

5-15-2006

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Recommended Citation

Allen M. Linden *Acceptance Speech: The Fleming Award 2004*, 33 Pepp. L. Rev. Iss. 4 (2006)
Available at: <https://digitalcommons.pepperdine.edu/plr/vol33/iss4/5>

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Acceptance Speech: The Fleming Award 2004

Justice Allen M. Linden^{*}

I am doubly honored in receiving this award today. First, it was created to honor the memory of Professor John G. Fleming, my beloved teacher, mentor, and friend, whose work in tort law made him the preeminent Commonwealth scholar of this time. Fortunately for me, he arrived to teach at the University of California at Berkeley the same time I arrived to do graduate work. Professor Fleming had been discovered by the great William Lloyd Prosser, at the time the Dean of the U.C. Berkeley Law School and the leading torts scholar in America. As Dean Prosser's *Hornbook on the Law of Torts* was in the U.S., Professor Fleming's textbook on torts was the Bible of the judiciary and bar in the Commonwealth. How lucky I was to study torts at the same time under *both* of these titans of torts! What else could I have chosen to do other than try to humbly follow in their footsteps in teaching and writing about the law of torts? I want to thank the Committee, John Fleming, and Bill Prosser today, and especially Professor Stephen Sugarman, who carries on the Berkeley tradition of great torts teaching. I hope and expect that many of you will be able one day, in the not too distant future, to publicly thank one or more of your professors of torts or otherwise on receiving a similar honor.

Second, I am thrilled to be receiving this award at Pepperdine University School of Law, my adopted academic home these last six years, which has warmly embraced me and given me continuous access to the wonderful students of this great faith-based institution. Not only have the great Deans and Associate Deans of Pepperdine embraced me—Ronald Phillips, Richardson Lynn, Shelley Saxer, Richard Cupp, and, of course, our distinguished current Dean, the Honorable Kenneth Starr—but the administrative staff has done so as well, along with the library staff and the secretarial staff, led by the phenomenal Candace Warren, all of whom have cheerfully helped me whenever I needed it.

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Pepperdine University School of Law is also an institution with a great history of superb torts teaching—Professor Anthony Miller, of course, Dean Richard Cupp, Professor Robert Cochran, Professor James Gash, and other luminaries in the past who taught here as visitors, such as Willard Pedrick, John Wade, and Sam Thurman.

The noble enterprises of this institution—purpose, leadership, and service—are ones that I wholeheartedly endorse. I try to teach our students here as I have taught students elsewhere: that tort law practice can be conducted with integrity and honor, and that it can afford lawyers the opportunity for leadership in serving their society with purpose, helping to make our world a better place.

In accepting this award I feel obligated to confess publicly that I suffer from an addiction, a powerful addiction from which I cannot escape, and do not wish to escape—I am a tortaholic. I get no kick from champagne, mere alcohol doesn't thrill me at all, but I get a kick out of torts. Why is that so?

I believe, in part, that it is the “human face” of tort law that so attracts us: its capacity for tragedy, for comedy, for pathos, for suffering, for heroism and even for villainy.¹ 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. We torts people are blessed with a front row center seat on the drama of life. This is one reason why we love torts and why it keeps us so enthralled.

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 recover whatever is left of their lives that can be salvaged 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. If engaged to help, the lawyer's work may last for years before the victim can be “healed,” at least as far as can be done by money, so the legal assistance is frequently

1. Portions of this speech were drawn from source material that served as the basis for another address, given at Suffolk University Law School on October 29, 2004. See Allen M. Linden, *Viva Torts!*, 5 J. HIGH TECH L. 139, 139-59 (2005), http://www.law.suffolk.edu/highlights/stuorgs/jhtl/V5N1/07_JHTL_Lambert_Linden.pdf.

far more significant than the doctor's in repairing the whole of the victim's life.

But it is not just the entertainment value of tort law, nor its capacity to provide tort lawyers with personal satisfaction, which makes it worthwhile. Tort law has a significant social mission, serving several important functions in our complex world.

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 deterrent, 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 types of wrongdoing in our society. As Dean Leon Green, an icon of tort law, perceptively wrote, "tort law is public law in disguise," serving not only plaintiffs, but society generally.² 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 both slowly and expensively. We cannot deny that there are some warts on torts, warts that may need treatment. But on the whole, tort law can be a glorious tool for a "juster justice and a more lawful law," to quote Tom Lambert, another torts scholar.

I shall not discuss the compensation or deterrent functions today, for they are well known, but I would like to briefly remind you of the psychological function of tort litigation. Victims of what they perceive to be wrongs committed against them may 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 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 is the O.J. Simpson civil case. After the criminal trial's acquittal in Los Angeles, Fred Goldman, the father of the young man murdered alongside Nicole Simpson, launched a civil suit against O.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 confirm—that his son was murdered by O.J. Simpson. It was obvious to all

2. See Leon Green, *Tort Law Public Law In Disguise*, 38 TEX. L. REV. 257, 257 (1960).

that launching this action was Mr. Goldman's response to a deep 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 O.J. Simpson publicly admitted his guilt. This invitation was obviously spurned, 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 even though the chance of recovering any money is remote.

Another function of tort law deserves attention here. Tort law, in a role similar to that of an ombudsman, also provides a voice for those injured individuals to proclaim, in a serious and public way, their condemnation of the risky activity that produced their suffering. Many of these idealistic—perhaps romantic—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 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 sufficiently noticed by politicians and regulators. It helps to keep hope alive, hope of a safer world.

