Viva Torts!

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I. INTRODUCTION

I am delighted to be here celebrating the legacy of Tom Lambert, one of my great American heroes. Tom was the Poet Laureate of Tort Law. He believed in tort law as the "Jurisprudence of Hope."[2] His romantic articles and exuberant speeches did more for the advancement of tort law than those of any other participant in the discourse over the value of tort law to Americans. He was an enthusiastic, passionate, steadfast believer in the tort system. 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

1. Federal Court of Canada. Justice Linden was the Conference's luncheon speaker. He based his remarks on this text.

2. 31 A.T.L.A. L.J. 29 (1965). *See also* Michael Rustad, *The Jurisprudence of Hope*, 28 SUFFOLK U. L. REV. 1099 (1994).

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make them think with his quotes from great philosophers and literature. He loved torts and tort lawyers and we, in turn, loved him.

Tom enjoyed nothing better than to talk about his beloved law of torts. In that way at least, I am just like Tom, for I too love to share ideas with other torts aficionados. I must confess that I am a "tortaholic," as I expect many of you are. Why is it that I get no kick from champagne, that mere alcohol does not thrill me at all, but I still get a kick out of torts? Why have so many of us been afflicted by torts mania? What is it about torts that so engages us, so tantalizes us, so captivates us?

I believe, in part, that it is the "human face" of tort law that so attracts us,[3] its capacity for tragedy, for comedy, for pathos, for suffering, for heroism and even for villainy. It can sadden us, shock us, infuriate us, thrill us, inspire us, amuse us, surprise us, and entertain us. The cast of fascinating characters, the exotic and mundane places, and the sometime bizarre events involve us in a kaleidoscope of real life. Many torts cases are like novels or movies, each telling a unique and gripping story.[4] We torts people are blessed with a front row center seat on the drama of life. That is one reason why we so love torts, why it keeps us so enthralled, why it gives us such satisfaction.

There is also the excitement of the intellectual exercise furnished to us by the tantalizing problems exposed in torts cases. As a Cal-Tech Nobel prize-winning scientist, Richard Feynman, once wrote about his love of science, "[a]nother value of science is the fun called intellectual enjoyment which some people get from reading and learning and thinking about it, and which others get from working in it."[5] Tort lawyers share that type of excitement with scientists. Whenever there occurs a major tragedy - 9/11, Bhopal, Chernobyl, AIDS, tainted blood, Princess Diana's death, asbestos, tobacco, mold - tort lawyers, in addition, of course, to the usual human reactions of shock and sadness, cannot avoid analyzing the potential tort liability that may arise. For us, there is challenge and pleasure to be involved in the theorizing and, if we are lucky, in litigating about those issues. In addition, there is a special delight for those of us who are privileged to teach torts to the next generations of tort lawyers, to engage in this analysis in class with law students who

3. *See* T.H. KOENIG & M.L. RUSTAD, IN DEFENSE OF TORT LAW (New York University Press 2001).

4. ROBERT L. RABIN & STEPHEN D. SUGARMAN, TORT STORIES (Foundation Press 2003).

5. Richard P. Feynman, *The Value of* Science, in WHAT DO YOU CARE WHAT OTHER PEOPLE THINK? (Bantam 1995).

participate enthusiastically, optimistically, perhaps naively, in the exercise. In short, tort law and tort lore are a unique reflection of our culture and our English-speaking heritage, providing a welcome arena in which the "culture wars" can be fought peacefully and rationally.[6]

There is another attractive feature of tort law practice. It gives those who are so inclined, and most tort lawyers are so inclined, the opportunity to help people in trouble. The injured and the bereaved desperately require tort lawyers to help them retake whatever is left of their lives that can be retaken with money. This work is most satisfying to humane, sensitive lawyers. A New Yorker magazine cartoon depicts someone lying unconscious on the floor in an office, having been knocked over by a filing cabinet, which had fallen on him. One of the sympathetic and helpful onlookers shouts, "Quick, someone call a lawyer." Although the cartoon was meant to tease Americans for their tendency to sue too often, the truth is that the shouting onlooker was actually quite astute. If a doctor had been called, instead of a lawyer, the doctor's work in healing the victim or in pronouncing them dead would likely be completed quickly. The lawyer's work, if engaged to help, may last for years before the victim can be "healed," at least as far as can be done by money, so that the legal assistance is frequently far more significant than the doctor's in repairing the whole of the victim's life.

This joyful intellectual activity, this enhanced capacity to observe the joys and sorrows in life, this ability to engage in a vital part of our cultural expression, this satisfaction for do-gooder lawyers are all certainly worthwhile, side-effects of tort law, but this is not enough to justify the existence of tort law: there must be, and certainly is, social value in what we torts people do. Entertainment and personal satisfaction for tort lawyers are not all there is to torts, for that would not be worthy of our respect, our commitment, our fidelity, nor even our serious attention. Tort law, happily, does have a noble mission.

II. THE MISSION OF TORT LAW

One scholar has recently written (I kid you not) that tort law has no mission, no social purpose; tort law, like love, he asserted somewhat romantically, has no goals, no ulterior ends.

He proclaimed joyously:

6. MARSHALL S. SHAPO, TORT LAW AND CULTURE (Carolina Academic Press 2003).

> Explaining love in terms of ulterior ends is necessarily a mistake, because a loving relationship has no ulterior end. Love is its own end. In that respect, tort law is just like love.[7]

It is true that tort law, like love, is valuable for its own sake, but there are many aspects of love and many facets of tort law. Professor Weinrib, by maintaining that there are no pragmatic ends of love and of torts, undervalues them both. There is more to love and to torts than just their intrinsic unpolluted merit, however splendid that may be. Neither should be sold short.

