling, without excruciating pain ...

List all of the potential causes of action that might gain recovery in a case such as this one (of course subsequent investigation and discovery may wean out many of these), and the possible defendants for each cause of action:

17. As you will see, the soap opera format treats the tragedies befalling Nettleton’s citizenry with some flippancy. While the students are entertained, there is a real danger. In real life, the cases are not funny. A fellow human is seriously injured or killed; their family, friends, and loved ones become secondary victims of the tragedy. By making all of this a comedy, students may lose this vital perspective, and in fact become desensitized to the real human suffering involved. On the other hand, the lighthearted approach engages the students and lessens emotional barriers to their learning of legal analysis. What then should a teacher do? I discussed this problem with a respected colleague who teaches torts. She acknowledged that she had the same concern when teaching her own class. Accordingly, while most of her hypotheticals are playful, she regularly reminds the class of the painful realities, and discusses how those realities might and should affect judges, jurors, and legislators.
[DO NOT PROCEED UNTIL YOU HAVE COMPLETED THE PREVIOUS SECTION]

[Morning] You are an associate in a firm representing Mr. Fishbowl, Inc. The partner with whom you work regularly has called you into her office. "Our client, Mr. Fishbowl, Inc., has just been served with a complaint for damages. Marilou Boxner is the plaintiff. You remember Marilou. She had amnesia when ... anyway, it's a long story. She was cut pretty badly on one of our client's fishbowls. Guess her attorney did some investigation before suing, because they are not alleging defective design or defective manufacture. The attorney must have found out that all glass which has been subjected to constant pressure along its surface by, for example, water will wear out in time, from longitudinal cracks, and break. Their cause of action is based solely on products liability theory of "failure to warn." I want you to think about the case, get yourself up to speed in the area, and then let's meet again late this afternoon to begin to plan our strategy and 'to do' list . . ."

(1) You leave your supervisor's office and head straight for the library to get a quick grasp of the doctrinal area, "failure to provide warnings and instructions." You locate the following authorities to review:

(a) Shecbells v. ACV Corp., 987 F.2d 1532 (11th Cir. 1993).


How might each of these cases be used or distinguished by the plaintiff in this case? By the defendant?

(2) To be able to effectively prepare to frame trial testimony, draft instructions, and communicate your case to the jury, you need to have as full and sophisticated sense of the plaintiff's cause of action as possible.

18. The professor can use the exercise as a springboard to raise other issues, such as whether plaintiff could also allege breach of various warranties, and the advantages and disadvantages of these warranty theories as compared to the products liability claim.
(a) How do lack of warnings or instructions make a product which is otherwise operating properly "defective"?

(b) Based on what you've just read, is this "failure to warn" theory one truly resting in strict liability, or is it really a negligence claim?

(3) Your first reaction is that this risk is "open & obvious," and therefore no warning is required. After all, everyone knows that glass can wear out and break, and when it does, you can get cut. How strong is this argument? What do you think will be Plaintiff's response to your position?

(4) Since Plaintiff is claiming that your client should have provided some form of warning on its product, it may provide a useful perspective to envision what that warning could be.

(a) How about the following?

WARNING: OVER TIME ALL GLASS FISHBOWLS IN USE WILL FORM LONGITUDINAL CRACKS AND BREAK. WHEN THIS HAPPENS, THE GLASS COULD SPLINTER INTO RAZOR SHARP SHARDS CAPABLE OF SEVERING MAJOR BLOOD VESSELS AND CAUSING A CASCADE OF WATER, SATURATED WITH SMALL, COLORED PEBBLES, FISH FECES, MINIATURE SEAWEED, SAND, FRAGMENTS OF SHATTERED CERAMIC CASTLES, SNAILS, AND FLOPPING FISH GASPING FOR BREATH, TO POUR OUT ON YOUR CARPET AND NEARBY FURNISHINGS.

(b) If you don't like the one I drafted, draft your own warning. Be prepared to explain why you choose the language you selected.

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Your supervisor has just told you that you will second chair her at Marilou's deposition. She wants you, however, to prepare for and actually do the part of the deposition regarding the reasons, expectations, circumstances, etc. surrounding Plaintiff's purchase of the fishbowl. To get some background on taking a deposition, review the following [selected tapes, articles, texts, etc.].

