A Review of Torts and Compensation: Personal Accountability and Social Responsibility for Injury

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One of the most bewildering tasks facing a new professor is selecting a casebook. I would suggest one cardinal rule to follow: know thy book, know thy students, and know thyself. With this principle in mind, I will review my selection of Dobbs and Hayden's *Torts And Compensation, Personal Accountability And Social Responsibility For Injury* (hereinafter "the Dobbs casebook") for use in my year-long first-year torts class. My review will focus on the third edition and will note changes made in the fourth edition, which came out recently.¹ My hope is to tell you a little about the Dobbs casebook and a little about why I thought it would suit my incoming first-year students and my style of teaching.

When selecting a casebook I have four main concerns:

○ What is the coverage?
○ Does the casebook employ the traditional case method, a problem approach, or some combination?
○ What is the balance struck by the authors between exploring policy and explaining black letter law?
○ Is the casebook student-friendly? Is it faculty-friendly?

The short answers to these questions are that the Dobbs casebook’s coverage focuses on personal injury, it uses predominately the traditional case method, it stresses black letter law over policy, and it is extremely student- and faculty-friendly.

I. COVERAGE

As the Preface ² to the third edition of the Dobbs casebook notes, the two most notable features of its coverage are that the casebook fo-

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¹ For those distracted by the typographical errors in the third edition, a brief review of the fourth edition shows that almost all have been eliminated.
² Ideally, one would canvas all casebooks in their entirety to select a casebook. My rule of thumb is to at least review the preface, first chapter, and the book’s treatment of the easiest and
cuses on personal injury (not on economic or dignitary torts) and that it keeps up with changes in tort law.\(^3\)

The casebook is heavily focused on personal injury.\(^4\) Economic loss and dignitary torts are banished to the later chapters and receive brief treatment.\(^5\) If these are topics that you love to teach in depth, then either this is not the book for you or you should be prepared to supplement heavily. Personally, as an addict of defamation law, I always end up supplementing the casebook’s defamation materials. On the upside, the focus on personal injury allows for in-depth coverage\(^6\) and gives the casebook a strong, consistent flow.

Second, the Dobbs casebook does indeed keep up with changes in tort law. There are frequent new editions and when combined with the yearly, extensive update letter, it is the rare instance when an interesting decision escapes the eyes of the authors.\(^7\) Moreover, new issues of tort law are not simply dumped into additional notes, but rather incorporated in a thematic way throughout the casebook. The third edition was sprinkled with cases on AIDS (in particular, the liability of blood banks),\(^8\) and the fourth edition has a series of cases, hardest topics in the course. Most authors have a preface or other introductory section describing the authors’ goals for the casebook. Are these goals your goals? When reviewing the authors’ announced purposes, there are two caveats to keep in mind. First, beware of the authors' self-delusion. Sometimes my perception of a book’s approach will differ drastically from the authors’ claims. Second, remember that what you do in the classroom can reiterate the casebook’s theme, oppose it, or supplement it. It is also vital to review the first chapter because this is usually the first thing students will read, and it will set the tone for your class. Finally, I review the book’s treatment of the easiest and hardest topics. I want to gauge the book’s teaching level and compare it to my students learning level.


5. See THIRD EDITION, supra note 3, at Chs. 25, 26, 27.

6. Occasionally, I have heard concerns that the Dobbs casebook tries to “do too much.” Perhaps as a response to criticism that the second edition was too detailed, the Preface to the third edition noted that the casebook “is somewhat more streamlined and accessible than its predecessors.” THIRD EDITION, supra note 3, at vi. To be honest, I like the detail. Although you cannot teach the entire book even within a five-credit course, you can use the suggested omissions in the Teacher’s Manual to quickly cover a particular topic. See, e.g., DAN B. DOBBS & PAUL T. HAYDEN, TEACHER’S MANUAL TO ACCOMPANY TORTS AND COMPENSATION: PERSONAL ACCOUNTABILITY AND SOCIAL RESPONSIBILITY FOR INJURY 103, 127, 182–83 (4th ed. 2001) [hereinafter FOURTH EDITION TEACHER’S MANUAL].

