Does Tort Law Have a Future?

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The perils of prophecy are plain. The prophet can be wrong. Even if the prophecy is reasonably accurate, few will remember. Credit given will be limited. Under the circumstances it is not surprising that as a calling or even as a pastime, it enlists only a small band, those attracted, perhaps, by the sporting nature of the game. For those intrepid souls willing to exercise the prophetic ken there are, fortunately, a few Canons on Soothsaying designed to minimize the inevitable risks. One of the first and most widely accepted Canons is never to prophesy what will happen tomorrow, for a prophesy might be remembered over that time span. Moreover, the batting average is too quickly and easily computed. A second Canon is to prophesy in ambiguous terms and conflicting directions—thereby improving the prospect that something prophesied can be related in some fashion to whatever it is that happens later. Finally, the prophecy should never, never be committed to writing. A written prophecy has a half life of incalculable length, a defect of major proportions. Worse still, since the loose leaf technology has not yet been applied to the art of prophecy, a written prophecy lends itself neither to revision nor repudiation. Prophecy should be only by word of mouth and preferably only through hearsay.

The Editors of the Journal have, of course, violated the last and most important Canon of Prophecy, in this issue of their otherwise distinguished publication. What retribution the shades of departed prophets will visit upon them in the years that lie ahead will not be forecast here—but the deserts will surely be just, and tailored to the crime.

Forecasting the future of the law or any part thereof founders on the hard fact that the law is simply a handmaiden of the society it serves. It is human society, its values, organization, and technology, that shapes the law and not the reverse. As the late, distinguished Lord Radcliffe recognized, "Every system of jurisprudence needs . . . a constant preoccupation with the task of relating its rules and principles to the fundamental moral assumptions of the society to which it belongs."[1] He also identifies as the fundamental moral assumption of the free world a "commit[ment] for good to the principle that the purpose of society and all its institutions is to nourish and enrich the growth of each individual human spirit."[2] In a moving society, however, technological change and

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1. C. RADCLIFFE, THE LAW AND ITS COMPASS 63-64 (1960).
2. *Id.* at 65.

its impact on living patterns means the objective of maximizing the growth and development of the individual itself becomes a moving target. To serve society, the law must change with its master. In another setting Lord Radcliffe observed:

> No one really doubts that the common law is a body of law which develops in process of time in response to the developments of the society in which it rules. Its movement may not be perceptible at any distinct point of time, nor can we always say how it gets from one point to another, but I do not think that, for all that, we need abandon the conviction of Galileo that somehow, by some means, there is a movement that takes place.[3]

I. CHANGES IN TORT LAW WILL BE SLOW

Despite great and far reaching changes in the setting for life and the organization of society, changes in tort law have been evolutionary and relatively slow. In torts we still, in theory at least, process most of the social dislocations resulting from traffic injuries by reference to a backdrop of common-law propositions originally worked out to serve the horse and buggy era of the eighteenth and nineteenth centuries. Society exhibits an amazing tolerance for this system of processing injury claims, which is widely regarded as inefficient, costly, and otherwise disadvantageous to the entire justice system.

After intense scrutiny, however, reform proposals frequently are seen to have deficiencies of their own. Thus, the reluctance to embrace sweeping change in a system that does function, after a fashion, is understandable. Tolerance for a system of tort law that falls measurably short of the ideal reflects an instinctive conservatism reinforced by special pleas of those with a stake in the present system. It is, after all, a system that is established and functional. Tolerance for the status quo is particularly marked in "private law," which governs the rights of citizens *inter se*, as contrasted with "public law," which deals with the relationship of citizen and government. Tort law is freighted, of course, with public interest, but it is not often seen as presenting public or political issues. Apart from occasional panic over the level of insurance rates, tort law tends to be very much in the background of public interest or legislative attention.

For these reasons, the next twenty years may see changes in tort law as modest as the changes of the past twenty or thirty years. Those changes have included elimination of many immunity doctrines, easing of the plaintiff's burden in product liability cases by shifting to strict liability standards for defective products, adoption of comparative negligence by statute or court decision, expansion of liability for fright-transmitted injuries, abandonment of auto guest statutes, and enlargement of the

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3. Lister v. Romford Ice and Cold Storage Co., [1957] A.C. 555, 591-92 (Radcliffe, J., dissenting).

landowner's duty of care to those on his premises. These modest patches on the system have effected very little change in the basic system itself. One who would prophesy the future by looking to the past, a standard prophetic technique, could offer at least a short-run prophecy that tort law will creak along for twenty or thirty more years with relatively insignificant alterations.

