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# American Tort Law: Shining Beacon?

The Honorable Allen Linden\*

Thank you for your only slightly exaggerated claims on my behalf, Dean Starr and Professor Lewis Klar. Thank you *all* for being here with us at Pepperdine, my adopted home, where I resurrected my teaching career eleven years ago as a winter term Adjunct Professor under Dean Ron Phillips and where I, luckily, remain here still, this year as Distinguished Visiting Jurist, thanks to the kindness of Dean Starr.

On reaching seventy-five years of age last October, I had to stop traveling the circuit as a Justice of the Canadian Federal Court of Appeal from Atlantic to Pacific to Arctic, “dispensing with justice,” as we jokingly phrased it; no longer could I proudly proclaim, “have gavel, will travel.” You can imagine my delight when Dean Starr this last autumn gave me, for my seventy-fifth birthday present, seventy-five fresh-faced first-year law students to teach, which I undertook with great relish, but with some trepidation. During that magical fall term I learned that law students were much the same as they always were, although thankfully more diverse, intellectually more qualified, undoubtedly better equipped with computers at their desks, sadly more financially stressed, scarily more outspoken and independent, but encouragingly still excited, optimistic, and eager to help make the world a better place.

I also learned that the American law of torts, although certainly more omnipresent and more sophisticated, is not *very* different from what it was fifty years ago when I first encountered it. The central core of U.S. tort law is still solid. It has learned from and survived the law and economics movement, the feminist critique, and the critical legal studies onslaught. Its philosophical underpinnings have been better identified, of course, and its content, though adjusted, has been largely reaffirmed and refined by decades of decisions. Although American tort law may not be broken, it is badly bruised and needs repair. Yes, there are lots of warts on torts. But while American tort law should not be idolized, neither should it be demonized. For much of this repair work has already been done, with the help of many

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\* Distinguished Visiting Jurist, Pepperdine University School of Law, April 2010.

of you in this room, but much more remains to be done—toxic torts, cyber torts, environmental torts, medical torts, etc.—which is why we have assembled here.

How lucky was I, as a Canadian graduate student, to first encounter U.S. Tort Law in 1960 in the classroom of William Lloyd Prosser at U.C. Berkeley, where I was warmly welcomed. I had turned down a scholarship offer from Harvard Law School, choosing instead to study with Prosser, at that time the Dean of the law school. Prosser, a true *titan* of torts, was in his prime. He was the author of the hornbook<sup>1</sup> that had already become the Bible of U.S. tort law, the Reporter of the *Restatement (Second) of Torts*,<sup>2</sup> and a dramatic classroom and conference legend who not only knew the citation of every important tort case, but could quote entire passages from them. After attending ninety of his classes, indeed after only a dozen or so, I was hooked. I couldn't help it. I became, and remain to this day, a tortaholic who gets no kick from champagne but who still gets a kick out of torts. No Malibu rehab center can cure me from my addiction to torts. Also to blame for my hopeless condition was Prosser's anointed successor, the great John Fleming, author of the Commonwealth's Bible on British tort law,<sup>3</sup> who taught the same torts course at Berkeley to another section, in which I also participated, joyfully, as the moustache-wearing Fleming mischievously bounded around the classroom emphasizing his points and scaring the students. Can you imagine how thrilled I was? I loved it. I looked forward to every class! Even to the examinations!

I was captivated by the subject—its capacity to help the injured; the fascinating, human cases, many memorialized in Rabin and Sugarman's collection, *Torts Stories*;<sup>4</sup> the odd characters described in the cases; the great judges who, often poetically, penned the notable cases—Cardozo, Holmes, Traynor, Hand, Friendly; and the great scholars of the period who produced the leading books and articles—Francis Bohlen, Warren Seavey, Leon Green, Clarence Morris, Fowler Harper, Fleming James, John Wade, Willard Pedrick, Wex Malone, Harry Kalven, and others.

Prosser and Fleming became my heroes and, inexplicably, took an interest in me and encouraged me to become a law professor at Toronto's Osgoode Hall Law School, my alma mater, to write a treatise and to edit a casebook on Canadian Tort Law, which I undertook to do, did do, and, miraculously, am still engaged in doing. It would have been churlish, indeed foolish, of me to have done otherwise! My casebook, which I took over from C. A. Wright after his death (now in its thirteenth edition, thanks

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1. W. PAGE KEETON ET AL., PROSSER AND KEETON ON THE LAW OF TORTS (5th ed. 1984).

2. RESTATEMENT (SECOND) OF TORTS (1977).

3. JOHN G. FLEMING, THE LAW OF TORTS (9th ed. 1998).

4. TORTS STORIES (Robert L. Rabin & Stephen D. Sugarman eds., 2003).

to Lewis Klar and Bruce Feldthusen<sup>5</sup>) and my treatise (now in its eighth edition,<sup>6</sup> thanks again to Bruce) as you might expect, utilized the basic structure of the *Restatement of Torts* and borrowed many Prosserian ideas, some of which infiltrated Canadian legal education and, gradually, the Canadian legal system.

For nearly two decades, until I became a judge in 1978, I joyfully taught full time at Osgoode Hall, Canada's leading law school, wrote about the Canadian law of torts, lectured at many conferences across Canada, the United States, and around the world—namely, Oxford, India, Paris, Rio de Janeiro, Australia, Switzerland—testified before Royal Commissions in the United Kingdom and British Columbia and even before the U.S. Senate in the 1970s about Canada's "peaceful coexistence" automobile insurance plan.<sup>7</sup>

Tort law teaching has been very good to me and my children. It was not as lucrative as a career in corporate or tax law might have been, nor was it as exciting as criminal law and constitutional law, but it was a dignified, worthwhile, and enjoyable endeavor which, indirectly perhaps, made a difference in the lives of many individuals ensnared in a tort system of which they had little understanding. All three of my daughters eventually graduated from law school and, thankfully, married fellow classmates. Sadly, only two of them work in the torts field. I fully expect that I will have better luck with my seven grandchildren, *all* of whom will become tort lawyers. They now range in age from seven to seventeen, but except for one, so far show no interest in my plan. My wonderful wife, Marjorie, graciously tolerated my addiction to torts, often contributing insights, passion, and humor that, to use the Hollywood phrase, would "punch up" my material (which, incidentally, included this material and more of my judicial decisions than I would publicly admit).

