
Foreword to the Thomas F. Lambert, Jr., Symposium Issue on Sophisticated New Tort Theories

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Despite the raven croaking of contemporary Cassandras that “Tort is Dead” or at least gone over the horizon, it might be closer to the truth to recall the insight of a recent commencement speaker. “I have,” he said, “some good news and some bad news. First, the bad: The world is coming to an end. Now the good: Not soon. Not necessarily.” Even if a prophecy of such robust hope should prove vain, it is enough to recall and cling to the craftsman’s motto on the statute of Sisyphus: “One need not have hope in order to persevere.”

Thomas F. Lambert Jr.²

The future of tort law is somewhat murky in this first decade of the twenty-first century. Tort reform is President Bush’s number one domestic priority, and his goal is to nationalize tort law by placing federal limits on products liability and medical malpractice remedies. In Texas, then Governor-elect George W. Bush spearheaded a tort reform bill “to prevent frivolous and junk lawsuits,” which included a \$200,000 cap on punitive damages.³ As I write this Foreword to the Thomas F. Lambert, Jr., Symposium issue, a coalition of tort reformers is again using the specter of a medical liability crisis to gain popular support for limitations on remedies for ordinary Americans. The U.S. Senate is considering federalizing medical

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2. Thomas F. Lambert, Jr., *Law in the Future Part II—Tort Law: 2003*, TRIAL, July 1983, at 96.

3. R.G. Ratcliffe, *Bush Proposes Tort Reform; Says His Plan Would Prevent “Junk Lawsuits,”* HOUSTON CHRON., June 18, 1994, at 30.

liability by imposing an aggregate cap of \$250,000 on non-pecuniary damages for the victims of nursing home negligence, abuse and mistreatment.⁴

As co-advisor of the *Journal of High Technology Law*, I am pleased that the editorial board has chosen to dedicate this special issue on *Sophisticated New Tort Theories* to the memory of my teacher and friend, Thomas F. Lambert, Jr. Professor Lambert taught at Suffolk University Law School from 1972 until his death, in 1999. Suffolk University Law School is justifiably proud of the legacy of Tom Lambert, who was one of this country's leading tort scholars and a steadfast advocate for strong civil law remedies. Tom Lambert wrote extensively about the groundless attacks on America's tort system, arguing that the "tort defomers" routinely constructed an artificial civil justice crisis to mislead the public. Professor Lambert's mission was to counter the full-scale, wide ranging attack on consumer rights.

The Lambert Conference is a scholarly forum that brings together nationally prominent law professors, practitioners, and jurists to consider the impact of tort law on the legal system and society. This issue of the *Journal of High Technology Law* is the byproduct of the Thomas F. Lambert, Jr., Symposium on Sophisticated Tort Theories held at Suffolk University Law School on October 29, 2004. At the 2004 Conference, nationally known tort scholars, jurists, and practitioners examined the best available research on the future of tort law.

The Lambert Symposium would not be possible without the steadfast support of Paul Sugarman, the former dean of Suffolk University Law School. Tom Lambert considered Paul to be his best student as well as the spiritual dean of the Massachusetts' trial bar. I would also like to acknowledge the steadfast support of Suffolk University Law School's current dean, Robert Smith, who supported this conference. Both of these leaders of Massachusetts' legal community recognize that Professor Lambert's scholarship has a continuing vitality for shaping the path of twenty-first century tort

4. Senate Bill 354, limiting noneconomic damages to \$250,000, is "cosponsored by Sens. John Ensign, R-Nev., and Judd Gregg, R-N.H. -- introduced last month in the U.S. Senate. The Ensign-Gregg bills include S. 354, a comprehensive reform package similar to California's 30-year-old Medical Injury Compensation Reform Act, which would include a broad, \$250,000 cap on the noneconomic damages that can be awarded in malpractice complaints lodged against all types of health-care providers." *Texas Study Suggests Malpractice Payouts Have Been Largely Stable*, BESTWIRE, March 16, 2005 (discussing implications of academic study of Texas medical liability awards on proposed Senate Bill S. 354) (available in LexisNexis CURNWS database).

law.