7. This trend continues in the fourth edition, which includes at least twelve cases decided in 2000. FOURTH EDITION, supra note 4, at v.

spread throughout the book, on care in nursing homes.9 This use of 20th century fact patterns, in preference to 17th century sword fights, seems to engage and interest students.

One area where coverage seemed weaker in the third edition was products liability; however, this has been partially remedied in the fourth edition. A difficulty with the third edition was the inclusion of a drug case to explain design defects.10 This bred confusion in the students who took the reasoning used in the drug case as typical of all design defect cases.11 The fourth edition drops the problematic drug case.12 It continues to use a pair of Ohio cases to illustrate the shift from consumer expectation to risk/utility;13 has a note on the burden shift of Barker v. Lull Engineering Co.;14 utilizes an airplane case to illustrate the complexities of risk/utility analysis and the need for proof of a reasonable alternative design;15 and concludes with the addition of a new case, the Long Island shooting case, on whether bullets are “defective.”16 I think the students will find this structure much easier to follow and will find the addition of the gun case and related notes to be interesting and provocative.

The down side is that drug design cases are now virtually absent from the casebook. With the exception of one extended note summarizing the conflicting positions of Brown v. Superior Court17 (California’s adoption of the no design defect action for drugs rule), Cochran v. Brooke18 (taking a risk/utility position), and Allison v. Merck & Company, Inc.19 (a Nevada vaccination case where some of the justices

10. See THIRD EDITION, supra note 3, at 634–36 (citing Cochran v. Brooke, 409 P.2d 904 (Or. 1966)).
11. I solved this confusion by initially omitting Cochran and the related notes when teaching the basic test for design defects and then reassigning all the drug issues at the end in a “do we want to allow a design defect claim for drugs” section.
12. See FOURTH EDITION, supra note 4, at 639–54 (the design defects section does not include Cochran).
14. FOURTH EDITION, supra note 4, at 643 (reprinting Barker v. Lull Eng’g Co., 573 P.2d 443 (Cal. 1978)).
15. FOURTH EDITION, supra note 4, at 644–46 (reprinting Wilson v. Piper Aircraft Corp., 577 P.2d 1322 (Or. 1978)).
16. FOURTH EDITION, supra note 4, at 648–50 (reprinting McCarthy v. Olin Corp., 119 F.3d 148 (2d Cir. 1997)).
17. 751 P.2d 470 (Cal. 1988).
18. 409 P.2d 904 (Or. 1966).
flirted with a consumer expectation approach), the casebook stays away from drug design cases. To be fair, there are products liability cases involving drugs elsewhere in the fourth edition, but those who want to ask whether and why drugs should be treated differently for design defect purposes may need to add a handout. This omission was probably driven by the addition of materials on guns, and, overall, the coverage of product liability is much improved.

II. CASE METHOD OR PROBLEM APPROACH?

The Dobbs casebook overwhelmingly uses cases as its teaching vehicle; however, the casebook does include occasional statutes. This inclusion offers the opportunity to make sure that students learn to read statutory language with care. First-year students often suffer from "case myopia" (a condition caught in about the fourth week of class, which causes them to skim any text not in a case). The Dobbs casebook's reproduction of several statutes provides an opportunity to balance the book's case law focus.

Equally, although the casebook does not employ the "problem method" in any comprehensive way, it does offer the occasional problem, usually at the end of a chapter, which can be a useful tool for re-
view. I often give students the option of handing in a written answer to one or two of these problems in the course of the term so they can test their understanding and polish their exam writing skills. Still, to reiterate, this clearly a casebook, not a problem book.

III. WHAT IS THE BALANCE BETWEEN POLICY AND BLACK LETTER LAW?

This casebook’s primary aim is to make sure students understand black letter law. I do not mean this in a derogatory sense, or to imply that this is a simplistic book. On the contrary, students who use this book are called on to master tort law and its often-conflicting rules. But this is not a policy-focused book. Policy does not drive its layout or its presentation. Nowhere in the third edition’s Preface does the word “policy” appear, and with the exception of a brief two-page section in the Introduction on the goals of tort law, express discussion of tort theory is left to a separate chapter near the end of the book.