And now as dessert, as if I needed one, these last eleven years I have been embraced and adopted at Pepperdine, and amazingly, the current titans of torts have come here today, at the invitation of our Law Review, to discuss my beloved law of torts with us; to assess its impact; and to help explain, rationalize, humanize, and improve it.

When I returned to Canada from Berkeley in 1961, I was imbued with the spirit of a humane and caring American tort law, which I believed was

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5. ALLEN M. LINDEN, LEWIS N. KLAR & BRUCE FELDTHUSEN, *CANADIAN TORT LAW: CASES, NOTES AND MATERIAL* (13th ed. 2009).

6. ALLEN M. LINDEN & BRUCE FELDTHUSEN, *CANADIAN TORT LAW* (8th ed. 2009).

7. Allen M. Linden, *Peaceful Coexistence and Automobile Accident Compensation*, 9 CAN. B.J. 5 (1966).

quite splendid and, if imported, would make Canada a better place, more like the United States. U.S. tort law was a shining beacon to me. There were many other rookie Canadian torts teachers who had also studied in the United States and felt the same way as I did. In those days, Canadian tort law was virtually non-existent; it was simply British tort law, just as most other common law fields were almost exclusively British, the Privy Council being our Court of last resort until 1949. The Canadian courts, including the Supreme Court of Canada, were reluctant to depart from U.K. precedent and were still not ready to embrace whole-heartedly the robustness of American tort law. Increasingly, our law teachers and lawyers attended U.S. conferences, studied U.S. books, articles, and cases, and worked the best American ideas into our books, articles, and jurisprudence, sometimes by stealth. I recall attending and planning many meetings of the A.A.L.S. Torts Roundtable Council in Chicago during the Christmas break with Victor Schwartz, Marshall Shapo, and other aficionados of torts, to hear the great torts scholars propounding their newest insights.

It is the glorious and noble central idea of U.S. tort law—redress for wrongdoing—that makes it special, so special that some, like John Goldberg, have opined that it is a constitutional imperative.<sup>8</sup> The notion that any individual in America who feels wronged may challenge a wrongdoer by launching a civil law suit seeking compensation for his or her individual loss before a jury of ordinary citizens is truly remarkable. This right is embedded deep in the soul of American culture, as Shapo has shown us.<sup>9</sup> This is not a phony right, but a real one, although it is sometimes fraught with difficulties—legal, procedural, tactical, and financial. The symbolism of this open system, however, as well as its actual effect, is truly astounding when you think of it—any person injured by Vioxx or a defective Toyota, for example, is empowered to challenge a massive corporation either individually or as part of a class involving as many as 150 lawyers sometimes and, if merited, secure compensation—*full* compensation—for his unique injuries.

Tort law is a very human instrument, capable of providing psychological therapy and palpably manifesting “empathy” with the litigants, an attitude that has somehow become controversial for judges nowadays. Never forget that the primary task of tort law is to deal with the consequences of human tragedy, lives lost and shattered, businesses and reputations ruined. Individuals are seeking recompense from those *they* believe are responsible for their losses, but their targets also believe strongly that they are *not* to blame. The psychological tension is pervasive. It is stressful for the parties

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8. John C. P. Goldberg, *The Constitutional Status of Tort Law: Due Process and the Right to a Law for the Redress of Wrongs*, 115 YALE L.J. 524 (2005); see also JOHN C.P. GOLDBERG & BENJAMIN C. ZIPURSKY, *THE OXFORD INTRODUCTIONS TO U.S. LAW: TORTS* (2010).

9. See MARSHALL S. SHAPO, *TORT LAW AND CULTURE* (2003).

and the participants. Judges and juries must make hard choices, requiring sensitivity and understanding, as well as knowledge of the law and its procedures. Appellate review must keep in mind the human dramas involved in the cases and cannot let the system get bogged down in complex procedural impediments, although these elements are, of course, necessary to ensure that the system is fairly administered.

Let me not leave the impression that tort law is, or should be, exclusively plaintiff—or victim—oriented. Defendants also deserve empathetic treatment, for 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. Tort courts often decide, as they should, where the plaintiff's case has not been established, that the doctor being sued did nothing wrong, that the driver who collided with the child running across the street could have done nothing to prevent the accident, that the newspaper accused of libel printed the truth, that the manufacturer of the drug properly warned about its side-effects, that the corporate managers did not cheat their shareholders, and so on.

In addition to this ordinary and human aspect of tort law, deciding whether to redress injury, I have described what I call the ombudsman function of tort law<sup>10</sup>—the opportunity that is available to some tort claimants to challenge the powerful and seek not only compensation, but perhaps more importantly, to empower the injured, to educate, to spur legislative actions, and to make the world safer. This private attorney general role, which has been praised by Michael Rustad and others,<sup>11</sup> hopefully helps make America and the world less dangerous. Of course, there are other mechanisms for doing this—criminal law, administrative law, ordinary commercial and human influences—but when they are ineffective, as they often are, tort law is there as a secondary “sentinel of safety.” Professor Gillian Hadfield, in her recent study of 9/11 victims, has shown that some of the families, who rejected the government's compensation payments and launched civil actions, were motivated not so much by

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10. A. M. Linden, *Tort Law as Ombudsman*, 51 CAN. B. REV. 155 (1973); see also Allen M. Linden, *Reconsidering Tort Law as Ombudsman*, in ISSUES IN TORT LAW (Freda M. Steele & Sanda Rogers-Magnet eds., 1983); Allen M. Linden, *Torts Tomorrow—Empowering the Injured*, in TORTS TOMORROW 321 (Nicholas J. Mullany & Allen M. Linden eds., 1998); John W. Wade, *Tort Law as Ombudsman*, 65 OR. L. REV. 309 (1986); Marshall S. Shapo, *Changing Frontiers in Torts: Vistas for the 70's*, 22 STAN. L. REV. 330, 333 (1970).