To understand Tom Lambert's lasting contribution to American tort law, it is necessary to know a little about his life in the law.⁵ Tom was the first graduate of UCLA to be awarded a Rhodes scholarship. He received a B.A. in Jurisprudence from Oxford University in 1939. After his legal studies in England, he was awarded a Sterling Fellowship for graduate law study at Yale University. While Tom was studying for the California Bar, he began teaching at Stetson University Law School in 1940. A year later, Tom Lambert, at age twenty-six, was chosen to be Dean of Stetson Law School, making him the youngest dean in the history of American legal education.

In 1942, Tom went to Washington, D.C., where he taught in the Columbia School of Military Government, a program designed to train people to administer occupied enemy territories. He then served as a Navy Military Affairs Officer working in liberated Europe. After the end of World War II, he was appointed by U.S. Supreme Court Justice Robert Jackson to help prosecute the former leaders of Nazi Germany in the Nuremberg Trials. At age 30, despite being the youngest attorney on Justice Jackson's staff, Tom was chosen to prosecute the most powerful Nazi henchman other than Hitler, Martin Bormann. The Nazi strategist was head of the Party Chancellery and the Fuhrer's private secretary. Lambert prepared his case based upon evidence that Bormann had planned crimes against humanity that were carried out by the German High Command, the Gestapo, the Storm Troops, and the S.S. (*Schutz-Staffel*).

After a brief post-World War II stint teaching at New York University, Tom Lambert joined the faculty of Boston University School of Law, where he taught torts, conflicts of laws, trial advocacy, and legal history, until 1955. During the 1950's, Professor Lambert played a key role in the growth of the National Association of Claimants' Compensation Attorneys (NACCA), which later evolved into the Association of Trial Lawyers of America (ATLA). When Professor Lambert joined the nascent trial lawyers' association, NACCA was still a local organization with a limited vision. The stump speeches that Professor Lambert delivered to lawyers' groups in all fifty states greatly increased the prestige of trial lawyers.

5. This brief account of Tom Lambert's life as a tort scholar is drawn from Michael Rustad, *The Jurisprudence of Hope: Preserving Humanism in Tort Law*, 28 SUFFOLK U. L. REV. 1099 (1994), and Jerry J. Phillips, *A Verray Parif, Gentil Knyght*, 28 SUFFOLK U. L. REV. 949, 951-1001 (1994) (including interviews by Angela Bonin with Tom and Elizabeth B. Lambert).

The first key step toward NACCA's professionalization was the hiring of retired Harvard Law School Dean Roscoe Pound to head the organization. NACCA eventually purchased Roscoe Pound's house on Church Street in Cambridge, which became NACCA's national headquarters. Roscoe Pound, the Dean Emeritus of the Harvard Law School, selected Tom to serve as his successor as editor-in-chief of the *NACCA Law Journal*. As a legendary speaker and writer, Tom Lambert did more than any other individual to strengthen the confidence and resolve of trial lawyers in protecting consumer rights. Professor Lambert, like Dean Roscoe Pound, brought old-fashioned virtues: grace, wit, compassion and an erudite style to NACCA.

During the period in which Tom Lambert was editor-in-chief of ATLA's publications, the law of torts was rising like an arrow. William Cohen, later to become a U.S. Senator from Maine and President Clinton's Secretary of Defense, was Tom's assistant. William Cohen recounts how he searched out his potential employer's background:

West Coast debating champion; West Coast Oratorical champion; Rhodes Scholar; prosecutor on Justice Robert Jackson's team at Nuremberg; Dean of Stetson University College of Law at the age of twenty-seven; professor at Boston University School of Law. Just what exactly could I offer to a man of his gothic achievements?⁶

Senator Cohen describes how Tom Lambert prefigured the work of Ralph Nader in the field of consumer protection.⁷ He noted that Tom was not only a celebrated academic, but "the spiritual leader who helped trial lawyers open new legal frontiers and blaze unique arguments on behalf of the injured and the dispossessed."⁸

In our book, *In Defense of Tort Law* (with Thomas Koenig), we traced the plaintiff-oriented reforms begun shortly after World War II, due in part to the efforts of Tom Lambert.⁹ Attorneys inspired by Tom's words urged the courts to reverse harsh precedents in order to help ordinary Americans victimized by corporate malfeasance. Tom wrote about the alchemy of corrective change, challenging appellate courts to reverse regressive precedents. Judges, he wrote, should "sit not like the figure on the silver coin ever looking backward."¹⁰

6. William S. Cohen, *Recognizing a Spiritual Leader Who Helped Blaze Legal Frontiers*, 28 SUFFOLK U. L. REV. 1011, 1011-1012 (1994).