(5) Getting a chance to do part of the deposition with an experienced attorney right at your side, both as a safety net and as someone who can afterwards critique your performance, is a great learning opportunity for you. But why should the client have to pay for your education? Your
supervisor can certainly do the entire deposition by herself. Is this ethical? Should the client be consulted? How would you discuss this with the client?

(6) List the specific information you will seek in your portion of the deposition. Be prepared to explain why you are seeking this information in terms of the doctrine you researched, and your case theory strategy.

(7) Now, be prepared to actually do the deposition. [The instructor will select someone to play Ms. Boxner, and give her the witness's special instructions.]

VOCABULARY you should have a command of:

- Products Liability
- Failure to Instruct and Warn
- "Open & Obvious" Danger
- Adequate Warning/Adequacy of Warning

B. CASE #2: "The Case of the Homicidal Hemoglobin"49

You are the attorney for the Nettleburg Hospital Association. Traditionally, the conduct of doctors in the State of Nettle has been tested against the standard of care of the Nettle Medical Community. The Nettle Supreme Court, however, has a case before it in which the plaintiff/appellant is asking the court to accept the reasoning of Helling v. Cary, 83 Wash. 2d 514, 519 P.2d 981 (1974). Plaintiff’s facts are exactly like those of the plaintiff in Helling. The medical community is up in arms because of what they fear will be tremendous uncertainty in the standards by which they will be judged if Helling becomes law, and want you to draft an Amicus Brief on behalf of the association opposing adoption of Helling.

(1) What is the appropriate role for an Amicus? How will this affect the way you draft your brief? In what way will this be different than if you represented the actual defendant?

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19. The documents in this “case” were created as part of an independent study in 1987 by Andrew Schwarz under the supervision of the author (on file with the Seattle University Law Review).
(2) Principal defendant (i.e., the Ophthalmologist Plaintiff is suing) will raise the basic arguments against Helling in his appellate brief.

(a) What do you anticipate these arguments will be?^{20}

(b) What response would you expect from Plaintiff's counsel? What would be your response?

(3) As Amicus, you must supplement (not repeat) the position taken in Defendant's brief by emphasizing the interests and perspectives of your organization. What are these? [You may wish to first think about whether and why doctors are held to a different standard of care than nonprofessionals, and what role the traditional standard of "accepted" or "actual practice" in the relevant medical community plays in this equation.]

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As attorney for the Nettle Hospital Association, you regularly have contact with administrators of the various hospitals in the state. Today, you are meeting with Jim Stire, Administrator of Nettletown General. Jim had suffered psychologically induced blindness as a teenager when he saw his parents, or at least he thought they were his parents, burn to death, or at least he thought they had died . . . . Anyway, it's a long story, and he seems just fine now since that incident with the lightning. Jim is concerned in general about Helling becoming Nettle law, and specifically about developing "guidelines" for what testing must be done if Helling sets the rules. Even more specifically, he wants to know if the hospital must routinely do tests for CAIDS whenever a blood transfusion is involved.

(4) Try to draft "guidelines" based on Helling. Are these useful? How?

(5) What about the tests for CAIDS? In the equation of countervailing "costs" under Helling, do you include nonmedical costs such as fear caused by false positives, along with possible stigma, employment difficulties, etc.?

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^{20} Here, the professor could also delve into the appropriate role for an appellate court, as contrasted with the legislature, and whether or not the Helling court crossed this line.
(6) Assuming you give the tests, must you fully inform patients of these nonmedical risks? Review the following cases on "informed consent." Do they help answer the question?

(a) Bang v. Charles T. Miller Hospital, 88 N.W.2d. 186 (Minn. 1958).

(b) Kennedy v. Parrott, 90 S.E.2d. 754 (N.C. 1956).

(7) Now look at a few "implied consent" cases:

(a) Hackbart v. Cincinnati Bengals, 601 F.2d 516 (10th Cir. 1979).

(b) O'Brien v. Cunard Steamship Co., 28 N.E. 266 (1881).

Would these cases be helpful in answering question #6? Why or why not? Do they have any possible bearing on this case at all? Explain.