Here, the fourth edition makes a change, apparently in response to criticism. The fourth edition’s Preface mentions policy and highlights a new introductory chapter that outlines major policy considerations. However, the Dobbs casebook seems, at best, ambivalent about this expanded coverage of policy. It ends this initial discussion of policy with the following comment: “A great deal can be said about approaches to tort law or its goals, but for those without experience in reading actual cases and encountering actual tort problems the goals are so abstract that they almost elude the grasp.” I agree. I prefer to integrate policy discussion as the term progresses rather than raising

24. See, e.g., id. at 78 (problems on consent), 152 (negligence), 177 (res ipsa loquitur), 189 (cause in fact), 241 (proximate cause). One minor annoyance with the third edition was that the usually voluminous Teacher’s Manual varied in the level of analysis it devoted to these problems, sometimes offering only terse comments, reflecting the primarily “case driven” casebook. See, e.g., DAN B. DOBBS & PAUL T. HAYDEN, TEACHER’S MANUAL TO ACCOMPANY TORTS AND COMPENSATION: PERSONAL ACCOUNTABILITY AND SOCIAL RESPONSIBILITY FOR INJURY 259–60 (3d ed. 1997) [hereinafter THIRD EDITION TEACHER’S MANUAL] (comments on the Hartsock v. Forsgren Inc. problem). The fourth edition of the teacher’s manual expands the analysis of several of these problems. See, e.g., FOURTH EDITION TEACHER’S MANUAL, supra note 6, at 230 (expanding comments on the Hartsock v. Forsgren Inc. problem).

25. See THIRD EDITION, supra note 3, at v–vi.

26. Id. at 4–5 (discussing the goals of freedom, accountability, and social responsibility).

27. See id. at ch.19 (discussing “Problems in Tort Theory: the Role of Conceptions, Justice and Policy in Tort Law”).

28. See FOURTH EDITION, supra note 4, at vi (noting that the new chapter on policy considerations was added because of "suggestions from teachers who use this book and our own experience... ").

29. Id. at 3–9 (this new introductory chapter also adds a discussion of damages).

30. Id. at 9.
the issues, in the abstract, up front. However, if you want to give students a quick textual overview of policy in the first class, the fourth edition’s new introductory chapter gives you this option. Even with this new introductory chapter, however, black letter law remains the driving force behind this casebook.

While this is not the book to select if you want the prevailing theme of your torts class to be policy, you can use this casebook to teach a class with a policy component if you keep in mind three simple points. First, remember that you are selecting a book for students to read before they come to class: what you do in the classroom can reiterate the casebook’s theme, fight it, or supplement it. I want a casebook which allows students, on their own, to gain a basic understanding of the tort rule at issue. If students walk into the classroom having already grasped the basic rule, then I can use the class time as I want, rather than using it to reiterate that rule.

Second, in torts, students sometimes appear to think that policy is all there is. Moreover, at times, policy analysis consists of the student’s personal belief that tort plaintiffs are “hapless victims” or “undeserving money diggers” (pick the sentiment that prevails in your student body). A strength of the Dobbs casebook is that it forces students to focus on the rules, how they work, and when they break down. It is only after students have mastered the rule and its exceptions that I want them to discuss the policy considerations that the courts deem, or say that they deem, important in fashioning those rules and whether those policy rationales are well founded and consistently applied.