7. *Id.* at 1013.

8. *Id.*

9. THOMAS H. KOENIG & MICHAEL L. RUSTAD, *IN DEFENSE OF TORT LAW* (2001) (outlining the development of progressive tort law in Chapter One).

10. Thomas F. Lambert, Jr., *Progress and Prospects*, 30 NACCA L.J. 28, 28 (1964).

Tom's civil religion was the bedrock belief that tort law serves as the chief guardian of the institutions central to American civilization. Tort law, to Tom, was the chief means of protecting our bodily integrity, the right to enjoy property and free speech, as well as reputation and family relations. His famous column, *Tom on Torts*, continues to be a treasure trove of tort aphorisms. "No rule is settled until it is settled right," "A fence at the top of a cliff is better than an ambulance in the valley below," and "Tort law divorced from damages is like Hamlet without the Prince of Denmark" are some of his sayings that are still quoted today.¹¹

Tom continued to write his column for the *ATLA Law Journal* after he resumed teaching at Suffolk University Law School. Tom was not only an inspiring writer, but an inspiring teacher whose classroom style was truly kinetic. Tom was convinced that the attempts by tort retrenchers to dismantle the U.S. civil litigation system could best be countered by careful empirical study. Tort law is under attack and needs defenders in Tom's tradition. The contributors to this symposium issue each sheds light on the future of tort law in a tort reform era.

The Symposium begins with an article that I wrote with Professor Thomas H. Koenig of Northeastern University about the expanding role of tort law in a global information society. In our article, *Harmonizing Cybertort Law for Europe and America*, we call for a globalized regime of Internet torts to protect consumers and other travelers in cyberspace. Major technological advances always create new forms of injury that require updating the law of torts. In the nineteenth century, the development of injuries from railroads, street cars, and canals required the reworking of tort law to provide compensation for mass accident victims.

In the twentieth century, the rise of the automobile spurred the development of products liability and many other doctrines within tort law. Today, the Internet is blurring national boundaries and creating new cybertort dilemmas, just as the widespread adoption of the automobile did in Tom Lambert's boyhood. The judiciary is again confronted with legal gaps arising from the rapidly expanding use and abuse of this revolutionary technology. Our article examines the procedural and substantive barriers to the development of a harmonized cybertort regime.

Tom Lambert had a keen interest in the choice of law, conflict of

11. These quotes were frequently used in Tom's lectures on products liability and advanced torts at Suffolk University Law School. I heard these memorable phrases as a student in his products liability seminar in the Fall of 1983.

law, and procedural barriers to tort law development. Americans and Europeans have different traditions in the law of torts, or *delicts*. American courts routinely enforce choice of forum and law clauses that require consumers to litigate in distant forums. Such freedom of contract is not found in any of the countries of the European Community, where consumers have the right to litigate in their home forum. The European Community has yet to determine whether Internet torts, or *delicts*, should be based upon *lex loci delicti* or the place where the goods or services were ordered.¹²

The substantive law must also be updated to account for divergent tort law traditions. Transnational cyberwrongs, such as unwanted spam e-mail, the extraction of data by “spiders,” identity theft, online stalking, and cybersmearing present difficult legal dilemmas in the Internet’s cross-border context. For example, the Internet creates new legal conundrums as to community standards, defining the contours of defamation, defenses, and immunities. A new global Internet legal regime must find a place for tort law if consumers are to be protected against online injuries. As Justice Cardozo reminds us, “the law, like the traveler, must be ready for the morrow. It must have a principle of growth.”¹³

Jay Feinman, a Distinguished Professor of Law at Rutgers University School of Law/Camden, comes next with his magisterial survey of tort law developments, entitled *Unmaking and Remaking Tort Law*. Professor Feinman argues that the unmaking of tort law by business-friendly, conservative forces has already undermined civil law by making it more difficult for injury victims to obtain fair compensation. During Professor Lambert’s day, courts expanded plaintiffs’ recovery rights for torts committed against them. In his *Tom on Torts* columns, Lambert wrote about the crumbling of the citadel of privity, the rise of products liability, the recognition of actions for psychic injuries, and the elimination of harsh immunities. To Tom, the law of torts was to vindicate, not veto, legitimate expectations.