True, the greatest thing about love is love itself, but love also inspires song, animates poetry, builds new homes, establishes families, encourages new businesses, etc. In short, love can take credit for many of the good things that happen in our world, even though lovers may not start out with these things in mind. Similarly, tort law may achieve beneficial effects, without necessarily setting out to do so, things like compensation, deterrence and education. Thus, whether by design or not, tort law, like love, is valuable not only intrinsically but also for its other contributions to a better world.

Nevertheless at this particular time, when American tort law is under serious assault, we must reconsider its value to America, whether it requires major renovation and whether it is worthy of our continuing fidelity. No less a figure than the current President of the United States has disparagingly opined about the credentials and motivation of Vice-Presidential candidate, John Edwards, a former personal injury lawyer. The President has declared, to cheering throngs, that "you cannot be a trial lawyer and be pro-small business." Is there anything in this critique? Or, on the contrary, is tort law actually an instrument that is pro-small business, as it serves and protects honest, careful business people and their customers by challenging and punishing dishonest and careless business. One might respond to the President by asking, "Can anyone who is for democracy, freedom and justice be against trial lawyers?"

To those of us assembled here, the social functions of tort law are obvious, varied and well-recorded. Although its value and efficacy are sometimes doubted and not always apparent, tort law is a compensator, a deterrer, an educator, a psychological therapist, an economic regulator, an ombudsperson, and an instrument for empowering the injured to help themselves and other potential victims of all sorts of wrongdoing in our society. As Dean Leon Green perceptively wrote, and Tom Lambert repeated many times, "tort law is public law in disguise," serving not only plaintiffs, but

7. Ernest Weinrib, *Understanding Tort Law*, 23 VALP. L.J. 485 (1989).

society generally. While all of these functions are performed by tort law at various times, sometimes magnificently, they are not always admirably and efficiently achieved. Sometimes unfortunately, tort law fails, fails slowly and fails expensively. We cannot deny that there are some warts on torts, warts that may need treatment. But on the whole, tort law is a glorious tool for a "juster justice and a more lawful law," to use Tom's phrase.

At least one thing is certain, thousands of injured individuals do collect many millions of' dollars every year to assist them in deriving some comfort and enjoyment from what remains of their shattered lives. Remember, it is not only broken bones and lost lives for which tort law seeks to compensate, but also homes flooded, farms burned, businesses ruined, savings depleted, reputations sullied and every other form of hurt that can be wrongfully inflicted on human beings. Tort law is the protector of virtually all that is worth protecting in our society, furnishing compensation to all those wrongfully damaged.

Through tort law, those who engage in dangerous activities are meant to be deterred from causing harm by their wrongful conduct. They are made to learn about the potentially tragic consequences of their inattention or callousness. Tort law encourages them to take more care in dealing with their foreseeable neighbors in the future. Tort law does this by gently persuading, by persistent nagging, by constantly offering its counsel of caution - no hammer blows like the criminal law - no rapier thrusts like administrative law - only money damages where loss is caused. There are some who doubt that this deterrent force of tort law is very effective. Others disagree, describing the tort system as a powerful regulatory system which fosters safety measures by industry,[8] something governments often fail to do or fail to do effectively. To me, there are clearly some situations where tort law may deter and others where it may well not have that effect. Where actors know and care about tort liability it may be influential. When doctors practice defensive medicine, for example, it is tort law that encourages this. Critics may bemoan this but it may sometimes save lives. Nevertheless, just as it may be wrong to say that tort law always deters, it is also wrong to say that tort law never deters.[9]

Victims of what they perceive to be wrongs done to them may

8. CARL T. BOGUS, WHY LAWSUITS ARE GOOD FOR AMERICA 2-5 (New York University Press 2001).

9. Gary T. Schwartz, *Mixed Theories of Tort Law: Affirming Both Deterrence and Corrective Justice*, 75 TEX. L. REV. 1801 (1997).

obtain some psychological therapy at court hearings before a jury of their peers or before a judge, where they may tell their tragic stories to people who will listen to them attentively. They may receive some psychological balm for their suffering, some fellow feelings, some sympathy for their sad plight in a world that often does not seem to care about them and their sorrows. This psychological or appeasement function of torts cannot be ignored, for it is always better to pursue a wrongdoer with a writ than with a rifle. An example of this function of tort law was the 0.J. Simpson civil case. After the 0.J. Simpson criminal trial's acquittal in Los Angeles, Fred Goldman, the father of the young man murdered with Nicole Simpson, launched a civil suit against 0.J. Simpson. Goldman consistently stated that he did not care about the money, but felt compelled to establish through the civil suit what the criminal trial had failed to do - that his son was murdered by 0.J. Simpson. It was obvious to all that launching this action was Mr. Goldman's response to a psychological need; it was not a financially motivated law suit. This was clearly demonstrated when, after his victory in the civil case, Mr. Goldman offered to forego the collection of the multi-million dollar damage award if 0.J. Simpson would publicly admit his guilt. The invitation was spurned, of course, but it was made and would have been honored, I expect. This, to me, is vivid evidence of the psychological aspect of tort law. Similar therapeutic effects are often obtained by sexual assault victims who launch civil suits against their attackers.[10]

Tort law, in a role similar to that of an ombudsman,[11] also provides a voice for those injured individuals, who wish to avail themselves of it, to proclaim, in a serious and public way, their condemnation of the activity that produced their suffering. Many of these idealistic plaintiffs hope that their involvement in tort litigation will lead to a safer, better, more humane world. With the aid of their lawyers, they often assume the role of private attorneys-general or crusaders for safety. This empowerment[12] or political function of torts is becoming increasingly apparent in an era where human rights activism is so prevalent and valuable. It is something beyond ordinary deterrence - stimulating governments to respond to problems not yet noticed sufficiently by politicians and regulators. It helps to keep hope alive, hope of a safer world.