(8) Prepare to meet with the administrator and to give your advice, answer his further questions, and such. [The instructor will select someone to play Mr. Stire, and give him the witness's special instructions.]

[DO NOT PROCEED UNTIL YOU COMPLETE THE PREVIOUS SECTION]

* * *

[Early morning] You've just finished reading the Nettle Lawyer, the local legal paper. Seems the Nettle supemes just adopted Helling. Suddenly, your intercom buzzes. Your client, Marilou Boxner, wants to see you. You assume she just wants an update on the Mr. Fishbowl, Inc. lawsuit, and are shocked when she walks into your office looking grim and pale. You saw her only last week, and she had looked better than you can ever remember seeing her. She was so radiantly happy, telling you that she and Vern Faulk, the local postal person, were getting married. Vern had really picked up the pieces of his life since the court ordered prison officials to allow the operation separating him from his Siamese twin who was serving life for soliciting Vern's murder. Before you could say a word, however, Marilou blurted out, "I have CAIDS, and I want to sue the world . . . ." You do some quick background reading (See, Medical Journal Article, Appendix B, and transcript of expert witness's trial testimony from another case, Appendix C), and begin to think.
(9) You toy with a couple of legal theories, listing any information of which you are aware to date which you believe supports each claim. You then think of other information which may be useful and how you might find/develop such information. (Of course you must always keep in mind why you want this information in terms of applicable legal standards and cases.)

(a) Negligence: The hospital breached its duty of care under Helling when it failed to conduct the test.
   
   Supporting Information of Which Aware:
   Other Information Would Seek/Possible Source(s):

(b) Lack of informed consent: The hospital was required to get Ms. Boxner's consent not to do the test.
   
   Supporting Information of Which Aware:
   Other Information Would Seek/Possible Source(s):

[DO NOT PROCEED UNTIL YOU COMPLETE THE PROCEEDING SECTION]

***

[Noon] You're in-house counsel for Nettletown General Hospital. You have just received a complaint (Appendix D) in which Marilou Boxner is suing the hospital for negligence leading to her now certain death from CAIDS. Before you spend the Hospital's budget on expensive outside litigation specialists, you want to do a preliminary work up of the case yourself so you'll be able to keep close tabs on outside counsel when they are retained.

(10) First, you list all possible defenses to the claim, and then summarize the types of facts which would support each such defense, and the types of facts which would weaken it.

(11) You just talked to a local litigator who told you that in the first case tried in Nettle on a Helling theory, the trial judge gave the instructions attached as Appendix E.

(a) What will be your position if these instructions are proposed in your case?21

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21. This question allows the professor to explore whether Helling is in reality an appellate test for when an accepted medical practice will nevertheless be found negligent as a matter of law, as opposed to a test for malpractice which is to be applied by a jury.
(b) Would you propose different instructions? Which ones? What legal arguments will you make (including supporting cases) in support of your request?

(c) Assume your trial judge gives these instructions. How (specifically) will they affect how you will characterize your case to the jury?

(d) You'd like the jury to know that no doctor in Nettle would give this CAIDS test, and would like to put on distinguished experts to bring out this information. Plaintiff will claim, and the court will likely agree, that actual community practice is not the standard (at least in testing situations) under *Helling*. Counsel will then go on to argue that evidence as to "actual practice" is therefore irrelevant. What will be your response?

[DO NOT PROCEED UNTIL YOU HAVE COMPLETED THE PREVIOUS SECTION]

* * *

After reviewing the medical article [Appendix B], the transcript of the expert's testimony [Appendix C], and the following cases, an attack on "causation" initially seems a potentially fruitful line of defense—


(c) *Richardson v. Richardson-Merrell, Inc.*, 857 F.2d 823 (D.C. Cir. 1988).


(e) *Summers v. Tice*, 199 P.2d 1 (Cal. 1948).


(12) Briefly outline the relationship between the doctrine of "causation" and your case. [Specifically focus on the difference between factual causation and proximate causation, assessing whether either or both are helpful to your case.]

(13) List all the points at which you could potentially break the chain of causation in the Boxner case.

(a) Do you need more information? Why?

(b) Where will you get it?

(c) A former friend of the plaintiff has told you that "Marilou has had a number of lovers . . . . I've never seen any, but I just know. It'll be in her diary. I know where she keeps it, and I can sneak into her house while she's away and get it for you . . . How about it?" What will you do?