Third, the Dobbs casebook provides opportunities to discuss policy perspectives. For instance, the initial battery case, Van Camp v. McAfoos,31 demands a discussion of whether tort law should be fault-based or should focus solely on compensating injury—a theme that resonates throughout the first chapter.32 Equally, economic theory can be introduced in the material following United States v. Carroll Towing Co.,33 and feminist legal theory can be taught both from the sexist language of some of the malpractice actions and the limited vision of some courts in proximate cause cases.34

31. THIRD EDITION, supra note 3, at 20–22 (reprinting Van Camp v. McAfoos, 156 N.W.2d 878 (Iowa 1968)).
32. See THIRD EDITION, supra note 3, at 20–22.
33. Id. at 138–42 (reprinting United States v. Carroll Towing Co., 159 F.2d 169 (2d Cir. 1947)). Judge Posner discusses economic theory again in Wassell v. Adams, 865 F.2d 849 (2d Cir. 1989), reprinted in THIRD EDITION, supra note 3, at 247–53.
34. See THIRD EDITION, supra note 3 at 75–77 (reprinting Kennedy v. Parrott, 90 S.E.2d 754 (N.C. 1956)). The court rejects the need for consent by a female patient holding that the law should reject the "fetish of consent" and instead "encourage self-reliant surgeons . . . not men
In short, if you want a casebook that explores tort policy in depth, this book is not the one you want to pick. If, on the other hand, you want students to come to class with a mastery of the basic rule, this is a good book regardless of what you want to do with those students once they arrive.

IV. STUDENT- AND FACULTY-FRIENDLY?

The Dobbs casebook is designed to be student- and faculty-friendly. Let me explain each in turn.

A. Student-Friendly

Perhaps the most revealing comment in the Preface to the Dobbs casebook is that its "main goal is always to teach students, to challenge them, and to provide everyone with a good time in the process."35 The casebook's strength is that the authors remember how confusing it was to be a first-term, first-year student, and they write for that confused student.

To see how a casebook treats students, I recommend reviewing the first chapter. This is the first thing your students will read about the course. It will inevitably shape what the students think about the course, about you, and about the law. You can have very different visions of how you think students should be introduced to the law. Do you want to show the students how complex and demanding law can be? Do you want to start with a policy overview setting out themes the students should recognize as the term progresses? Or, do you want a user-friendly approach that aims to help students use the casebook and study the law?

The Dobbs casebook takes the third approach—it is very user-friendly. A couple of illustrations suffice to give the flavor of this casebook. The third edition's introductory chapter includes a section on "Reading Tort Cases: Trial Procedure."36 From a simple explanation of why we read cases to a short note on summary judgment, this introduction helps students learn how to read their first case. Students need a basic understanding of civil procedure, yet no torts professor wants to spend a class teaching process. The casebook's approach al-

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35. THIRD EDITION, supra note 3, at vi.
36. Id. at 1–16. This material remains in the Fourth Edition, split into two introductory chapters and combined with the policy overview and a new explanation of damages. FOURTH EDITION, supra note 4, at 2–32.
allows you to jump straight into torts, yet the material is available and accessible when questions on procedure inevitably arise.

The Dobbs casebook also has student-focused notes. Casebooks tend to use notes in three basic ways: to reinforce and test understanding of the main case; to introduce multiple new cases; or to ask rhetorical and largely unanswerable questions. In the Dobbs casebook, the early chapters' notes serve, predominantly, the first task—they reinforce the message of the main case. I once characterized the notes following the battery cases as asking, "Did you get the rule? Did you really get the rule? Can you apply the rule (which we will now tell you in case you missed it) to new facts?" This strong focus on pulling a rule from the case and then demanding a detailed analysis of that rule and its application to new facts is often the hardest thing for students to learn. An advantage of this casebook is that, especially early on, it persistently emphasizes these skills.

Later in the casebook, the notes take on other roles, such as introducing other cases, incorporating statutory changes, drawing parallels to other areas of the law, and raising policy concerns. Yet, one of the strengths of this book that leads me to conclude it is student-focused is that the difficulty level of the book alters as it progresses.