Even if some modest form of "no fault" automobile insurance is adopted widely, it is likely to be a product of political compromise that will leave much of the torts system operational even with respect to traffic injuries. We should not forget that although "no fault" insurance proposals for traffic injuries have been debated for nearly fifty years, only a modest beginning has been made toward their establishment.

The early years of the next century should find tort law very much as it is now. That is not to say that there will not be changes. On the common-law side, the trend will be to open the courthouse door more widely. There will be increased willingness of the courts to hear cases concerning injury resulting from fright or shock. Immunities will continue to disappear. The doctrine of comparative negligence will be universally accepted. Arbitration will make further inroads as the process of choice for determining modest-sized claims. Class actions may become accepted as a means for dealing with certain mass claims. These will be incremental, evolutionary developments that moderately alter the shape of tort law but not its fundamental nature.

At the same time, popular panic over the level of insurance rates, together with well-organized lobbies, may spur the legislature to "reform" the law of torts by limiting liability through such devices as shorter statutes of limitation, screening panels, and piece-meal tinkering with the "collateral source" rule. These measures, already established in some jurisdictions, offer only slight economy to the handling of personal injury claims. Moreover, they contain the seeds of injustice in their irrational refusal to entertain some meritorious claims, and may well be found wanting under state constitutional provisions that can be read to require rational responses to demonstrated shortcomings of the tort law system.

II. Further into the Twenty-First Century

Longer range prophesy must be seen as a high risk enterprise, an ultrahazardous activity but surely one not appropriate for imposition of strict liability. Long range prophesy concerning the future of the law of torts must come to grips with the nature of changes to be expected in the social condition in this country a half century or a century from now. There are a number of forces or factors that may markedly alter the pattern of life.

What of the pressure of population? Perhaps inside the United States we are about to level off our population growth. The population pressure of an urbanized society in this country already exerts an insidious pressure

on the legal system and the law of torts. It is not just a matter of court congestion in the urban centers. Our densely populated urbanized society marred by segregated housing patterns and bedroom suburbs, has, thanks to the automobile and modern technology, given us a society of strangers. Few of us know our geographic neighbors. There is a weakened sense of community, of relating. From this sense of alienation come pressures that must in time affect the law of torts. Litigation for placing the blame and providing vindication in the anonymous society simply does not yield the satisfactions that once may have come from this exercise in community peer assessment—especially when it is really a faceless insurer who is hauled into court. Suing becomes a costly, long delayed, impersonal exercise that is less attractive as other alternatives become available.

With the decline of older forms of social subgroups, such as the church, we can expect more groups to organize and speak in what they see as their self-interest. Such self-interest groups will surely include some that recognize the very real stake that all members of society, all potential injury victims of the technological age, have in the system of compensation that responds to the accident toll of such a society. But even before such groups begin to be heard on the subject of the tort compensation system, they will be heard on significant aspects of the broader problems of injury and illness—the costs of medical care and the need for continued income during periods away from the job.

Despite the contemporary phenomenon of the "taxpayer's revolt," evidenced by adoption of Proposition 13 in California, we will surely adopt a national system to assure comprehensive medical care, whether administered by government or private companies, or both, by the next century. There will also exist minimum wage and salary continuation plans for virtually all employed persons. At that point the "collateral source" rule, which sanctions tort recoveries for medical expenses and lost income unreduced by coverage from other sources, will be too much of an anomaly. The emerging issue may well be whether it makes sense to compensate economic loss in piecemeal "no fault" programs or to go the full distance and opt for comprehensive social insurance coverage, through private carriers or government, for medical care costs and all interruption of employment income due to sickness or accident. In such a system of economic security for the individual would there be a place for negligence law? The New Zealand Royal Commission, which studied the problem in 1967, proposed adoption of a broad social insurance system and also recommended that "the common law rights in respect of personal injuries should be abolished and the Workers' Compensation Act repealed."[4]

Even under a system that assures compensation for economic loss and provides medical care, including full costs of rehabilitation, the civil trial process may continue to serve a need for individualized consideration of

4. ROYAL COMMISSION, COMPENSATION FOR PERSONAL INJURY IN NEW ZEALAND 180 (1967).

physical injury cases. Punitive damages, occasionally disparaged, may perform a function in extreme cases, such as drunken driving or battery by automobile. Preservation in appropriate circumstances of a private remedy for punitive damages, perhaps reinforced by recovery of attorney's fees, could provide a useful sanction. To rely on the criminal process to punish these less than heinous offenses is unrealistic. Prosecutorial staffs will almost certainly be more overloaded in the next century than they are now.