Jay Feinman provides many examples of the reversal of American tort law by neoconservatives who are resuscitating discredited 19th-century legal concepts under the guise of upholding personal liberty,

12. The Rome II Convention is being drafted in the European Community to consider conflict-of-law rules for torts or non-contractual relations which will apply equally well to cyberspace. Proposal for a Regulation of the European Parliament and the Council on The Law Applicable to Non-Contractual Obligations (“Rome II”) (July 22, 2003).

13. Tom was fond of quoting BENJAMIN N. CARDOZO, *THE GROWTH OF THE LAW* 19-20 (1973).

the sanctity of the market, and free enterprise. Injury victims find it more difficult to obtain legal representation and to get to court as awards are radically downsized. Feinman documents how caps on noneconomic damages and punitive damages as well as new constitutional limits on recovery have diminished the rights of consumers. Feinman embraces the values of Tom Lambert when he describes tort reform as the “longest-running front” in the war against citizens’ rights. He notes that the tort reform movement has infected the wider culture. Films of the past depicted tort lawyers as heroes, but today’s movies paint an unfavorable picture of them as greedy trial lawyers.

Jay Feinman argues that the campaign to discredit tort lawyers has a wider purpose: padlocking the courtroom door to the victims of corporate wrongdoing. Big Tobacco would not have been brought to the bargaining table under a “loser pays” system or other “reformist” proposals. Feinman contends that proposals to cripple the contingent fee system will make it far less likely that future landmark cases—such as the case that inspired the book and film *A Civil Action*—will ever be filed. The conservative campaign to unmake tort law is occurring in the face of a growing body of empirical research that confirms there is no tort crisis. Despite the many dark clouds on the horizon due to the unmaking of tort law, there is room for a progressive remaking of our civil liability system. The future of tort law will depend largely on a combination of politics and ideology. To paraphrase Tom Lambert, Feinman’s article is a thunderbolt falling on an inch of ground, but the light from it fills the horizon of the common law.

Jeffrey White shifts our focus to the role of punitive damages in the American civil justice system in his article, *State Farm and Punitive Damages: Call the Jury Back*. Jeff White, who is Associate General Counsel for the Association of Trial Lawyers of America, served as Tom Lambert’s editorial assistant when he was editor-in-chief of the *ATLA Law Journal*. Jeff White, like Tom Lambert, is a zealous defender of the remedy of punitive damages against unfounded assaults by the tort reformers. Tom Lambert’s 1988 monograph, *The Case for Punitive Damages: A New Audit*,¹⁴ was a succinct summary of the public policy justifications for this civil remedy. Professor Lambert argued that the “sting of the chastising shilling”¹⁵ was an important form of remedial justice to punish and

14. THOMAS F. LAMBERT, JR., *THE CASE FOR PUNITIVE DAMAGES: A NEW AUDIT* (1988).

15. Thomas F. Lambert, Jr., *Tom on Torts, Business Torts*, 28 ATLA L. REP.

deter flagrant wrongdoing.¹⁶ He contended that the remedy was ideally suited for “expressing the community’s sense of outrage at shoddy corporate practices. The result of such punitive awards is much more likely to be the promotion of safety and decency in commercial conduct.”¹⁷

Jeff White’s marvelous historical survey confirms that punitive damages are deeply rooted in the Anglo-American common law. Punitive damages have been awarded for more than two centuries to punish and deter reckless or outrageous conduct that threatens the public safety or interest. Americans imported the English doctrine of exemplary damages, which originated as a means to punish the abuse of governmental power in the 1763 case of *Wilkes v. Wood*.¹⁸ In *Wilkes*, John Wilkes, the publisher of *The North Briton*, sued a Member of Parliament for trespass, after he was wrongfully detained for writing an editorial excoriating the King’s Minister.¹⁹ The sting of the shilling²⁰ was levied against the King’s agents, who ransacked the *North Briton* and held its publisher without a lawful warrant.