11. THOMAS H. KOENIG & MICHAEL L. RUSTAD, IN DEFENSE OF TORT LAW (2001); see also CARL T. BOGUS, WHY LAWSUITS ARE GOOD FOR AMERICA: DISCIPLINED DEMOCRACY, BIG BUSINESS, AND THE COMMON LAW (2001).

monetary gain, but by a “strong sense of the duty to act as an agent of the community to gain information about what happened, to hold people accountable and to play a role in prompting responsive change.”<sup>12</sup> This ombudsman function of tort law is rarely exercised, and should only be only exercised as an integral and necessary part of deciding cases. Judges usually prefer to avoid these controversial tort cases as they prefer to avoid controversial cases in other fields. But it is no power trip for judges, in exercising their solemn decision-making authority, to occasionally elaborate a novel aspect of tort law. There is no need to shrink from this indirect, public function of tort law, nor to apologize for it; it has always been a vital part of the common law tradition.<sup>13</sup>

We are met today to assess the value of American tort law and its influence on the tort law of other countries. We are asking the question: “Does the world still need U.S. tort law?” Like all other aspects of American culture, U.S. tort law is studied abroad, adopted sometimes and spurned at other times. As for Canada, U.S. tort law has long had a significant influence. That influence has waxed and waned at different periods of our history. Remember the early English-speaking settlers to Canada were largely comprised of American colonists who disapproved of the 1776 revolution and moved north, preferring to remain loyal to the British Crown, so that distrust of the radical U.S. “patriots” was endemic among the early English-speaking Canadians. Rather than embracing the bracing challenge of “life, liberty, and the pursuit of happiness,” the early English-speaking Canadians preferred to include in their constitution the more comfortable ideal of “peace, order, and good government.” That fundamental difference in the two cultures is apparent to this day in the attitude of Canadians to many things American, including tort law; it is definitely not a love/hate relationship—it is more of an admiration/concern relationship. There is much that Canadians admire about U.S. tort law, but also much that causes concern. One might describe the Canadian attitude as ambivalent, perhaps even schizophrenic at times. Let me talk about some examples.

One early example of the positive U.S. influence on Canadian tort law is in the area of products liability. Following Cardozo’s great breakthrough in *MacPherson v. Buick Motor Co.*,<sup>14</sup> ending the privity rule for manufacturer liability, the Canadian courts swiftly and quietly adopted that negligence approach in *Ross v. Dunstall*<sup>15</sup> and *Buckley v. Mott*.<sup>16</sup> It was not until 1932,

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12. Gillian K. Hadfield, *Framing the Choice Between Cash and Courthouse: Experiences with the 9/11 Victim Compensation Fund*, 42 *LAW & SOC’Y REV.* 645, 673 (2008).

13. *But see* John C. P. Goldberg, *Unloved: Tort in the Modern Legal Academy*, 55 *VAND. L. REV.* 1501, 1515 (2002).

14. 111 N.E. 1050 (1916).

15. [1921] 62 S.C.R. 393 (Can.).

16. [1919] 50 D.L.R. 408 (Can. N.S. S.C.).

over a decade later, that the British courts, without giving the Canadian courts any credit for getting there earlier, discovered *MacPherson* and incorporated it into British law, much more eloquently and flamboyantly in *Donoghue v. Stevenson*,<sup>17</sup> also known as the snail-in-the-bottle case, that transformed products liability law throughout the Commonwealth. Strangely, however, when the next U.S. revolution occurred, the strict liability revolution in the 1960s, the Canadian courts refused to follow the United States, even though most Canadian scholars urged them to do so.<sup>18</sup> Although two provinces did so legislatively,<sup>19</sup> what Prosser described as the “most rapid and altogether spectacular overturn of an established rule in the entire history of the law of torts,”<sup>20</sup> caused nary a ripple on our placid Canadian waters, even though the products involved were the same and the manufacturers were the same companies or their subsidiaries. Paradoxically, U.S. manufacturers were and still are better shielded from tort liability to injured Canadian consumers in Canada, a foreign country, than they are in the United States, their homeland.<sup>21</sup> Subsequent history, including the *Restatement (Third) of Torts: Products Liability*, has shown that maybe our courts were right to hold back, at least for design and warning defects, and that maybe the ordinary negligence principle of *MacPherson*, with the aid of *res ipsa loquitur* and other devices, gave adequate protection to Canadians in this area, without chasing away American business enterprise.

Another early example of U.S. influence was the law of rescuers. British courts at first had difficulty with rescuers, denying liability because of voluntary assumption of risk or lack of causation.<sup>22</sup> The poetic prose of Justice Cardozo in *Wagner v. International Railway*,<sup>23</sup> “[d]anger invites rescue,” was specifically quoted by a British trial judge in *Haynes v. Harwood*,<sup>24</sup> who referred to the “well-known American Judge Cardozo,” as did the Court of Appeal,<sup>25</sup> which affirmed the decision and also cited a supportive article by an expatriate American working at Oxford, Arthur L. Goodhart, something not normally done in those days. Of course, the

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17. [1932] A.C. 562 (H.L.) (appeal taken from Scot.).

18. See William L. Prosser, *The Fall of the Citadel (Strict Liability to the Consumer)*, 50 MINN. L. REV. 791 (1966).

19. New Brunswick and Saskatchewan.

20. Prosser, *supra* note 18, at 793–94; see also LINDEN & FELDTHUSEN, *supra* note 6, at 655.

21. See Bruce Feldthusen, *Recent Development in the Canadian Law of Punitive Damages*, 16 CAN. BUS. L.J. 241 (1990).

22. See *Cutler v. United Dairies (London) Ltd.*, [1933] 2 K.B. 297 (C.A.).

23. 133 N.E. 437 (N.Y. 1921).

24. [1934] 2 K.B. 240, *aff'd*, [1935] 1 K.B. 146 (C.A.).