(14) [Several months later.] Outside counsel has just taken plaintiff's deposition. Review the excerpt attached as Appendix G. What (specific) effect does this information have on your causation argument? What response do you expect from Plaintiff's counsel?

[DO NOT PROCEED UNTIL YOU HAVE COMPLETED THE PREVIOUS SECTION]

* * *

[Office of Plaintiff's attorney] Counsel for Nettletown General has just filed an Answer [Appendix F] to your complaint on behalf of Marilou. No real surprises, but that "causation" argument may be a dicey one, though the jury is likely to be sympathetic to Marilou and will find for her if they think the law permits. So, time to do some serious thinking about causation.

22. The professor of course may choose to spend a number of classes analyzing this line of causation cases in order to help students get a grasp on the area.
(15) Review the causation cases, supra. Now, what is your response to defendant's position on causation?23

(16) You plan to re-interview your client, this time focusing only on causation.

(a) To get some background on conducting this scaled-down interview, review the following [selected tapes, articles, texts, etc.]

(b) What (specific) areas will you delve into? Why (in terms of doctrine and case theory strategy)?

(c) Prepare to conduct the interview. [The Instructor will select someone to play Ms. Boxner, and give her the witness's special instructions.]

(17) [Three a.m.] You just jumped up in the middle of the night with a brainstorm. Amend the Mr. Fishbowl, Inc. complaint to allege responsibility for CAIDS. After all, it's foreseeable that if you're cut, you'll bleed; if you bleed, you may need a transfusion; and, any transfusion carries the risk of AIDS or CAIDS. Now calm down, go back to bed, and when you wake up in the morning, rethink your inspiration. Is it a sound idea legally? What does your client gain? Risk? Are there practical problems?24

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23. The professor can use the basic hypothetical as a springboard for further "what ifs." For example, in the area of "causation," the professor might ask the class to imagine that Ms. Boxner committed suicide because of overwhelming pain (or depression, fear, etc.).

24. You could also apply a "proximate cause" analysis to the relationship between the lack of warning and Marilou's injury to her wrist. Here theories of proximate causation can be explored: One could posit that it was foreseeable that if the bowl breaks, the contents will slop on the floor; but not that a serious injury will result. An alternative theorist might respond that some cut is foreseeable, therefore, the fact that the magnitude of harm that ensued was greater than envisioned should not matter.
VOCABULARY you should have command of:

<table>
<thead>
<tr>
<th>Standard of Care</th>
<th>Intervening Cause</th>
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<tr>
<td>Professional Custom</td>
<td>Independent Intervening Cause</td>
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<tr>
<td>Relevant Expert Community</td>
<td>Joint &amp; Several Liability</td>
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<tr>
<td>&quot;Locality Rule&quot;</td>
<td>Joint Tortfeasor</td>
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<tr>
<td>National Standards of Practice</td>
<td>Acting in Concert</td>
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<td>Consent</td>
<td>Indivisible Harm</td>
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<td>Informed Consent</td>
<td>Joint Enterprise</td>
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<td>Incapacity to Consent</td>
<td>Multiple Causes</td>
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<tr>
<td>Actual Cause</td>
<td>Proximate Cause</td>
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<tr>
<td>&quot;But For&quot; Cause/Cause in Fact</td>
<td>Foreseeable Harm</td>
</tr>
<tr>
<td>&quot;Wrongful&quot; Cause</td>
<td>Foreseeable Plaintiff</td>
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<tr>
<td>Epidemiological Studies</td>
<td>Foreseeable Result</td>
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<tr>
<td>&quot;Loss of Opportunity&quot;</td>
<td>Scope of Risk</td>
</tr>
<tr>
<td>Last Clear Chance</td>
<td>Substantial Cause</td>
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II. APPENDIX B

New Nettle Journal of Medicine  
Vol. 581 Issue 46 pg. 3 Jan., 1990

While much national attention has been focused on AIDS research, several groups of researchers in the U.S. and Europe have made marked progress in understanding a similar disease known as Curable Acquired Immune Deficiency Syndrome or CAIDS. [Ed. note: This article was written long before the recent optimistic news about the likelihood of an eventual cure for AIDS.] The obvious difference between these acquired deficiencies is in the apparently very high rate of cure reported for CAIDS patients where the disease is found early in its incubation.