This recognition that student learning progresses at different rates during the semester is reflected in both the pacing and the sequencing of the materials in the book. For instance, the first chapter, on intentional torts, starts off at a deliberately slow pace, which later quickens. The sequencing of materials also accommodates the students' learning curve. The layout of the book starts with intentional torts and their defenses, then rehearses a simple negligence case

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37. The second note in the casebook tells students that casebook authors often select cases with more than one theme (hinting to the students to look for more than one rule in a case) and that the notes furnish related information or help develop analysis. THIRD EDITION, supra note 3, at 22. The authors realize that students have no idea how or why cases are selected and do not know what purpose the notes serve.

38. An occasional annoyance is that sometimes a note cites to a case's facts to illustrate a rule even though the case is not decided on that rule. This method can be initially confusing because the citation of the case implies that the case's resolution turns on the point being discussed. The Teacher's Manual, however, usually alerts the reader that the case was decided on a different point of law. See, e.g., id. at 421 (citing Rockweit v. Senecal, 541 N.W.2d 742 (Wis. 1995) (illustrating the nonfeasance/misfeasance issue)), clarified in THIRD EDITION TEACHER'S MANUAL supra note 24, at 527–28. The Third Edition Teacher's Manual refers to the case as Rockweit v. United Wisconsin Proservices, Inc. in error, but this is corrected in the Fourth Edition Teacher's Manual.
(where the duty is presumed to be reasonable care), and only then returns to more complex duty issues.\(^{39}\)

This sequencing has distinct advantages for first-term students. Starting with intentional torts allows students to confront, dissect, and put back together, an entire tort. They can study detail while keeping the big picture in mind. Once they enter negligence, they can carry the concept of a tort as a series of elements with them. In addition, dealing with a simple negligence case first and postponing duty questions until later keeps the class moving and the "big picture" of negligence in the students' heads. The Dobbs casebook rejects the approach taken by many casebooks of starting with negligence and studying it in detail for much, if not all, of the first semester. If you want to teach negligence first, this is not the book for you. It could be done, but I think you would lose the advantages of pacing and the careful building on prior cases that characterize this casebook.\(^{40}\)

There is one topic on which the Dobbs casebook may prove less than friendly in student eyes: proximate cause. This is a section that has undergone extensive revision in the fourth edition. In the third edition, in a section entitled "basic rule choices," the Dobbs casebook laid out the essential split between the direct/intervening acts vision of Polemis and the foreseeability of harm approach of Wagon Mound.\(^{41}\) Both cases were extracted at length. I liked this introductory section because, although (as Dobbs illustrated in the section on "Qualifying and Applying the Rules")\(^{42}\) modern courts mix up these approaches, at least the students could enter the often conflicting morass of modern case law armed with an analytical framework. Was a court raising a proximate cause issue because of a scope of the risk concern, or did the court see the harm as foreseeable but have concern with an intervening act? This was the chapter's strength. The downside of the chapter, one that caused me to skip several cases, was a series of opinions of the New York Court of Appeals and particularly of Judge

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39. See Fourth Edition, supra note 4, at Chs. 3, 4 (covering intentional torts and defenses), Chs. 5–9 (covering the basic elements of negligence and defenses), Chs. 10–19 (covering complex negligence issues).

40. As previously mentioned, this casebook encourages student learning by using modern cases. The first section, battery, deals with school violence, religious objections to surgery, sexual harassment, smoking as battery, and insane murderers. Third Edition, supra note 3, at 20–48. These cases engage the students, and engaged students learn.


Fuchsberg. As the Dobbs Teacher's Manual explains, this series of New York cases was intended, in part, to illustrate the confused application of proximate cause. To quote from the Teacher's Manual: "the grounds for the decision are themselves perhaps unclear; and even more unclear is the principle that might be used in subsequent cases." I find these cases far too confusing for the students when they are struggling to come to grips with proximate cause and I would much prefer a few cases where the courts do a better job of applying proximate cause.

This is one place where the changes of the fourth edition seem problematic—Polemis and Wagon Mound are relegated to textual notes, and the New York opinions are left untouched. The same two visions of proximate cause are set out in the text (along with a simple case and a series of hypothetical fact patterns), but I think that the students need more cases to read to master proximate cause. With the omission of Polemis and Wagon Mound as main cases, I fear that the students will move too fast and will have only started to grasp the issues when they are confronted with the confusing language of the New York cases.