25. See *id.* at 247; 1 K.B. at 163.



Canadians happily followed the United Kingdom following the United States, but unknown to the world, the Canadian courts had, here too, quietly got there first in 1910, when an unknown Canadian jurist from Manitoba, Justice Albert Richards, declared in *Seymour v. Winnipeg Electric Railway Co.*<sup>26</sup> that “those who risk their safety in attempting to rescue others who are put in peril . . . are entitled to claim compensation.”<sup>27</sup>

One recent example of the schizophrenic influence U.S. law has had on Canadian law is the case of *Grant v. Torstar Corp.*,<sup>28</sup> a libel case. In the past, publication of erroneous factual information led to strict liability, regardless of the lack of fault of the communicator. In *New York Times Co. v. Sullivan*,<sup>29</sup> the U.S. Supreme Court changed that, protecting erroneous information about public figures, unless there was proof of “actual malice” by the defendant. When Canadian libel lawyers tried to import this muscular principle into Canadian defamation law following the 1982 adoption of our Canadian Charter of Rights and Freedoms, the Canadian Supreme Court balked and refused to do so,<sup>30</sup> preferring instead to protect reputation rather than promoting freedom of expression.<sup>31</sup> This led to a booming libel litigation business in Canada and the United Kingdom, where public figures often sued non-malicious but careless libelers to avoid the *New York Times* rule, sometimes with success.

However, further reflection has now led to an adjustment of this Canadian hesitancy, but the American rule has still not been adopted fully. In *Grant v. Torstar Corp.*, the Supreme Court of Canada, obviously influenced by the evolving U.S. jurisprudence, but somewhat more timidly and half-heartedly, created a new libel defense of responsible communication on matters of public interest, which it added to the existing defenses of fair comment and the various privileges.<sup>32</sup> This new defense allows publishers to escape liability if they can establish that they acted responsibly in attempting to verify the information they published about a matter of public interest.<sup>33</sup> As you can see, this is a halfway house between the U.S. malice test and the former strict liability rule. This approach demonstrates the general attitude of Canadian courts towards U.S. tort law—a willingness to consider it, but a reluctance to follow it completely. Clearly, the robust freedom of speech permitted in the United States is still too robust for Canadian judges, who were influenced into loosening the law

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26. (1910), 19 Man. R. 412 (Can. Man. C.A.).

27. For other examples, see generally Allen M. Linden, *The American Influence on Canadian Tort Law*, 50 UCLA L. REV. 407 (2002).

28. [2009] 3 S.C.R. 640 (Can.).

29. 376 U.S. 254 (1964).

30. See *Hill v. Church of Scientology*, [1995] 2 S.C.R. 1130 (Can.).

31. See 1 RAYMOND E. BROWN, *THE LAW OF DEFAMATION IN CANADA* 6 (1987).

32. See *Grant*, 3 S.C.R. 640, para. 95.

33. See *id.* para. 98.

by relying on the constitutional values embedded in our Charter, but were also cognizant of the danger to reputation by enlarging the protection further. Ambivalence is not necessarily a vice, at least not in Canada.

When the no-fault auto insurance debate exploded in the United States in the 1960s with Keeton and O'Connell's brilliant book, *Basic Protection for the Traffic Victim*,<sup>34</sup> leading some states to legislate a variety of plans,<sup>35</sup> Canadians also became engaged. This was understandable because the original no-fault plan for auto accidents had been enacted in Saskatchewan in 1946, but it was a government-run plan that was not popular elsewhere.<sup>36</sup> In the 1960s and 1970s, Canadian provinces, not unlike U.S. states, adopted a variety of plans—some private and some public, some “add-on” (which I named “peaceful coexistence”), one threshold (Ontario), one pure (Quebec), and one even allowing a choice between fault or no fault (Saskatchewan).<sup>37</sup>

There are many other areas of U.S. influence on Canadian tort law. Bruce Feldthusen has outlined the impact of U.S. law on compensation for economic losses.<sup>38</sup> In resolving the issue of breach of statute in negligence law, the Supreme Court of Canada relied on Ezra Thayer's 1913 article and Clarence Morris's 1932 article, both published in the *Harvard Law Review*, and the *Restatement (Second) of Torts* in deciding that breach of penal statute would be treated as evidence of negligence.<sup>39</sup> As for informed consent in medical cases, Canada adopted the U.S. reasonable patient standard and the objective theory of causation.<sup>40</sup> The learned intermediary doctrine was lifted from U.S. law by the Supreme Court of Canada.<sup>41</sup> The issue of caps on general damages, which has so exercised U.S. courts, legislatures, and scholars, was resolved judicially in 1978 by the Supreme Court of Canada, which placed a \$100,000 maximum on these damages, but

34. ROBERT E. KEETON & JEFFREY O'CONNELL, *BASIC PROTECTION FOR THE TRAFFIC VICTIM: A BLUEPRINT FOR REFORMING AUTOMOBILE INSURANCE* (1965).

35. For example, states like Massachusetts, Florida, Connecticut, New Jersey, Michigan, and New York enacted pure no-fault insurance statutes. See M.G. WOODROOF III ET AL., *AUTOMOBILE INSURANCE AND NO-FAULT LAW*, 439–69 (1974).

36. For more on Saskatchewan Plan, see *id.* at 417–18.

37. For a chart describing all Canadian provincial plans, see LINDEN, KLAR & FELDTHUSEN, *supra* note 5, at 786.

38. See Bruce Feldthusen, *What the United States Taught the Commonwealth About Pure Economic Loss: Time to Repay the Favor*, 38 PEPP. L. REV. 309 (2011).

39. See *The Queen v. Saskatchewan Wheat Pool*, [1983] 1 S.C.R. 205 (Can.) (citing Ezra Ripley Thayer, *Public Wrong and Private Action*, 27 HARV. L. REV. 317, 225 (1914); Clarence Morris, *The Relation of Criminal Statutes to Tort Liability*, 36 HARV. L. REV. 453 (1933); and RESTATEMENT (SECOND) OF TORTS §§ 286, 288A, 288B (1966)).