Lord Justice Camden coined the term “exemplary damages”²¹ to describe a large award when the actual damage was slight.²² His choice of the word “exemplary” reflects the role the remedy played in moderating abuses of power. He noted that the jury was well within its discretion in expressing social disapproval to government agents who were heedless to civil liberties:

To enter a man’s house by virtue of a nameless warrant, in order to procure evidence, is worse than the Spanish Inquisition; a law under which no Englishman would wish to live an hour; it was a most daring public attack made upon the liberty of the subject.²³

340, 343 (Oct. 1985).

16. *Id.* at 351.

17. THOMAS F. LAMBERT, JR., *THE CASE FOR PUNITIVE DAMAGES: A NEW AUDIT* x-xi (1988).

18. 98 Eng. Rep. 489 (K.B. 1763).

19. *Wilkes*, 98 Eng. Rep. at 489-99.

20. Thomas F. Lambert Jr., *The Case for Punitive Damages (Including Their Coverage by Liability Insurance)*, 35 ATLA L. J. 164 (1972) (noting that the “historical justification for punitive damages was for the ‘chastising shilling.’”).

21. Lord Camden in *Huckle v. Money* stated: “They saw a magistrate over all the King’s subjects exercising arbitrary power, violating Magna Charta (sic), and attempting to destroy the liberty of this general warrant before them; they heard the King’s Counsel, and saw the solicitor of the Treasury endeavouring to support and maintain the legality of the warrant in a tyrannical and severe manner. These are the ideas which struck the jury on the trial; and I think they have done right in giving exemplary damages.” *Huckle v. Money*, 95 Eng. Rep. 768, 769 (K.B. 1763).

22. *Id.*

23. *Id.*

The availability of exemplary damages played a significant role in establishing the salutary principle that no one, no matter how powerful, is above the law. English courts upheld punitive damages against other oppressive, arbitrary, or unconstitutional action by the servants of the government.²⁴ White notes that the *Wilkes* case had a profound impact on our Bill of Rights and subsequent common law developments. His article provides many insights into the constitutionalization of the punitive damages remedy through a string of recent U.S. Supreme Court cases, culminating in *State Farm Mutual Automobile Insurance Co. v. Campbell*.²⁵ Mr. White's exhaustive review of the punitive damages case law since *Campbell* will be of great value to both tort scholars and practitioners. He found that 160 state and federal courts have used the *Campbell* due process framework as a basis for reviewing large punitive awards.

Attorney White contends that the Court has not established 10 - 1 as the new substantive due process ceiling on punitive damages. He found that a number of courts have upheld ratios well into the double digits when the conduct was especially egregious or reprehensible. He argues that anyone reviewing the post-*Campbell* cases will observe that each judicial decision has the façade of objectivity. However, he concludes that a closer reading of the cases reveals an epidemic of judicial subjectivity. The remedy of punitive damages has many built-in judicial controls to prevent abuses and there is no need for a subjective due process review by appellate courts.

White concludes that the jury is under relentless attack by the tort reformers and that hamstringing punitive damages endangers the Seventh Amendment right to a jury trial. White speculates that the U.S. Supreme Court may continue on the path of diminishing the role of the jury in punitive damages to the point that it will be "little more than an advisory panel, a decorative reminder of past glory." White calls for the Court to reverse course and reassert its faith in the common sense of the common law jury. Jeff White's article falls

24. Lord Devlin in *Rookes v. Barnard* ([1964] AC 1129, 1228) stated that exemplary damages was recoverable for the "oppressive, arbitrary or unconstitutional action by the servants of the government. For example, exemplary damages were awarded against the government for a brutal flogging of an innocent soldier in *Benson v. Frederick*. 3 Burr. 1845 (1766). In that case, the soldier received a £ 150 against his colonel who ordered the flogging to "vex a fellow officer. *Id.* at 1847. Lord Mansfield observed that the damages "were very great, and went beyond the proportion of what the man had suffered." *Id.* In that case, the defendant's motion for a new trial was denied because the injury was inflicted out of pure spite by a fellow soldier. The exemplary damages principle served the function of restraining the arbitrary and unfair abuse of executive power.