Substantial work is now going on at the Center for Disease Control in Atlanta and at the Sloan Kettering Center in New York. The Atlanta team, under Dr. Wolfgang Green, has reportedly isolated and identified the disease causing agent and has made significant inroads in fully explaining the biochemical process by which it causes the disease.

In a recently published article in the Journal of Immunology and Pathology, Dr. Green reports that the disease affects between 1 to 3% of Americans and that number is rising at a rate of approximately 1/2 of 1% per year. The disease, like AIDS, is transmitted primarily through certain sexual practices, intravenous drug use, and transfusions involving infected blood. One researcher in England has suggested that a statistical analysis indicates that 70% of males diagnosed as having the disease probably contracted it from sexual relations with an infected individual. The same study indicates that 68% of the women known to be symptomatic received a blood transfusion sometime prior to the onset of the symptomology. "The irony of the situation," says Dr. Green, "is that a highly accurate test was developed for this syndrome over five years ago." The test, first mentioned in a 1985 issue of this journal, costs about $15 per patient. It is a simple procedure requiring .5 ml's of whole blood and may be performed using present laboratory technology.

"With the high incidence of infection through transfusion apparent in women, we have been working to develop a screening procedure for whole blood before it is administered to the patient," reports Dr. Green. His recent work, however, suggests that the disease agent does not manifest until it passes through the liver, interacting with certain gamaglobulins in the presence of an enzyme known as heptarin. As a result, the agent may only be identified after it is at work in the body. Tests on laboratory animals have indicated a 98% success rate in identifying the agent; however, other research suggests that some of the
positive test results are caused by other biochemical agents. This suggests that some percentage of those indicated to have the disease through this testing process, do not, in fact, have it.

Additionally, the incidence of complete cure varies depending on how early the disease is found. Researchers in England have found that the agent may be completely neutralized if detected up to four months after infection. Between four and six months, the incidence of cure drops sharply to 10%. After six months of infection, no cures have been reported. If not cured, the disease is 100% fatal within three to five years of the onset of symptoms.

In Sweden and Denmark, where the test is routinely administered to pregnant women and men entering the military, the number of deaths attributed to CAIDS has declined by 38% in four years. A recent study by the Immunology Institute of Sweden suggests that this impressive reduction in deaths may reflect an immunization effect rather than a change of lifestyle for those who had the disease and survived through early treatment. Apparently, it is suggested, once the disease is neutralized in the body, an individual's immune system will prevent reinfection.

In the United States, while the disease seems to be spreading at least at the rate of 1/2 to 1% per year, some researchers point to the similarities between the later stages of CAIDS and the symptomology of AIDS as making it impossible to know the true rate of increase. Nonetheless, the test, while widely known among doctors in the country, is seldom, if ever, used. Dr. Green suggests this is because of two factors. "Primarily, I think, doctors feel it is an inappropriately delicate issue to raise with most patients. The social stigma and potential for personal embarrassment is high. Secondly, and integrally related to the first, is that most American doctors that I've spoken with seem to think that the incidence of the disease is still too low to subject their patients to a suggestion that they be tested, with of course, the attendant fear and misunderstanding a patient might have." Dr. Green warns that with this disease seriously on the rise, it may be appropriate to reconsider this attitude. The high rate of success in treating this syndrome after early detection indicates that the fear of patient resistance may be receiving disproportionate weight. Dr. Green states that many doctors are hesitant to broach the subject with their pregnant female patients out of concern for their emotional health. "It is commonly believed that pregnant women are particularly sensitive to the suggestion that they should be tested for a disease associated with homosexuality and drug use. The question remains whether a doctor's protection of his patient from possible fear or stigma is justified where the results are so catastrophic."
III. APPENDIX C

TRIAL TRANSCRIPT
Mary Beth Simpson v. SULAW Medical Clinic

This transcript contains the testimony of Dr. Furst, an expert on the causes, incubation, and diagnostic possibilities concerning CAIDS. This is a partial transcript omitting Dr. Furst's credentials and qualifications and the introductory testimony on the disease itself.