10. Feldthusen, *The Civil Action for Battery: Therapeutic Jurisprudence?*, 25 OTTAWA LAW REV. 203 (1993).

11. Allen Linden, *Tort Law as Ombudsman*, 51 CAN. BAR REV. 55 (1973).

12. Allen Linden, *Torts Tomorrow – Empowering the Injured*, TORTS TOMORROW (1998).

Our joint enterprise is also about education, about the re-enforcement of some of our prized Western values: individual responsibility, caring about one another, and the dignity and worth of each unique individual in our society. Tort law seeks to reflect some of what is best about our society. Accordingly, we devote much time and effort to be sure that fault is proved on a balance of probabilities, for we will not make anyone pay who did not do wrong. We also carefully investigate in great detail the suffering inflicted and the pleasures denied to each plaintiff. An avid golfer who can no longer golf, a music aficionado who has lost her hearing, a brilliant scholar who has lost the full use of his mind, are to be compensated for their unique loss. We try, perhaps imperfectly, but as perfectly as we humanly can, to restore to that person exactly what has been taken from that individual, at least as far as money can. Tort law cares, really cares, about individuals. That we do not always succeed in achieving all that we would hope to achieve is regrettable, but it is the effort we expend in trying to do so that is the noble and the notable thing.

Let me not leave the impression that tort law is exclusively plaintiff- or victim-oriented. Tort law also serves to vindicate those who stand accused of wrongdoing by mistaken, misguided or lying challengers. Tort law is a defender of liberty and freedom, the valuable right to do as one pleases as long as one does not wrongfully injure one's neighbor. Thus, tort courts often decide, where the plaintiff's case has not been established, that the doctor being sued did nothing wrong, that the accountant followed the appropriate custom of the profession, that the driver who collided with the child who ran across the street could have done nothing to prevent the accident, that the newspaper accused of libel printed the truth about the plaintiff, that the manufacturer of the drug properly warned about its side effects, that the corporation did not cheat its customers, and so on. Tort law, therefore, performs the function of publicly vindicating those who are mistakenly or maliciously accused of wrongdoing.

Although tort law is certainly no panacea for all the ills of society, it is a worthy endeavor for a society that places a supreme value on each of our citizens, for it underscores continually our sincere belief in the dignity of the individual and our commitment to right wrongs peacefully and fairly, no matter what the financial cost. It is one tool, not the only one, for advancing some of these worthy goals. I am proud to have devoted so much of my professional life to this mission and I am proud to be associated with you, fellow toilers in the tort fields, who have been comrades in the quest.

III. BRIEF HISTORY OF AMERICAN TORT LAW

The history of American tort law in the twentieth century is of a steady march forward, except for the last decade when the "imperial procession" of tort law faltered. However, one hundred years ago, tort suits dealt mainly with industrial, railway and shipping accidents,[13] and very few of them succeeded in those days because of the heartlessness of the fellow servant rule, the law of contributory negligence and voluntary assumption of risk doctrine. Gradually, the harshness of these laws governing workmen was ameliorated legislatively and by judicial decision. Eventually, state workers' compensation statutes began to be enacted, copying the U.K. and Bismarck's Germany, with the last American state finally succumbing in 1948.[14] Those rare few who were lucky enough to succeed in tort cases received trivial amounts in the early days - the families of the immigrants who drowned on the Titanic received only $1,000.00 each.[15] Modem products liability law took a leap forward in 1916 with Cardozo's *McPherson v. Buick Motor Co.,* mandating manufacturers liability to ultimate consumers for negligence, a breakthrough at that time. Fault-based liability, however, was still the central core of tort law, save for very few exceptional situations.

As for torts scholarship done early in the last century, building on Oliver Wendell Holmes' *The Common Law,* (1881) and Cooley's seminal text (1878), superb analytical work was done by Ames, Thayer, Jeremiah Smith and Francis Bohlen, whose first *Restatement of Torts* (1934) was a masterpiece of analysis, though perhaps a bit short on humanity. In the 1920's and 1930's, Leon Green, Roscoe Pound and other realists produced outstanding analysis of tort doctrine that contributed to the advancement of "social engineering" through tort law. Following the Second World War, mirroring the advances in human rights law, tort law began to develop quite dramatically. Auto accidents and products liability cases became more common. Dean William Prosser's great *Hornbook on the Law of Torts,* (1941) had crystallized tort law with a responsible, forward-looking approach. *The Second Restatement of Torts* (1962), also done by Prosser, my torts professor, was a great achievement. Fault law began to crack, at least for products cases, as enterprise liability and loss-distribution theory took hold. Section 402A, which went

13. *See* FELA Statutes, 45 U.S.C. § 51; Sugarman, *A Century of Change in Personal Injury Law*, 88 CALIF. L. R. 2403 (2000).

14. Mississippi.

15. *See* LAWRENCE FRIEDMAN, AMERICAN LAW IN THE 20TH CENTURY (Yale University Press 2002).

through three different drafts, finally adopted *Greenman v. Yuba's* theory of strict liability in tort in 1965. This event was described as the "most rapid and spectacular overthrow of an established rule in the entire history of tort law."[16]

Professor George Priest, of Yale, insists that Fleming James, of Yale, deserved most of the credit for this triumph, based on the enterprise liability theory which enabled tort law to serve as a loss distribution mechanism and an alternative to non-existent social insurance for those lucky enough to be able to rely on it.[17] Certainly Professor Fleming James' many articles and his multi-volume book, written with Fowler Harper, *The Law of Torts* (1956) was a heroic contribution, giving much credibility to the enterprise liability theory. G. Edward White, however, disagrees and awards most of the personal credit for the rise of strict tort liability to the influence of Dean Prosser.[18] American consumers are clearly indebted to both of these giants, as well as to many others. The mid-century produced a richness of compensation-motivated tort scholarship by luminaries like Wex Malone, John Wade, Willard Pedrick, Warren Seavey, Charles Gregory, Albert Ehrenzweig, Harry Kalven, Page Keeton, Robert Keeton, John Fleming, Guido Calabresi and others.