40. See *Reibl v. Hughes*, [1980] 2 S.C.R. 880 (Can.) (following *Canterbury v. Spense*, 474 F.2d 772 (1972) and *Schloendorff v. Soc'y of N.Y. Hosps.*, 105 N.E. 92 (1914)).

41. See *Hollis v. Dow Corning Corp.*, [1995] 4 S.C.R. 634 (Can.).

allowing the maximum to rise with inflation to \$300,000 today.<sup>42</sup> The runaway U.S. punitive damages problem and the efforts to resolve it spurred the Canadian Supreme Court to wisely address it, even though this problem was non-existent in Canada, with the highest such award ever made being only \$1 million.<sup>43</sup>

But the light of this shining beacon of U.S. tort law has dimmed in recent years. Following *The Tort Policy Working Group Report (1986)* and under the onslaught of the American Tort Reform Association, the Chamber of Commerce, PLAC, and other powerful business interests, and responsive to what many perceived to be irresponsibly generous tort law, courts and legislatures began to downsize U.S. tort law, something that may have been necessary. The television, movie, and publishing industry has become an enthusiastic accomplice to these forces by portraying tort lawyers in a negative light—as alcoholics, dishonest, sleazy, and money-grubbing. The distortion of the facts of the much-publicized McDonald’s hot coffee case has done more harm to the U.S. tort system around the world than anyone could imagine, especially because the actual facts portray not an embarrassment, but rather a great triumph for tort law.<sup>44</sup> The O.J. Simpson criminal trial severely damaged the U.S. criminal justice system, but the civil trial’s redemption of that system, finding O.J. civilly liable in tort, is totally unknown. Lawyer jokes are so widespread and poisonous that one of our most respected scholars, Marc Galanter, wrote an entire book, *Lowering the Bar*, analyzing and trying to explain why these lawyer jokes are so omnipresent in the United States<sup>45</sup>

As a result, attitudes toward tort law are changing; there has been a “retreat” in the United Kingdom. The Canadian Supreme Court has placed a virtual lid on new tort duties. The Australians, as Professor Cane has shown, have moved dramatically to rein in tort law legislatively.<sup>46</sup> Judges and juries everywhere are becoming tougher and tougher, often dismissing cases that years ago would have succeeded. Many believe that, although the tort reform movement may have been necessary originally, the pendulum has swung too far. Tort law, some say, is losing its humanity. Icy rationality and fearful negativity are replacing judicial and jury empathy. The hard philosophy of Hobbes is supplanting that of Rousseau.

But it is not so much substantive tort law that is primarily to blame; it is mostly the procedural quagmire through which tort claims must navigate. While much of this may be necessary in huge cases and class actions, it is not needed in routine ones. Dilatoriness, wastefulness, and the ruthlessness

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42. See *Andrews v. Grand & Toy Alberta Ltd.*, [1978] 2 S.C.R. 229 (Can.).

43. See *Whiten v. Pilot Ins. Co.*, [2002] 1 S.C.R. 595 (Can.).

44. See *Liebeck v. McDonald’s Rests., P.T.S., Inc.*, 1995 WL 360309 (D.N.M. 1994).

45. See MARC GALANTER, *LOWERING THE BAR: LAWYER JOKES AND LEGAL CULTURE* (2006).

46. See Peter Cane, *Searching for United States Tort Law in the Antipodes*, 38 PEPP. L. REV. 257, 265–70 (2011).

of the procedures employed in America now infect routine tort litigation. There are more and more hurdles to overcome, and more and more pitfalls for the injured to avoid. Endless interrogatories, repetitious discoveries, voluminous productions, costly experts, and harassing motions may sometimes be useful, but they inevitably cause delay, increase the costs, and prolong the worrying and suffering of the claimants—something that benefits *only* the defense side and incidentally increases *its* billable hours, but not the contingency fees of the claimants' attorneys. Judges, upon the urging of defense counsel on procedural, technical, or jurisdictional grounds, sometimes dismiss cases on the pleadings alone or at the summary judgment stage without even allowing claimants a chance to present their cases before a jury, ending any settlement discussions. This is a Draconian way to reduce the crowded dockets awaiting trial.

One of the much-heralded reforms in recent years in the United States, Canada, and elsewhere is the Apology Act.<sup>47</sup> This popular new law is supposed to be a humane development, encouraging healing and reconciliation between parties, but some say that it is really just another so-called "reform" that allows defense attorneys to keep evidence of apologies, which express sorrow and perhaps responsibility for accidents by alleged tortfeasors, from being introduced into evidence at a trial, where they may damage the defense and be of assistance to the claimant occasionally.

With its increasingly complex procedure and content, tort law, like tax law, is becoming an ally of the corporate community, rather than a balanced friend and protector of ordinary people, who seem now to be more and more alone in this dog-eat-dog, competitive, selfish, and sometimes ruthless market-driven world.

In my view, we torts teachers have an obligation, in addition to teaching basic tort principles with rigor and producing first-rate scholarly work, to instill in our students a sense of decency, civility, fairness, and compassion. We must teach our students humanity as well as rationality, exposing them to the social facts of injury and the problems many people have in paying for medical care and securing replacement of lost wages, with and without tort law. We must illuminate both the necessity and the difficulty of safety regulations for consumers as well as for industry. We must also advise our students, when they enter the practice of law, on *both* sides, to conduct themselves with integrity and balance, to be more open to settle cases sooner and with less hostility than what now seems to be the case. We must help

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47. See Daniel W. Shuman, *The Role of Apology in Tort Law*, 83 JUDICATURE 180, 182 (2000); John C. Kleefeld, *Thinking Like a Human: British Columbia's Apology Act*, 40 U.B.C. L. REV. 769 (2007).

our students to understand the concern of the business community when innocent defendants are being blackmailed by avaricious, overreaching plaintiffs in trivial, exaggerated, or phony lawsuits. There are almost always two sides to every tort case; often both parties can be “guilty” and “innocent” in part. Plaintiffs must make moderate, not outlandish, demands; defendants should make reasonable, not insulting, offers. But we should not condone the tactics sometimes employed by defendants, their insurers, and their attorneys who, even in obviously meritorious cases, use every procedural device, every delaying excuse, and even sometimes unsavory tactics to thwart the cause of justice. The vicious procedural and evidentiary ethos that is poisoning the U.S. tort system, with its overly competitive and aggressive spirit, portrays an adversary system run wild, hampering the fair and efficient resolution of tort cases.