As for pain and suffering, an increasingly affluent society could certainly afford to continue paying such damages. As the public comes to see that it ultimately pays those awards through increased insurance premiums, costs of goods and services, or taxes, it seems unlikely that we, as voters, will become enthused about the speculative process of converting pain into dollars. The troublesome problem of permanent impairments that subtract from the capacity for the ordinary pleasures of life, such as the loss of sight or a limb, does call for recognition under any system of compensation. A monetary award for noneconomic loss, related perhaps to the economic loss and the degree of impairment of function, might give a rough but acceptable recognition of injuries that permanently handicap the "pursuit of happiness."

One of the virtues of the old common-law system of liability for personal injuries was the opportunity that it provided for individualization of damage assessment. Truly individualized damage assessment is more appealing than any schedule of benefits or even individualized assessment subject to a prescribed ceiling. Loss assessment may continue to accommodate individualization appropriately in administrative processing of damage issues limited to measuring economic loss.

The new society will run short of fossil fuels but the mind of man will surely find a way to make the resources of nature sustain an even higher level of human energy consumption. We will in the next century be an even more mobile, transient society. Perhaps in that new age, science will design modes of transport and recreation marvelously freed from the risk of collision and bloodletting. Traffic personal injury claims would then wither away for the best of all reasons. But if our commitment to locomotion for business and pleasure continues, it is perhaps even more likely that our ability to unintentionally inflict horrendous physical injury upon each other will increase. The forecast offered here is that to deal with the dislocation resulting from increased personal physical injury and illness, we will turn increasingly to systems of social insurance rather than the law of torts.

With respect to improvement of the method for processing physical injury claims in a technological society, the California Citizens Commission on Tort Reform offered a remarkable statement of the issues that lie ahead:

The Commission concludes that the tort system is now in deep trouble. The combined effects of social and economic factors have created a level of uncertainty that prevents the system from serving *any* reasonable pattern of priorities among the tort objectives. Whether one believes that the balance of goals ought to emphasize compensation, or deterrence, or cost efficiency, or safety incentives, or any other objective, the evidence suggests that the current approach is far from the best instrument of social policy that can be devised to deal with the critical issues of injury and compensation. The recommendations of the Commission follow, beginning with those changes that would apply to all areas of liability.

The most critical need is to subject the social ends and means represented by the tort system to the same searching review and debate that democratic societies give to other crucial public concerns. The most obvious anomaly in the recent maelstrom of change in the tort system is that virtually all of the alterations have occurred without any action by the Legislature. Although it is entirely reasonable that judicial interpretation play a significant role in spelling out and applying the law, the social principles that underlie the legal rules should also reflect the actions of the elected representatives of the people. It is not only feckless but unfair to criticize the Courts merely on the ground that they have changed the tort law. The fact is that they have been left to make the adjustments implied by fast-changing social circumstances without statutory guidance by the bodies created to debate and decide social questions. Given the limitations of the case-by-case process and the limited analytic facilities provided in the Court system, it is not surprising that policy-making in the tort area has had a fitful, lurching quality. The fault here is not in our judges, but primarily in the failure of the rest of the policy-making mechanism to address the questions pressed upon the judiciary, and to provide sensible and authoritative answers.

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To be more specific, we do not believe that the society should be required to accept a tort system which:

Pays to injured people less than half of the dollars that it collects.

Systematically overcompensates the slightly injured and undercompensates the seriously hurt.

Encourages use of the highest cost mechanism for resolution of disputes, regardless of the scale of the injury or the issues that it presents.

Delays resolution of cases without regard to the financial capcity of the injured to endure delay.

Provides no point in the decision process where the overall economic effects of changes in rules of law can be taken into account.