A significant role in this spectacular march of tort law was played by Tom Lambert, Melvin Belli, NACCA and later the ATLA. The 1950's campaign for "the adequate award" and then "the more adequate award" resonated with the legal profession and juries responded. Lawyers for plaintiffs went from being a rather unimportant segment of the bar, who were often looked down on as "ambulance chasers," to a highly professional, powerful and wealthy segment of the profession, some might say too much so.[19] This expansion of tort law has been well described by Stephen Sugarman[20] and was mirrored in other common law countries. Advertising helped, the contingent fee helped, the growth in liability insurance availability helped and the larger sums won in jury verdicts all helped to improve the plight of the injured and the status of the plaintiff's bar. The imperial march of U.S. tort law seemed unstoppable, and its momentum affected other parts of the world. In 1962, for example,

16. Prosser, *The Fall of the Citadel*, 50 MINN. L. REV. 791 (1966).

17. Priest, *The Invention of Enterprise Liability*, 14 J. LEGAL STUDIES 461 (1985).

18. G. EDWARD WHITE, TORT LAW IN AMERICA (Oxford University Press 1980).

19. JOHN GRISHAM, THE KING OF TORTS (Doubleday 2003).

20. Sugarman, *A Century of Change in Personal Injury Law*, 88 CALIF. L. R. 2403 (2000); *see also* Schwartz, *The Vitality of Negligence and the Ethics of Strict Liability*, 15 GEORGIA L. REV. 963 (1981).

when the thalidomide tragedy struck in Canada, where nearly 100 children were born with deformed arms and legs, law suits were launched on their behalf in the U.S. by U.S. lawyers, because the Canadian legal system at that time was incapable of responding properly. Eventually, the advance of U.S. type tort law reached Canada, the U.K., Australia and other places.

Nevertheless, in the 60's the no-fault debate about auto insurance exploded. Keeton and O'Connell's *Basic Protection* (1964), advocating a mixed plan for auto accidents, allowing tort suits in big cases, but only no-fault compensation in smaller cases, terrified tort lawyers, who feared that tort law might be totally done away with. But that was not to be. "Basic protection" was a compromise plan which was adopted in a number of states. It aimed to broaden compensation without fault to those heretofore uncompensated, but, in order to finance this, amounts to be received by others had to be reduced or eliminated. The results of these plans have been mixed. Other states adopted add-on plans, which were pioneered in Saskatchewan, Canada. I supported, and still do support, these plans, which I called "peaceful coexistence plans," because no-fault coexisted peacefully with tort remedies, giving victims the benefit of both systems, tort and no-fault. Some states, like California, resisted reform and continued to rely solely on tort remedies. Nowhere in the U.S. did pure, comprehensive no-fault auto insurance take hold as it did in Quebec, New Zealand and some European countries. And nowhere in the U.S. did a government nationalize the auto insurance industry, as it did in the provinces of Saskatchewan, Manitoba, British Columbia and Quebec, some of which provinces maintained the tort action, at least in part. Plans involving choice have lately been promoted by Jeffrey O'Connell, and Saskatchewan, once again a pioneer in this area, has actually enacted such a plan, with other provinces currently studying the matter. American tort law, though dramatically adjusted by no-fault legislation in some states like Massachusetts and Michigan, survived the no-fault debate. It also survived the economics and law movement,[21] the feminist critique[22] and the critical legal studies onslaught.[23]

21. RICHARD A. POSNER, ECONOMIC ANALYSIS OF LAW (3d ed., Aspen Law & Business 1987).

22. Catherine MacKinnon, *Toward Feminist Jurisprudence*, 401 STAN. L. REV. 34 (1982).

23. Richard L. Abel, *A Critique of Torts*, 2 TORT LAW REVIEW 99 (1994).

IV. THE ASSAULT ON TORT LAW

In 1980, Ronald Reagan was elected to the Presidency of the United States. After many years in the wilderness, American Conservatism was finally victorious. Tort law and tort lawyers became targets, being blamed for damaging the economy, fostering a litigation society and diminishing personal responsibility. Not only were judges who had conservative constitutional views appointed (and elected), but also judges who were pro-defendant. Academia responded with a more conservative attitude toward tort law's growth[24] and the A.L.I. in 1998 replaced section 402A with a more restrictive approach to products liability, the *Third Restatement of Torts: Products Liability*. The counter-attack on tort law that was occurring in the U.S. influenced other parts of the world. In the United Kingdom, P.M. Margaret Thatcher also ushered in an era of judicial conservatism, appointing to the House of Lords Judges, like Lord Keith of Kinkel, who strove mightily to downsize tort law. Similar developments shrinking tort law occurred in Canada and Australia.[25]

The assault on tort law had come mainly from the left in the 1960s and 1970s, from those wanting to cut profits and litigation costs in order to ensure compensation for all the injured and ill by creating government plans. The social insurance solution advocated by the left fizzled because of the high cost of a complete accident compensation system, the loss of faith in government compensation schemes, and because the improvements made to the tort system had rendered it more user-friendly.