Q: Has your work, or any you are familiar with, indicated a likely source of the disease?
A: Well, that would depend on the sex of the patient.
Q: How so?
A: Well, men may get it from any of the known sources, depending mostly on lifestyle . . . . Among women, however, the data suggests a much clearer link to one cause. My own research indicates that 68% of women known to have the disease contracted it from a blood transfusion. Of course, as I said, if the woman is an intravenous drug user or engages in certain sexual practices, that's a possibility.

Q: Dr. Furst, if women were routinely tested for the disease, say, during pregnancy or after a transfusion, what effect would that have?
A: Well, as you must see, it would save lives. It's criminal that routine testing is not done. Every individual who receives a transfusion should be tested within 30 to 60 days. The tests would have a profound effect.
Q: But is that really possible?
A: Absolutely. The tests now being used in Europe are easy and cheap. Just a simple drawing of blood and the test can be done in any lab.

The defense then cross examined Dr. Furst.
Q: Dr. Furst, isn't it a fact that this test you mention is not in practice anywhere in this country, by any doctor or hospital known to you; aside, of course, from those solely in research?
A: Well yes, but . . . .
Q: And isn't it a fact that if the blood used for a transfusion is infected, there's no way to test it before it's used?
A: Yes, that's correct, the disease agent only seems to manifest in the host body.
Q: And isn't it a fact that there's no way, other than testing the patient's blood, to know if this person is infected or this one isn't, until it's too late and the disease manifests itself at the incurable stage?
A: Well no, no there's quite a bit of work going on which seems to indicate that the patient will suffer terribly painful headaches approxi-
mately 30 to 90 days after infection. At this point, research indicates that a 100% cure rate is possible.

Q: And how soon after these "headaches" will symptoms emerge?
A: Well there's the problem, you see it could be another month or year or 10 years. We just don't know, maybe more, we can't predict that.

Q: Based on your work and that of others, is there any reason to believe it couldn't be 50 or 100 years?
A: No, if the person lived that long naturally, that could be.

Q: So it is your testimony, then, that medical science is simply unable to determine in advance if the blood used in a transfusion will cause the disease?
A: Yes.

Q: And it is virtually impossible to know with certainty when a person was infected?
A: Well, with certainty? I suppose you're right.

On redirect, Dr. Furst was asked the following:

Q: Dr. Furst, in your opinion, should this test be administered routinely?
A: Absolutely, it could save many lives.

Q: Then why isn't it being used?
A: Well that's complicated, I've heard different excuses. I think primarily it's a question of embarrassment. To the patient, that is, and fear. Doctors are afraid to lose patients by suggesting a procedure to detect a disease primarily associated with homosexuals and drug addicts. They say people don't want to face it and maybe they're right, but lives are at stake. Some doctors, I think some very good ones, are also afraid that patients will refuse treatment, refuse a transfusion where it's medically indicated. They don't want a panic.
IV. APPENDIX D

In the Superior Court of Nettleside County

Marilou Faith Boxner

)  
) No. 92-01-23-4321
)  
v.  
) COMPLAINT AND
) PETITION FOR
) RELIEF
)  
Nettletown General Hospital

)  
)  
Defendant.

)  

COMES NOW the plaintiff, Marilou Faith Boxner, a true resident of Nettleside County in the State of Nettle, represented by counsel, and on this ___ day of __, 1992, does hereby declare in open court, under penalty of perjury, the following; and makes the following claim for relief:

1. I, Marilou Faith Boxner, plaintiff, am 35 years of age.
2. On April 3, 1991, I was under the care of the Nettletown General Hospital (“Hospital”) in Nettleside County, State of Nettle. While in said care of defendant Hospital, I was administered a transfusion during surgery by the attending physician as a result of blood loss caused by a severe laceration of my wrist. I continued in the care of defendant Hospital for postsurgical care until March of 1992.
3. In April of 1992 I was diagnosed with CAIDS in an incurable phase of the disease. The disease is fatal.
4. Due to the negligence of the defendant Hospital I was not tested for the disease while it was still curable.
5. A test exists for CAIDS, and treatment in the early phases of infection is possible with extremely high rates of success.
6. The test is well known in the medical community and was known to the defendant Hospital at all times between the transfusion and the date I was diagnosed as manifesting the fatal symptoms.
7. Marilou Faith Boxner, plaintiff, hereby prays for relief, and asks that she be awarded money damages for her pain and suffering and loss of income caused by the negligence of the defendant, Nettletown General Hospital.
This is a true and correct statement, sworn this ____ day of ______, 1992.