One new idea to consider as an antidote to these delays and costly procedural maneuvers is a so far totally unnoticed development in Ireland—the Irish have established a Personal Injuries Assessment Board, a bold agency created to speed up settlements in tort cases at less legal cost.<sup>48</sup> Injured persons, before suing, apply to this Board for an independent assessment of their claims and, if the respondent agrees, a valuation decision by the Board is normally made within nine months on the documents submitted.<sup>49</sup> No legal costs are awarded except those incurred to comply with the act.<sup>50</sup> Something like seventy-five per cent of these claims are settled on the basis of the board’s assessment.<sup>51</sup> If they are not, the Board may authorize the parties to proceed to court, but cost penalties may be awarded against the respondent where the court award exceeds the Board’s assessment, or against the plaintiff if the court award is less.<sup>52</sup> Administrative costs have been cut to ten per cent<sup>53</sup> Such an institution deserves study in America and other places as a possible method of reducing court congestion and speeding up settlements at less cost, at least for routine cases.

My vision of the future of tort law, at least until universal protection against injury and illness is achieved, is perhaps a naïve one: a fair and efficient system that compensates the deserving justly, but not extravagantly, and that protects innocent defendants from unfounded claims, fairly but not

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48. See Personal Injuries Assessment Board Act 2003 (Act No. 46/2003) (Ir.), available at <http://www.irishstatutebook.ie/2003/en/act/pub/0046/sec0046.html>.

49. See *id.* para. 49; Jonathon Ilan, *Four Years of Personal Injuries Board: Assessing Its Impact* (Mar. 2009), [http://www.ucd.ie/roads/roads\\_documents/compcultwp%20no2.pdf](http://www.ucd.ie/roads/roads_documents/compcultwp%20no2.pdf).

50. *Guidelines on Legal Costs Under Section 44 of PIAB Act 2003*, INJURIESBOARD.IE, 3 (July 2009), [http://www.injuriesboard.ie/eng/Forms\\_and\\_Publications/Guidelines/Section\\_44\\_Guidelines.pdf](http://www.injuriesboard.ie/eng/Forms_and_Publications/Guidelines/Section_44_Guidelines.pdf).

51. See *Annual Report & Accounts 2009*, PERSONAL INJURES ASSESSMENT BOARD, 17 (Aug. 2010), [http://www.deti.ie/publications/corporate/2009/InjuriesBoard\\_AnnualReport09\\_EN.pdf](http://www.deti.ie/publications/corporate/2009/InjuriesBoard_AnnualReport09_EN.pdf).

52. *Most Frequently Asked Questions*, INJURIESBOARD.IE, Q25, <http://www.injuriesboard.ie/eng/FAQ/#25> (last visited Dec. 24, 2010).

53. PERSONAL INJURES ASSESSMENT BOARD, *supra* note 51, at 5.

cruelly. I believe that U.S. tort law should reflect humane concern for the injured, as an aspect of American society that underscores not its selfishness but its decency and caring side, which is so widespread in this great country, as the world has witnessed in Haiti, Chile, Indonesia, New Orleans, Africa, and elsewhere.

One dramatic symbolic measure that I have advocated for at least five decades is the adoption in the United States and the Commonwealth of a general civil duty of easy rescue, a Bad Samaritan law, as exists in Europe, three American states (Vermont, Minnesota, and Rhode Island), and the Province of Quebec. Propounded over a century ago by Dean James Barr Ames of Harvard Law School<sup>54</sup> and supported by Dean Prosser in all the editions of his great book,<sup>55</sup> the adoption of this idea has been resisted by almost all legislatures, all state courts, and all three versions of the *Restatement of Torts*. I am pleased that there has finally been some partial legislative movement in this direction in some states. Good Samaritans who *do* come to the aid of another, and there are many, are usually immunized (or partially immunized) from liability by statute, and they are eligible through tort action for compensation from those who created the danger at common law. Most states require motorists involved in accidents to stop and render assistance.<sup>56</sup> Some states by penal statute require individuals to report crime and to report sexual abuse of children, with a few state courts creating a civil duty based on this legislation,<sup>57</sup> but so far this is only a trickle. The *Restatement (Third) of Torts*<sup>58</sup> has lengthened its list of special relationships requiring rescue from four (carrier, innkeeper, custodian, and possessor of land) to seven (adding to the list landlord, employer, and school). Parents, other family members, and companions were sadly not added to the list, although discussed hopefully, as the jurisprudence did not yet justify it. There is still a long way to go.

Let me bask in the sunshine of what one caring and courageous Canadian province did. In the Province of Quebec, its Charter of Human Rights and Freedoms,<sup>59</sup> which has a quasi-constitutional effect, contains the following words:

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54. James Barr Ames, *Law and Morals*, 22 HARV. L. REV. 97, 110 (1908). *But cf.* Francis H. Bohlen, *The Moral Duty to Aid Others as a Basis of Tort Liability*, 56 U. PA. L. REV. 217, 219 (1908).

55. WILLIAM PROSSER, *THE LAW OF TORTS* 194 (1st ed. 1941); 185 (2nd ed. 1955); 338 (3rd ed. 1964); 343 (4th ed. 1971); 343 (5th ed. 1984) (posthumously).

56. *See, e.g.*, Cal. Veh. Code § 20001 (West 2011).

57. *See J.S. v. R.T.H.*, 714 A.2d 924 (N.J. 1998).