The threat to tort law today is from a different direction, the right. As everyone is aware, the growth of American tort law was spectacular in the 1960s and 1970s, but in the 1980s and 1990s it "stabilized."[26] Much of this occurred because the American judiciary changed, because attitudes changed and because tort law had evolved about as much as it reasonably could. Many in America and elsewhere now believe that tort law has become too powerful, that too many plaintiffs are recovering too much money, that tort lawyers are getting too rich, and that industry, commerce and the professions are being seriously damaged by huge and frequent damage awards.

24. Henderson, *Expanding the Negligence Concept: Retreat from the Rule of Law*, 51 IND. L. J. 467 (1976).

25. L.N. Klar, *Recent Development in Canadian Tort Law*, 23 OTTAWA L. REV. 177 (1991).

26. Schwartz, *The Beginning and the Possible End of the Rise of Modern American Tort Law*, 26 GEORGIA L. REV. 601 (1992).

The movie industry, unlike in the past, has become an accomplice in this change of spirit with its negative portrayal of tort lawyers (and other lawyers) as dishonest, alcoholic, unethical, sleazy and money-grubbing. The *Fortune Cookie* in 1966 starred a tort lawyer who was a stereotypical shyster, ambulance chaser. *Liar, Liar* was about a lawyer who was incapable of telling the truth. *The Rainmaker* and *The Sweet Hereafter* were about tort lawyers soliciting clients in hospitals, at home and at funerals. A similar unfavorable picture of tort lawyers emerged from *The Verdict, A Civil Action, Class Action* and others. These movies, more than television which is less unkind in its depiction of lawyers, diminish public confidence in tort lawyers and the tort system.[27]

Books have been written attacking tort law and those who practice it. For example, Robert Olson laments the *Rule of Lawyers* in his 2003 book of that title, claiming that plaintiffs' lawyers, with their huge class actions, have taken over much of the government of the United States, undemocratically forcing public policy shifts that elected legislatures would never approve. A former Judge, Catherine Crier has written a hysterical book, *The Case Against Lawyers*,[28] attacking the over-reliance on safety laws and urging their repeal. As for the tort action, she claims it is "no longer a crapshoot, it is becoming a sure thing."[29] She charges that lawyers "are making out like bandits as we litigate the most inane conflicts. Billable hours now dwarf any social contribution by the profession."[30] After giving examples of some runaway jury decisions for plaintiffs, she contends that "the concept of personal responsibility... has all but disappeared as the case law moves from the ridiculous to the downright outrageous."[31] She continues:

> The list of absurdities goes on and on: wrongful birth versus wrongful death; protect people and risk discrimination or allow access and face liability; admit a problem and actually fix it, then sit back as lawyers use your remedy as an admission to justify their lawsuits. Forget the word "accident;" apparently there's no such thing. Better yet, family members can now sue each other and collect on the insurance. Assumption of the risk has all but disappeared. Contributory negligence is waning. Joint and several liability insures that the deepest pockets will be brought into any lawsuit, no matter how tenuous their connection to an event.

27. *See* Asimov, *Bad Lawyers in the Movies*, Draft Paper, Pepperdine University.
28. CATHERINE CRIER, THE CASE AGAINST LAWYERS (Broadway 2002).
29. *Id.*
30. *Id.*
31. *Id.*

> The omnipotence of the rule of law has altered out very mind-set. The image of ourselves that we export, that of the frontier-minded, self-reliant, and free-spirited American, is all show. For every problem there is someone or something else responsible. For any loss, no matter how nebulous, there is a deep pocket out there from which to collect. For every complaint, no matter how worthless, there is an advocate. Our self-worth has been inflated to the point that Fort Knox could not compensate for the loss of a single life. Our psyches are so fragile; the mere mention of pain and anguish brings tears to the collective eye and dollar signs to the mind of the attending attorney.
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> Beyond the destruction of the American character, we have been suckered into extraordinary trade-offs for an allegedly risk-free world. Do you really prefer a padded room to the open range? A free society necessarily has dangers that more autocratic systems do not. The more liberties people have, the more varied the choices and the chancier the environment. However, the reverse is not true. More rules do *not* guarantee our security. They may afford a legal venue for redress, but they won't save our skins or our souls. Words on a page will not prevent babies from drowning in the bath or some hiker from diving in your pond. We must understand the false exchange as we seek more protection from unpredictable or dangerous behavior.
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> Finally, reliance on endless rules proved disastrous in the former Soviet Union. People were subjected to numbing regulations while innovation, reason, and personal judgment were not allowed. Ronald Reagan would credit the buildup of U.S. arms and the ensuing cost to the Soviet government, but it was the strangulation of the people that ultimately doomed that nation. This same fate can still be ours.[32]

Although the charges are often wildly exaggerated, to some extent these critics are being heeded. The tort system is starting to respond to their concerns. The movement to restrain tort law is gaining strength in America. Led by the American Tort Reform Association (ATRA), there is a campaign to discredit tort law, to influence juries (and judges) to be less sympathetic to plaintiffs, and to protect commercial, manufacturing and professional interests. Tom Lambert called the movement "tort deform," not tort reform. While that advocacy activity is, of course, legitimate, just as the lobbying efforts of the American Trial Lawyers Association (ATLA) and others in favor of plaintiffs are equally legitimate, some of the tactics of ATRA have been disingenuous.

Thanks to the brilliant publicity efforts of ATRA, almost everyone has heard about the tort suit against McDonald's Restaurant by the woman who burned herself with hot coffee. Talk show hosts, the Seinfeld Show, and others have made fun of it, ridiculed tort law because of it, and condemned American juries and courts as "out of

32. CATHERINE CRIER, THE CASE AGAINST LAWYERS (Broadway 2002).

control."