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. The Christian principle that you are to love your neighbor has been adapted into tort law's teaching that "you must not injure your neighbor." 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 the tort system 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 his or her hearing, a brilliant scholar who has lost the full use of his or her 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 the individual, at least as much as money can restore. Tort law cares, really cares, about individuals. That tort litigation does 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 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 customs of the profession, 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 corporation did not cheat its shareholders, 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 continually underscores our sincere belief in the dignity of the individual and our commitment to right wrongs peacefully and fairly, no matter what the financial cost. We recognize that tort law is a tool, but 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 invite you to join us torts people in that quest.

Despite these valuable contributions to society, tort law is under attack today. Tort law and tort lawyers are becoming popular targets of abuse, being blamed for damaging the economy, fostering a litigious society, and diminishing personal responsibility.

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 all-encompassing 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 “stabilized” in the 1980s and 1990s. Much of this occurred because the American judiciary changed, attitudes changed, and 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 gravely damaged by huge and frequent damage awards.

The movie industry, in contrast with its 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 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, have diminished public confidence in tort lawyers and the tort system.

Much of this criticism is helpful for the friends of tort law, as well as its foes, who recognize that there are some warts on torts. There are some remarkably high jury awards these days. Too many people seem to be suing unjustifiably, and too many others are defending the indefensible. Mistakes are 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 claim that there is a “crisis.”

But, on the other side, it may be noted that there are too many accidents, too many uncompensated victims, and many victims 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 caused by the slow and inadequate compensation for the injured that is the crisis, not the absence of sufficient profit for insurers and industry.

The law of torts is rightly undergoing strict scrutiny these days, for it costs U.S. society about \$250 billion annually³ or over \$800 per person, per year. But we cannot condemn tort law without a full hearing. We must develop a proper balance in the system which considers all the problems and all the potential solutions.

In reforming tort law, its excesses *should* be trimmed where trimming is necessary, but we should also preserve and even strengthen it where needed. Not only are too many victims of wrongdoing receiving windfalls, but there are too many victims of wrongdoing receiving too little or nothing at all. Not only are too many blameless people being held liable, but too many blameworthy individuals go undetected. During this reform effort, we must

3. John Engler, *Op-Ed: It's Good for U.S. Business . . .*, THE HILL, Feb. 15, 2005, available at <http://www.hillnews.com/thehill/export/TheHill/Comment/OpEd/021505.htm>.

keep in mind not only those being sued unjustifiably but also the needs of those who have been wrongfully harmed. We must consider the appropriate mix of public and private regimes of compensation, as well as the role of penal, administrative, and private industry regulation aimed at reducing accidents. A fair equilibrium is that for which we must strive.

I offer a few modest suggestions for consideration of future tort reformers:

1. We should support the work of the American Law Institute ("ALI") in its restatement efforts. The Restatement (Third) of Torts, covering physical injury, is about to be promulgated by the ALI, thanks to the efforts of dozens of great tort scholars, including Richard Cupp and Stephen Sugarman. Hopefully, this Third Restatement will help to maintain and enhance the traditional balance in the system. The Restatement (Third) of Products Liability (1997), although controversial, has 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 and courts, and this should continue. Class action abuses are rightly being addressed these days. Joint liability rules are being adjusted. We must renew our efforts to tame astronomical damage awards. We should offer more judicial guidance to juries. We cannot be unduly swayed by the polarized views of the American Tort Reform Association or the Association of Trial Lawyers of America. Rather, the voice of the communitarians such as Professor Robert Cochran, who have concerns about the treatment by tort law of intermediate organizations like churches and charitable institutions, must be heeded. Their proposals are balanced, suggesting both additional protection and new legal responsibilities for these institutions. The tort systems of other common law and even civil law jurisdictions should be canvassed for new ideas to renew tort law, but we must avoid the unmaking of tort law without providing for an adequate replacement.

3. Alternative dispute resolution techniques should be refined and utilized more often in tort cases. With the help of the Straus Institute for Dispute Resolution and others like it, perhaps lawyers in the future will come to resemble peace makers more than warriors.

4. One of the best ways to reduce the pressure on the tort system is to fill in the gaps of the U.S. social welfare system, which covers the injured much less generously than most other countries in the Western world. The U.S. has protected workers for years, but auto accident victims still do not have no-fault protection in many states, including California. Yet Congress responded swiftly and humanely to the 9/11 tragedy by establishing a

generous no-fault compensation system for the victims. A federal legislative solution to the messy asbestos litigation has been tried, but so far has failed. While a comprehensive accident and illness compensation scheme like that in New Zealand appears beyond our grasp for now, let us hope that these specific schemes may be replicated in dealing with other particular health issues, such as tobacco, guns, defective drugs, malpractice, fast food, alcohol, sexual abuse, and other mass tort situations.

5. In addition to these advances, tort law should survive as society's radar for early detection of emerging dangers. It takes time for legislatures to respond to many new health risks. In the interim, tort lawyers launch civil suits, often unsuccessfully at first, which spotlight danger even if compensation may not be obtained. The saga of tobacco litigation demonstrates that with persistence, a health risk can eventually win serious public attention. 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, they may be persuaded to exhibit more responsibility. Hopefully, the many dreadful sex abuse cases reported widely in the media are teaching us about that problem and are fostering solutions. The civil actions for corporate wrongdoing, evidenced by the Enron scandal amongst others, may promote more ethics and honesty in the business community.

6. While tort litigation will not eradicate terror and torture, 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."⁴

Remember, a court that says "no" in these novel cases may not help the claimant, but still may serve society almost as well as one which says "yes" by alerting society to the problem and the injustice of an absence of any legal recourse.

This is my song of torts, offered this day at Pepperdine in the hope that some of you, imbued with the spirit of this great school, will join us happy workers in the torts field. Together, we torts people can continue to serve our society and its injured with honor, integrity, and humanity. Thank you again.

4. 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* 109, 133 (Craig Scott ed., 2001).