__________________________  ________________________________
Marilou Faith Boxner         Attorney for Plaintiff

V. APPENDIX E

INSTRUCTIONS

Many instructions are given to a jury. Among them are standard instructions on the burden of proof, causation, proximate cause, etc.
The following are the two instructions which are relevant here.

Jury Instruction #19
You may find for the plaintiff if you find that:
1. A medical procedure existed which was known, or should have been known, to the defendant to be reasonably safe and effective;
2. Its use could reasonably be expected to avoid or prevent serious injury;
   and
3. No significant countervailing considerations (such as cost, danger to life or quality of life, or potential side effects) existed which made the procedure impracticable.

Jury Instruction #23
   If you find that the defendant physician reasonably exercised his judgment as a medical doctor and found compelling reasons for omitting a procedure which may otherwise have been indicated, you shall find this to be a defense to a claim of negligence based on that omission.
VI. APPENDIX F

In the Superior Court of Nettleside County

Marilou Faith Boxner )
) Plaintiff, ) )
) No. 92-01-23-4321)
) v. )
) DEFENDANT'S )
) ANSWER TO )
) COMPLAINT AND )
) MOTION TO )
) DISMISS UNDER )
) NETTLE CIV. R. 12(C)
) )
) Defendant. )
)

COMES NOW the defendant, Nettletown General Hospital, a corporation established under the laws of Nettle, by and through counsel, in open court this ___ day of ___, 1992, under penalty of perjury, and does declare the following answer to plaintiff's complaint and moves this court to dismiss this action:

1. Defendant incorporates and stipulates to paragraphs 1, 2, and 3 of plaintiff's complaint.
2. Defendant denies paragraphs 4-7.
3. The defendant moves this court to dismiss this action for failure to state a claim upon which relief may be granted pursuant to the laws of this State of Nettle and one or both of the following grounds:

(a) Plaintiff has not, and is not able to establish that she was infected with this disease on or about April 3, 1992, or at any time while under defendant's care.

(b) Courts in the State of Nettle have long recognized that the standard of care required of a physician is the skill and practice of other members of the profession. Plaintiff has not shown, and cannot show, that defendant departed in any way from this standard.
For the reasons stated above, either in the alternate or aggregate, defendant moves this court to dismiss this action for failure to state a claim pursuant to Superior Court Civil Rule 12(c).

This is true and accurate, sworn this ____ day of ________, 1992.

__________________________  ____________________________
Dr. Kibort for Nettletown General  Attorney for Defendant
Hospital

VII. APPENDIX G

DEPOSITION

The following is a partial transcript of the plaintiff, Marilou Boxner's, deposition:

On examination by counsel for defendant:

Q: Now Marilou, did you experience any unusual pain shortly after you received the transfusion?
A: Yes, terrible, terrible headaches about one month after, I'd have to sit down, the room would swim. They lasted a couple of hours each and went away after four or five days.
Q: Have you ever used intravenous drugs?
A: No! Never, my god.
Q: Now I'm sorry, but, have you ever engaged in extramarital sex?
A: Absolutely not.
Q: How many men have you had sex with?
A: Just my husband.
Q: Ever have a transfusion before this one?
A: No.
Q: Ms. Boxner, about these headaches, did you report them to your doctor?
A: No, I didn't think it was important.
Q: And why is that?
A: Well they were really bad but, well ... I don't know I guess ... not so different . . . .
Q: Different than what?
A: What I used to get.
Q: You had these headaches before?
A: No, not these, different . . . but kind of the same.
Q: And when was this?
A: Well, when my dad died sixteen years ago for awhile I got them.
Q: And that was the only time?
A: Well, also four years ago, I got fired and it was the tension. When my
dad died too, I would get so wound up. And this is my first kid and we
were having a hard time. I thought it was that, the tension. I didn't want
anyone to know how hard, up all night, bottles, crying. I had no idea it
could mean I was sick.