The true facts of the case, however,[33] indicate that the situation was not at all as the press represented it to be. The newspapers reported a $2.9 million jury verdict for a woman who burned herself with a cup of hot coffee purchased at the McDonald's drive-through window. She had placed the l80-degree cup of coffee between her legs to remove the cover and it spilled.

What was not reported was that the seventy-nine-year-old woman received third degree burns, spent eight days in the hospital and under-went several painful skin grafts on her thighs, groin and buttocks. It took two years for her to recover fully and she was still left with permanent scars on 16% of her body.

What was also not reported was that the plaintiff had offered to settle the claim for $10,000, essentially her medical expenses, which the trial judge urged McDonald's to accept but which it refused to do. Also unreported was the fact that McDonald's routinely sold coffee super-heated at 180 to 190 degrees, while homemade coffee's temperature was 140 to 150 degrees and while other food outlets sold coffee at similarly lower temperatures. No one was told that in the previous ten years there had been seven hundred reports of other patrons burning themselves with McDonald's super-heated coffee. Following the trial, McDonald's lowered the temperature of its coffee, as did other restaurants.

As for how much money the plaintiff actually received in the end, few people really know. Yes, the jury did award $200,000 for compensatory damages and $2.7 million for punitive damages, totaling $2.9 million as initially reported. The trial judge, however, while refusing to eliminate the punitive award altogether, because McDonald's conduct had been willful, wanton, reckless and callous, reduced the punitive damages to $480,000. Moreover, the plaintiff was found 20% contributorily negligent, reducing her $200,000 compensatory damages to $160,000.

Furthermore, of course, McDonald's appealed the decision and then settled by paying an undisclosed amount, presumably much lower than the court's revised total of $640,000 ($160,000 and $480,000) and far less than the $2.9 million reported in the media, but deservedly far more than the $10,000 it would have taken to settle the case at the beginning if McDonald's had behaved responsibly.[34]

33. As told by Koenig & Rustad, *supra* note 3.

34. A similar case in the U.K. that was legally aided was dismissed at the pleading stage on the flawed basis that the public wants to buy hot coffee despite the risk, *see Bogle v. McDonald's*, E.W.J. No. 1621 [2002]. No appeal has been taken because of lack of funds.

From this one example, and there are many more, we see that the assault on tort law is continuing. This is not necessarily a bad thing, for the friends of tort law, as well as the foes, recognize that there are some flaws in the tort system. ATRA may be right to worry about runaway jury awards and the growth of an increasingly litigious society. Mistakes are sometimes made. Sometimes joint and several liability may be unfair to defendants who are only minimally responsible. The process is still too costly and too slow. It is open to fraud and manipulation. Yes, many lawyers are making a lot of money, not unlike rock singers, actors, athletes and stock manipulators, at least until recently. Opponents of the tort system, however, claim that there is a "crisis."

But, on the other side, it may be noted that too many injured people are still not being compensated, and many are compensated too slowly and too stingily. Tort law is still not doing enough for them. Too many who ultimately do recover have to suffer psychologically and financially during their lengthy pursuit of compensation. If there is a crisis in tort law, which I do not accept, it would be the needless human suffering and lack of compensation that qualifies as a crisis, not the absence of sufficient profit for insurers and industry.

To talk of a "crisis" in tort law, as current opponents of the system frequently do, is overly dramatic, just as it was wrong of the socialists to talk of a "forensic lottery"[35] or "negligence lottery." What lottery pays compensation to 80-90% of its customers, like tort law does? The fact is, not only in the auto field, but in other areas of tort claims - slip and fall, malpractice, products liability, sports injuries - most plaintiffs receive fair settlements without having to try their cases and often without even filing a claim. The tort system, rather than being litigation, is one of "litigotiation," to use Marc Galanter's phrase. Even those most difficult cases that go to trial and are then appealed all the way to the court of last resort are successful half of the time. These figures hardly merit the description "lottery," where the chance of "recovery" is several million to one. This does not mean that the outcome of tort litigation is not sometimes difficult to forecast, but in what area of law is it easy to predict the outcome of hard cases in this age of the all-too-frequent 5-4 decisions of our highest court?

35. TERENCE ISON, THE FORENSIC LOTTERY: A CRITIQUE ON TORT LIABILITY AS A SYSTEM OF PERSONAL INJURY COMPENSATION (1967).

V. FUTURE DIRECTIONS

As a true believer in the mission of tort law, despite its frailties and despite the attacks on it, I see enormous potential for its future role and for the judges, scholars, and lawyers who administer it. Let me describe some of the possible future directions of tort law development.

1. Efforts will continue to rationalize and humanize the content of tort law. Thanks to the A.L.I., the late Gary Schwartz, Michael Green and Charles Powers, we shall soon have an updated *Third Restatement of Torts* dealing with physical injuries. We shall continue to strive to see that tortious wrongdoers are held responsible and that those who innocently cause injury are not. We shall search for efficiencies in procedural matters that can be achieved without sacrificing fairness. Jury trials will be adjusted to ensure that their work is more accurate and reflective of all the principles and goals of tort law. Methods will be devised to ensure that tort awards are reasonable: not too generous and not too stingy. I do not understand the aversion to damages for loss of enjoyment of life or so-called hedonic damages,[36] which we award routinely; but I do worry about runaway punitive damages, rare as that may be. Compensation for legal services will also be fair: not exploitative and not too meager. (I am somewhat suspicious of the campaign promises of the President to "reform medical malpractice" and stop "trivial" law suits. I fear that he does not have in mind a no-fault proposal like that of Paul Weiler or any other scheme that we might think is fair.) The voice of the communitarians, who worry about the harm being caused by tort law to intermediate organizations like churches and charitable organizations should be heeded.[37] Hopefully, attention will be paid to other common law jurisdictions where some progress has been made moderating and fine-tuning some of tort law's faults. In short, the work of tort scholars, legislators, judges and practitioners in making tort law an even worthier servant of Americans will go on with some success.