58. RESTATEMENT (THIRD) OF TORTS: PRODS. LIAB. § 34 (1998).

59. R.S.Q., c. C-12.

Every human being whose life is in peril has a right to assistance . . . . Every person must come to the aid of anyone whose life is in peril, either personally or calling for aid, by giving him necessary and immediate physical assistance, unless it involves danger to himself or a third person, or he has another valid reason.

As you can see, Quebec is a province that cares about its people's safety and is ready constitutionally to protect them in many ways, including requiring fellow citizens to assist in times of danger. Quebec, like France, believes not only in liberty and equality, but also in *fraternity*. It embraces a view like Bob Cochran's warm communitarianism, something we need more of today.<sup>60</sup>

Although the objections to this measure for the United States and other commonwealth countries are worthy of respect, the argument for a general affirmative duty is more compelling to me. The argument here is grounded largely on values, for it is hard to contend that such a change in the law will produce a flurry of additional rescue efforts. My main plea here is that we torts people should, in our circumscribed but significant domain, ensure that our tort law is reflective of the best in our culture, incorporating the decency and humanitarianism that is the hallmark of Americans and other English-speaking people.

As I have mentioned, the American tort system became a shining beacon for the world, beckoning other countries to provide just and generous redress to their victims of tortious conduct. It was this incandescent light that drew me to Berkeley in 1960 to study torts with the great Prosser and Fleming and then to return home to teach. Soon after, it was this same beacon that ensnared me in the Canadian thalidomide litigation, when I was consulted by a law firm in Toronto about whether it should undertake to represent a thalidomide family with a badly damaged daughter in a lawsuit against the drug company. Against my advice, the senior partner declined, explaining to me: "This firm is not a charitable organization." He handed me the file, saying that I was welcome to pursue the claim myself if I believed so much in the case. Other Canadian law firms also passed. Realizing my limitations and the insurmountable odds against such a claim succeeding in Canada, I had an epiphany one sleepless night—try to get an American law firm to do it! I interviewed and rejected as a possible champion, Melvin Belli, whom I knew slightly, but he was tied up in the Jack Ruby defense at the time. I then approached a respected Cleveland law firm, Spangenberg, Traci, and Co., which bravely accepted the challenge. Eventually, a fair settlement for the thalidomide family I helped, as well as for the families of the many other Canadian children, was achieved.

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60. ROBERT F. COCHRAN JR. & ROBERT M. ACKERMAN, *LAW AND COMMUNITY: THE CASE OF TORTS* (2004).

Whereas the Bad Samaritan Canadian legal system failed to act to help these tragedy-struck Canadian families, the U.S. tort system and the U.S. bar, to its great credit, did not walk by, but nobly came to the rescue.

My main focus in this enduring cause of mine is the educational, didactic, or “expressive” function of tort law,<sup>61</sup> not necessarily its compensatory or deterrent role. Tort law, like all law, can influence attitudes in law-abiding citizens about right and wrong. That is one function of all law, especially criminal law, human rights law, and constitutional law. Consequently, our law supports those who do the right things and denounces those who do the wrong things. When American law teaches that one need not assist someone in danger, it diminishes the moral stature of that law, both at home and abroad.

When Cain, after killing his brother Abel, was questioned about the whereabouts of Abel, he responded evasively and asked, “Am I my brother’s keeper?”<sup>62</sup> Unlike Cain, we should answer “yes.” We are and should be our “brothers’ keepers.” The soul of commonwealth tort law has been grounded on this noble ideal for decades: the glorious neighbor principle—that one should act reasonably in order to avoid foreseeable injuries to one’s neighbors. This neighbor principle, born in *Donoghue v. Stevenson*,<sup>63</sup> the House of Lords’ snail-in-the-bottle case from 1932, is a diluted variation of the great Christian principle—love your neighbor—a principle that most great religions subscribe to. It challenges us to dream of a beautiful world where people care about one another, feel responsible for one another, and even (dare I say it) love one another.

Have we learned anything from the recent economic collapse spawned in part by the “dog-eat-dog,” “bottom-line” commercialism, and the selfishness of the “ownership society”? Can we return to a more compassionate and caring society, where we help our neighbors, not ignore them or fleece them? Can tort law and torts teachers, at least in our small but significant domain, help in this renaissance? My dream, a naïve, romantic, and hopeless one perhaps, is that the recent bailouts, stimulus packages, and the compassionate rhetoric and actions of the new administration seeking to protect ordinary people, to control the unduly avaricious, and to reach out in a more sensitive way to the rest of the world, will ignite a fresh awakening of generosity in America, which will be reflected in a more empathetic tort law, which hopefully will include a general duty of easy rescue.

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61. See Cass R. Sunstein, *On the Expressive Function of Law*, 144 U. PA. L. REV. 2021 (1996).

62. *Genesis* 4:9.

63. *Donoghue v. Stevenson*, [1932] A.C. 562 (H.L.) (appeal taken from Scot.).



An agenda for the years ahead would include the following:

1. We should continue to support the work of the American Law Institute (ALI) in its restatement efforts. The *Restatement (Third) of Torts*,<sup>64</sup> covering physical and emotional harm, is soon to be promulgated by the ALI, thanks to the efforts of dozens of great tort scholars, led by Mike Green, Bill Power, Ellen Pryor, Jane Stapleton, and many of you who are here today. Hopefully, this *Third Restatement*, and the further work that is ongoing,<sup>65</sup> will help to maintain and enhance the traditional balance and humanity in the system. The *Restatement (Third) of Products Liability* (1998)<sup>66</sup> and the Apportionment of Liability (2000) project,<sup>67</sup> although controversial, have already begun to achieve just that.