With this caveat, I find that students like, and learn from, this book.

B. Faculty-Friendly

Anyone who uses the Dobbs casebook knows that the Teacher's Manual is a gold mine of information. Resembling a small phone book (and I do not exaggerate), it is a well-organized, well-thought out guide to the casebook with both short and long summaries of each case, an explanation of why each case is included, hints on how to teach the case, and even sample questions to pose. The manual is so well organized and so consistent in its organization, that it is easy to


45. Id. Of course this also illustrates the virtues of the Teacher's Manual since, having read these cases and having derived no useful analysis, I was relieved when I turned to the manual and learned that the authors had included them with the belief that some of the "quoted language seems to make no sense" and that the terms used by the court were "mystifying." Id.

46. Some useful gems that the manual provides for each chapter include the following: a notation of any changes since the last edition; a preliminary note detailing the issues the chapter covers; an outline listing all of cases in the chapter and the rules they illustrate; a short summary of the holding of each case; and then extensive comments on each case and all the notes, including suggestions on how to use each case.
use despite its bulk. I found it an invaluable resource the first time through the course—I did not always agree or follow it, but at least I knew why the authors had included each case, what issues the authors expected the case to cover in that chapter, and how the authors taught a particular topic. It also often includes summaries of recent parallel cases that can be used as hypotheticals in class. One of the most useful sections for each chapter is “Suggested Omissions,” laying out what cases/notes to skip if you wish to cover the area in less depth. These suggestions are a godsend when you are structuring or restructuring a crowded syllabus.

One danger of the Teacher’s Manual is that its seeming comprehensiveness can lull you into believing that you need not consult anything else. It is problematic to rely exclusively on the manual. The authors are passionate about tort law and the strength of the book is the force and clarity of their vision of tort law, but the Teacher’s Manual sometimes gives rather short shrift to positions with which the authors disagree. The manual always alerts the reader to ongoing debate about a rule, but it does not always acknowledge the degree to which courts disagree with the manual’s conclusions. This was illustrated by the third edition’s treatment of battery. The authors are convinced that the intent element of battery is better stated as requiring both an intent to touch and an intent to harm or offend, not just an intent to touch.47 This is certainly a debatable point (one on which the Restatement (Second) of Torts seems deliberately ambiguous)48 and probably one on which few battery cases will actually turn. However, the Manual to the third edition made almost no mention of the rule it rejected (that “intent to touch” alone suffices) or of the frequent use of that phrase in state court opinions.

The fourth edition remedies this particular concern. A new case in the battery section acknowledges that “some courts around the nation have abandoned this dual intent requirement,”49 and the Teacher’s Manual to the fourth edition now has an extensive and fascinating note cataloging the “innocent touching cases” and explaining why the authors do not read these cases as supporting a rule that intent to touch is sufficient.50 My point is not that authors are “wrong,” but rather that the Teacher’s Manual reflects the authors’ viewpoint

47. THIRD EDITION, supra note 3, at 26–27 (illustrating the element of intent in the hypothetical questions in the notes), THIRD EDITION TEACHER’S MANUAL, supra note 24, at 15–18.
48. RESTATEMENT (SECOND) OF TORTS § 13 (1965) (requiring that the actor “acts intending to cause a harmful or offensive contact”).
49. FOURTH EDITION, supra note 4, at 55 (reprinting White v. Muniz, 999 P.2d 814, 817 (Colo. 2000)).
50. FOURTH EDITION TEACHER’S MANUAL, supra note 6, at 25–27.
and in the past has understated the degree of opposition to that viewpoint. You may miss the degree of division in the courts on a particular point of tort law if you do not consult other sources—as of course any good teacher always does.

IV. CONCLUSION

If you are selecting a torts casebook for the first time, or considering switching casebooks, I hope this review provides you with an incentive to consider using the Dobbs casebook and sufficient information to allow you to assess if it is a good fit for you and your students.