2. Tort law will continue to fill in the immense gaps left by our current social welfare system, furnishing fuller, more adequate compensation to those injured tortiously. America still lags behind most of the Western world in providing for its sick and injured. One dreams of a day when America joins the rest of the civilized world in providing universal health care to all. In the meantime, tort law is

36. *See* McDonald v. Garber, 536 N.E.2d 372 (N.Y. 1989).

37. *See* COCHRANE AND ACKERMAN, LAW AND COMMUNITY: THE CASE OF TORTS (2004).

one way to rectify that shameful, current situation, just as in Fleming James' day. But even where decent social insurance schemes are in place, as in Canada and the U.K., they are not always viewed as sufficient. Whether justified or not, many auto accident victims still wish to sue in tort, even where no-fault schemes are in place to help them. Many of our injured workers still try to circumvent our supposedly wonderful workers' compensation systems by invoking tort law. Is it not strange that some victims of 9/11 are choosing to exercise their right to sue in tort,[38] even though generous government funds, essentially compensating them on a tort scale, have been made available to them? Perhaps, to some extent, it is pure greed that motivates some of these plaintiffs and their lawyers, but it may also be that they perceive that they will receive fairer treatment in the tort regime, despite its cost, its dilatoriness and its uncertainty.

3. Due to the advent of the class action, a group of very talented and powerful tort lawyers are now available as private attorneys-general to victims of mass torts. We have already seen major victories in the tobacco suits, asbestos cases, pacemaker cases and other product cases. The years ahead will, alas, continue to produce many mass tragedies - plane crashes, chemical spills, product defects, environmental threats, tainted water, terrorist activities - and class actions will be launched to help furnish compensation for the victims. Tort lawyers will be there to do what they can to assist. Large sums of money will change hands, which may disturb some critics, but that is what must happen in tort law when large losses are incurred. Hopefully, some of the more unseemly aspects of the process can be diminished by increased court supervision.

4. Tort law has always acted as society's radar, an early detection system for emerging dangers. That will continue. Many new forms of dangerous activities will become subject to tort law's protection. In the past, some of these harm-producing enterprises have escaped our attention or have eluded the reach of tort law as it then existed. Consider the tobacco industry, which successfully defended every single tort claim against it over four decades until recently, when the tide turned against it due to the discovery of its fraudulent concealment and shocking cover-up of the addictive properties of nicotine. This finally led to a few jury verdicts for individuals that miraculously have been upheld and, more importantly, to a settlement involving over $246 U.S. billion being paid to the states for medical

38. *See* N.Y. TIMES, June 16, 2004 (97% of the families accepted awards between $250,000 - $7,100,00 for a total of $7 billion); Rabin, *The September 11th Victim Compensation Fund*, 53 DE PAUL L. REV. 769 (2003).

cost reimbursement.[39] Actions against American gun manufacturers are beginning to succeed in special situations and have led to a breakthrough settlement with Smith and Wesson, one of the more responsible (though now defunct) gun makers. Efforts have been made to hold accountable producers of alcohol for some of the accidents caused by intoxication. Makers of lead paint, greasy hamburgers and fried chicken have been sued. The entertainment industry, which includes movies, television, music and video games,[40] are being sued, so far unsuccessfully, for copycat crimes that they have allegedly promoted by glorifying violence, suicide and crime. The damage caused by computer abuse has hardly been tackled by tort law, but it will be. And of course, ongoing painful issues of life and death will continue to arise in tort cases. Remember, a judge who says no to one of these novel claims may actually accomplish something useful as well a judge who says yes, as social consciousness may be raised about the heretofore unnoticed danger. These cases are a significant forum for the culture wars that are ongoing across America and around the world.

5. It is a sad reflection of our times that tort law has had to become a weapon in the struggle against sexual abuse, both of children and adults. Criminal law has not succeeded in preventing this epidemic of evil. Shocking revelations, generally ignored in earlier years, have come to light, largely because of tort claims launched by victims against their teachers, jailers, foster parents, clergymen, and the like. The issue of vicarious liability, now being dealt with frequently by our highest courts, is fostering study and action by institutions that should have been more active in days gone by in rooting out this evil. It is naive to think that this despicable activity will entirely disappear, but we can thank tort law for doing its part to accelerate that happy day, by focusing attention on the problem, something governments and other institutions have been slow to do. Recent tort actions against notables like President Clinton by Paula Jones, and civil and criminal actions against Kobe Bryant and Michael Jackson should educate future transgressors about the high cost of these vile acts.

6. In the future, tort law will play a greater role in regulating business activities. Despite heroic efforts by our existing regulatory institutions, too many instances of fraud, deception and negligence in

39. In September 2004, the U.S. Government launched another action against the tobacco companies under RICO for $280 billion of disgorged profits.