2. Further efforts to rationalize, humanize, and render the tort system more efficient and fair have been undertaken by legislatures, courts and scholars, and this should continue. Class action abuses are rightly being addressed these days. Joint liability rules are being adjusted. The harshness of the contributory negligence defense is almost gone. Astronomical punitive damage awards are history. We should offer more judicial guidance to juries. The tort systems of other common law and even civil law jurisdictions should be canvassed for new ideas to renew U.S. tort law, but we must avoid the “unmaking” of tort law<sup>68</sup> unless we provide for an adequate replacement. One idea, the new federal vaccine court, deserves more attention, perhaps enlarging its jurisdiction to include medical malpractice generally.<sup>69</sup>

3. Alternative dispute resolution (ADR) techniques should be refined and utilized more often in tort cases. With the help of Pepperdine’s Straus Institute for Dispute Resolution and others like it, perhaps lawyers in the future will come to resemble peacemakers more than gladiators. But we must also guard against the pollution of the ADR system by disingenuous insurers and unethical and money-driven mediators, who sometimes do not help to deliver juster justice as they should.

4. One of the best ways to reduce the pressure on the tort system is for America to fill in the gaps in the U.S. medical and social welfare system, which, even after the recent protracted battle in Congress, still covers the injured much less generously than most other countries in the Western

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64. RESTATEMENT (THIRD) OF TORTS: LIAB. FOR PHYSICAL AND EMOTIONAL HARM (2010).

65. Ellen Pryor, *Restatement (Third) of Torts: Coordination and Continuation*, 44 WAKE FOREST L. REV. 1383 (2009).

66. RESTATEMENT (THIRD) OF TORTS: PRODS. LIAB. (1998).

67. RESTATEMENT (THIRD) OF TORTS: APPORTIONMENT OF LIAB. (2000).

68. JAY M. FEINMAN, UN-MAKING LAW (2004); Stephen D. Sugarman, *Judges as Tort Law Unmakers*, 49 DEPAUL L. REV. 455 (1999).

69. See, e.g., Deborah F. Buckman, *Construction and Application of Preemption Provisions of National Childhood Vaccine Injury Compensation Act of 1986 (“Vaccine Act”)*, 42 U.S.C.A. § 300aa-1 et seq., 39 A.L.R. Fed. 2d 155 (2009).

world. The United States has protected workers for years, but auto accident victims are still not protected by no-fault plans in many states, including California. The better the injured are protected by non-tort compensation, the less need there is for tort compensation. The current health care debate demonstrates, however, that there is sadly much resistance to serious reform in America. Yet Congress responded swiftly and humanely to the 9/11 tragedy by establishing a unique no-fault compensation system for the victims, which distributed fair compensation to 97% of the 5,560 victims within thirteen months at little administrative cost.<sup>70</sup> A federal legislative solution to the messy asbestos litigation has been tried, but it has failed. While a comprehensive accident compensation scheme like that in New Zealand,<sup>71</sup> so admired by Stephen Sugarman as well as other dreamers like me, appears beyond America's grasp for now, perhaps some individual humane and adventurous states will study these more radical options and enact versions of them, hopefully leaving some role for tort law.

5. In addition to these advances, tort law must survive not only as a vital system of civil recourse, but also as society's radar for early detection of emerging dangers. It takes time for legislatures to notice and to respond to emerging new health and safety risks. In the interim, tort lawyers launch civil suits, often unsuccessfully at first, which spotlight danger, even if compensation may not be obtained. Starting a tenuous, hopeless, even ridiculous, lawsuit may alert people to some unseen peril, even though it never succeeds or even reaches trial. In my view, it is better for a disgruntled citizen to pursue his imagined tormentor with a writ than with a rifle. The saga of tobacco litigation demonstrates that, with persistence, tort law can eventually direct serious public attention toward a serious health risk. The producers of television, music, and movies, the fast food industry, and the alcohol and gun manufacturers may succeed in avoiding tort liability for years, but one day, with the help of tort law's pressure, the negative publicity generated by tort actions may persuade them to behave more responsibly. Hopefully, the dreadful sex abuse cases, many involving celebrities, clergy, and politicians, that are reported widely in the media are teaching us more about that problem and are changing attitudes and behavior. The civil actions for corporate wrongdoing, evidenced by the Enron scandal amongst others, may promote better ethics and more honesty

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70. See Robert L. Rabin, *The September 11th Victim Compensation Fund*, 53 DEPAUL L. REV. 769 (2003); KENNETH R. FEINBERG, *WHAT IS LIFE WORTH?: THE UNPRECEDENTED EFFORT TO COMPENSATE THE VICTIMS OF 9/11* (2005).

71. Accident Rehabilitation Compensation Insurance Act 1992 (N.Z.).

in the business community. The rediscovery of the Alien Tort Statute<sup>72</sup> may foster more responsible corporate conduct all around the world, as Roger Alford explains.<sup>73</sup> Remember, a court that says “no” in these novel cases may not help the particular claimant, but it still may serve society as well as one which says “yes” by warning society about the existence of the problem and the need for addressing it outside the tort system.

6. While tort litigation will not eradicate terror, torture, and other crimes against humanity, just as mighty armies cannot, it may supply some compensation to victims, some deterrence, some psychological satisfaction, some education, and some impetus to more effective governmental 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.”<sup>74</sup> This is certainly a worthy endeavor.

This then is my continuing song of torts, sung again this day in the hope that U.S. tort law and U.S. tortaholics will continue to serve our society and its injured with honor, integrity, responsibility, balance, and humanity, and that the shining beacon of U.S. tort law, so full of hope and promise which entranced me long ago, will once again shine brightly for all the world to witness in wonder and gratitude, for it truly reflects the hope and promise of America itself.

Finally, I will answer the question—does the world still need U.S. tort law? Despite its doctrinal imperfections and its procedure frailties, I respond resoundingly—YES!

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72. 28 U.S.C. § 1350 (2006).

73. Roger P. Alford, *Apportioning Responsibility Among Joint Tortfeasors for International Law Violations*, 38 PEPP. L. REV. 233, 235–36 (2010).

74. John Terry, *Taking Filártiga on the Road: Why Courts Outside the United States Should Accept Jurisdiction Over Actions Involving Torture Committed Abroad*, in TORTURE AS TORT: COMPARATIVE PERSPECTIVES ON THE DEVELOPMENT OF TRANSNATIONAL HUMAN RIGHTS LITIGATION 109, 133 (Craig Scott ed., 2001).