25. 538 U.S. 407 (2003).

squarely in the tradition of Professor Lambert's central tenet about the importance of the jury:

Lastly the civil jury imparts flexibility to our legal system by softening the rigor of harsh, rigid and inequitable rules. By bending the rule, the jury keeps it from breaking...The threat to the civil jury at present is real. Recall Edmund Burke's warning: 'All that is necessary for the triumph of evil is for enough good men not to care.' We care. We are warned, and we are summoned. Let us be resolute and vigilant, and above all, let our voices be heard.²⁶

In the era of Enron, Global Crossing, WorldCom, and many other financial disasters, we need punitive damages more than ever to punish and deter corporate misconduct. Just as in eighteenth century England, a strong regime of civil punishment ensures that not even multibillion-dollar corporations operate beyond the reach of the law. The tort remedy of punitive damages teaches even the most powerful actors that "tort does not pay."²⁷

Allen M. Linden, an Honourable Justice of the Federal Court of Canada, was appointed to the Supreme Court of Ontario in 1978, following a distinguished law-teaching career at the Osgoode Hall Law School in Toronto. Justice Linden, who has authored the Canadian equivalent of *Prosser on Torts*, shares Tom's joy about the law of torts.²⁸ Professor Lambert frequently gave guest lectures in Justice Linden's classes. Tom Lambert inspired several generations of Canadian lawyers and judges in developing a humane tort law.²⁹

Justice Linden's awe-inspiring *Viva Torts!* confirms that he indeed is a disciple of Tom Lambert's compassionate tort jurisprudence. In his essay, he confesses to be a "tortaholic" who still gets a kick out of torts. Justice Linden asks the question: "What is it about torts that so engages us, so tantalizes us, and so captivates us?" His answer is that it is the human face of tort law that captures our imagination. Justice Linden compares a good tort case to a mesmerizing novel or film. Justice Linden was particularly captivated by Tom Lambert's tragic, humorous, and always colorful depictions of cases.

He could make an audience weep as he described the sorry plight of a tort victim. He could make them laugh. Most importantly, he could make them think with his quotes from great philosophers and literature. He loved torts and

26. Thomas F. Lambert, *In Defense of the Civil Jury*, 29 NACCA L.J. 27, 32 (1962-63).

27. *Rookes v. Bernard* (H.L. 1964) 1 All Eng. Rep. 367.

28. See ALLEN M. LINDEN, CANADIAN TORT LAW (5th ed. 1993); See also ALLEN M. LINDEN, LEWIS N. KLAR & BRUCE FELDTHUSEN, CANADIAN TORT LAW: CASES, NOTES AND MATERIALS (12th Edition, 2004).

29. Allen M. Linden, *Like Tom Lambert, Canadian Tort Law Cares*, 28 Suffolk U L. Rev 1051, 1051 (1994).

tort lawyers and we, in turn, loved him. Tom enjoyed nothing better than to talk about his beloved law of torts.³⁰

Viva Torts! is a rich, textured, and nuanced study of the genuine love of torts that Tom Lambert also shared. In Justice Linden's new audit of the mission of tort law, he begins asking whether American tort law is worthy of our continued love. His essay reminds us that the law of torts fulfills a number of critically important social functions. Tort law not only compensates and helps rebuild broken lives, but it deters others from causing harm by their wrongful conduct. He also notes that there is a psychological function for victims to have a voice to condemn the activity that produced their suffering. Justice Linden acknowledges that there may be some "warts on torts," warts requiring treatment, but on the whole torts remains a glorious tool for a "juster justice and a more lawful law," which is a phrase often used by Tom Lambert. Justice Linden, like his friend Tom Lambert, believes that the law of torts is a forward-looking subject that protects society. Like Tom Lambert, Justice Linden's faith in tort law will never falter. His retort to President Bush and fellow tort reformers: How anyone can say they are for democracy, freedom, and justice and be opposed to trial lawyers?

Each of the contributors to this special issue believes that the tort system has the capacity to compensate victims and prevent accidents in the twenty-first century. Each of the contributors has a cautious optimism, despite the victories of the tort reformers. They view the occasional backward-looking decision, statutory tort limitation, and the troubling trends as but a "single breaker [which] may recede but the tide is coming in."³¹

30. Allen M. Linden, *Viva Torts!* at 139-40.

31. Tom Lambert was fond of this quote from Lord Thomas B. Macauley.