40. For example, the creator of the MANHUNT video game, Sony, has been sued for wrongful death as a result of the killing of a 14 year old teenager by a 17 year old obsessed by the game. OTTAWA CITIZEN, Aug. 2, 2004.

business activity are going unnoticed, unregulated, and unpunished. This is a complex endeavor, one that many tort lawyers will want to avoid, but for those who care to, there is a fertile field to explore on behalf of their financially-ruined clients. There are some American authors, such as Bogus, who believe that tort law is primarily a "regulatory system" for product manufacturers and other economic activities. He argues that *"Lawsuits Are Good for America,"* encouraging commercial actors to keep in mind the wise counsel of caution proclaimed over the years by tort law: "take reasonable care to avoid acts or omissions which you can reasonably foresee would be likely to injure your neighbor." The shocking recent events in the American business world, including Enron, Worldcom and others, have offered tort lawyers a unique opportunity to help in cleaning up the stock market and the business world. One item we may well reconsider is tort law's current, inexplicably delicate treatment of accountants[41] in the light of our recent knowledge about their complicity in "cooking the books" of their clients.

7. Tort law is becoming and should grow into a significant weapon against terrorism and torture. This is a new challenge for tort lawyers that Tom Lambert would want us to grasp during these troubled times. While tort law will not eradicate terror and torture, just as mighty armies apparently cannot, it may supply some compensation to victims, some deterrence, some psychological satisfaction, some education and some impetus to more effective government action in this area. One author asserts that there is a "symbolic" value in these actions, which furnish some "recognition for and emotional vindication of the victims" and "places moral and political pressure on rights-abusing governments."[42]

Examples of these cases, which are most difficult procedurally as well as evidentially and practically, do exist. In 1985, for example, a disabled American man, Leon Klinghoffer, was shot and thrown overboard in his wheelchair by certain P.L.O. fanatics who had captured his Italian cruise ship, the Achille Lauro. After 12 years of litigation, the case was settled, the P.LO. paying some money, without, of course, admitting responsibility or apologizing. At the time of the settlement, the leader of the P.L.O., Yasser Arafat, was being pursued for discovery and it also became apparent that the P.LO. had funds in U.S. banks that might have been seized. The New

41. *See* Credit Alliance Corp. v. Arthur Anderson & Co., 483 N.E.2d 110 (N.Y. 1985); Hercules Mgmt.s Ltd. v. Ernst & Young, 2 S.C.R. 165 [1997].

42. *See* John A. Terry, *Taking Filartiga on the Road: Why Courts Outside the United States Should Accept Jurisdiction Over Actions Involving Torture Committed Abroad*, in TORTURE AS TORT 132 (Craig Scott ed., 2001).

York Times editorial stated that the P.LO. "implicitly acknowledged its responsibility in settling their suit."[43]

In another case, Iran, in a default judgment, based on the *Anti-Terrorism and Effective Death Penalty Act,* 28 U.S.C. §§ 1602-11, was held liable for a suicide bombing that killed Alisa Flatow, an American citizen vacationing in Gaza in 1995,[44] but collecting the $247.513 tort award has so far been thwarted.[45] The legislation and cases in the area are extremely complex and I shall leave it to the young and eager crusaders among you to untangle it and render it more user friendly.

These cases may be more effective against private parties which finance terrorism, as the procedural safeguards are less stringent. The recent action by Cantor Fitzgerald against several Saudi Arabian public and private defendants for their role in 9/11 is most promising.[46]

Another miraculous development is Libya's recent agreement to pay $46 million to the victims of a Berlin disco bombing on April 5, 1986,[47] and its earlier settlement of the Pan Am jet bombing over Lockerbie, Scotland, in 1988, killing 220 people ($3.6 billion) and the French U.T.A. jet blown up over West Africa, in 1989 ($225 million). The Libyan Ambassador called the accord "a step forward for the relations of Libya and the European Union." Amen! Let there be more such steps, thanks to tort law, by the rogue governments seeking to reenter civilization. Note Libya did not admit any guilt, calling the payment a "humanitarian gesture." Call it what you will, tort law did it.

VI. CONCLUSION

We must always remember that tort litigation is a very human process, not just an exercise in icy rationality. It teaches us about some of the most enduring values in our society: caring for one's neighbor, accepting responsibility for one's conduct, and respecting the unique worth of each individual. Regrettably, tort litigation does not always work perfectly. There are still some warts on torts. Our reach may exceed our ability to grasp. But what we grasp for in the tort system is noble and beautiful, a reflection of much that is

43. N.Y. TIMES, Aug. 21, 1997.
44. *See* L.A. TIMES, Mar. 12, 1998.
45. *See* Flatow v. Iran, 308 F.3d 1065 (9th Cir. 2002) (private bank not liable for governmental acts). However, under the *Victims Protection Act* of 2000, $26,000,000 was paid by the U.S.
46. *See* N.Y. TIMES, Aug. 2004.
47. OTTAWA CITIZEN, Aug. 11, 2004.

valuable in our society. Involvement in that endeavor is a worthy task for those of us who are responsible for its administration, its preservation and its amelioration.

I want to thank and pay tribute not only to Tom Lambert and his admirers, but to all American tort judges, tort scholars and tort practitioners for making tort law what it is today, an inspiration for the world. From what I have seen recently, tort law is in good hands. Serious research into theoretical, analytical and sociological issues is being undertaken by committed scholars. Responsible, wise and diligent judges are doing their best to understand and apply the law rationally and humanely. Imaginative, sophisticated lawyers are pressing forward on the frontier of tort law on behalf of their injured clients, sometimes with success. I am impressed with the achievements of U.S. torts scholars, lawyers and judges in making American tort law as rational and as humane as any on the planet. We can exult in the fact that the state of American tort law, though not perfect, is healthy.

Let us continue, faithful to Tom's example, to defend tort law and use it to help build a world that is safer and kinder for our children and grandchildren. Perhaps we here should consider establishing an independent, non-partisan Tort Law Society, perhaps an international tort law society, to study tort law, to protect and defend it and to make recommendations for its improvement so that it can better serve America and the common law world. In any event, I am confident that, whether in downsized or expanded form, tort law will long survive and thrive. Viva torts!