Leaves every category of citizens—drivers, property owners, workers, manufacturers, consumers, professionals, government officials, taxpayers—ever more deeply in doubt about what their rights and responsibilities are and how to provide for them.[5]

The Commission's indictment of the present system has the ring of an Old Testament prophet's denunciation of sin. The assessment here is that while the indictment is fairly returned, the prospect that tort law will be

5. CALIFORNIA CITIZENS COMMISSION ON TORT REFORM, RIGHTING THE LIABILITY BALANCE 10, 141 (1977).

substantially reformed is a long-term rather than an immediate prospect. Society will, however, finally address itself to the problems recognized by the Commission, although we will be well into the next century before the large portion of contemporary tort law that is concerned with compensation for physical injuries is supplanted.

Thus, by the middle of the next century, the future of tort law controlling mass physical injury claims is no future at all. Tort law for these physical injury claims will be supplanted by social insurance, governmental, private or a meld of both. As a part of such a system, there possibly may be a role for a "macro-tort claim" on behalf of the insurance system against an industry or even an individual company whose product or practices generated an identifiable number of injuries. Whether in terms of possible deterrence, or allocation of accident costs to the activities that generate the claims, there may be a function for such macro-indemnification or contribution claims. The process employed, however, will not resemble the present individual negligence trial. It is more likely to resemble the rating system now used for determining auto insurance premiums, although the rating system has been an exceedingly blunt instrument. The voice speaking for the insurance system will almost certainly be the voice of a computer or its successor device. Some general approach to "internalizing" the accident costs of particular activities may be seen as a desirable part of a social insurance system.

III. The Future of Tort Law Lies With Protection of Relational Interests

If the sun sets on negligence law for mass personal injury claims, that will not by any means signal the end of the law of torts. There are a great variety of important claims that would continue to call for individually fashioned remedies before a tribunal comparable to present day courts or administrative agencies. Dignitary torts do not occupy a great part of the courts' time, but they must be heard if justice is to be done. Assault, battery, false imprisonment, intrusion into privacy, and intentional infliction of mental suffering will continue to call for redress. There are, as well, financial and commercial interests to be protected against fraud and misappropriation. Business torts will multiply. A civilized society can surely provide more meaningful remedies for defamation and invasion of privacy. In the participating, nondiscriminating society there will be a great expansion of civil rights backed up by remedies obtainable in court or before some other tribunal. Activitites that impair the quality of life for others nearby or distant, and protection of intellectual property from misappropriation are among the claims that have called for special remedies in the past; they will continue to call for special remedies in the future. The central importance in the new society of affinity associations and the continuing evolution of family relationships will mean that tort law will be increasingly concerned with redressing wrongs to relational

interests. All these claims have one common feature: they are highly individualized, and, therefore require specially tailored remedies.

As we see the emerging central importance that protection of injuries to relational interests will have in the tort law of the future, we must acknowledge our debt to one of the great philosophers of tort law, Leon Green. Nearly twenty years ago in a preface to a new, jointly edited edition of his pioneering materials on relational interests he spoke as follows:

> Relational interests are set off against interests of personality and property as a third dimension which gives freedom and precision in the use of legal theory in dealing with many of the toughest problems arising out of the complexities of the modern social order. The basic relations of our society are those of trade, employment, family, neighbors and citizens.
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> Cases involving injuries to relations are three-party situations as contrasted with the two-party situations found in injuries to person and property. The relation may be hurt by a physical injury of one of the parties to the relation, as for example the killing of a member of the family; by appropriating the advantages of the relation or by destroying it, as for example inducing one party to violate his contract with another; by impairing the standing of a person in his community, as for example publishing an accusation of his dishonesty in business or office; or by denying a person some right he enjoys as a member of a social or political group, as for example the right to vote or hold office or other right of citizenship.
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> Inasmuch as relational interests until lately were either ignored as beyond the law's protection, or if recognized were dealt with by the courts as interests of personality or property, much confusion has arisen with respect to the remedies available for their protection. The orthodox common law remedies based on damages have been frequently found unavailable or inadequate, and extensions of damage rules have been required. Likewise equitable remedies have been greatly expanded in bringing the rapidly multiplying relational interests under the protection of law. Injunction, declaratory judgment, receivership, accounting, implied contract, constructive trust, unjust enrichment, estoppel and other equitable remedies are commonplace in many relations cases and not infrequently provide the only adequate remedies. Moreover the courts are in constant process of fashioning new theories of liability for the protection of these interests, and perhaps more than in any other area the creative spirit of law and equity is constantly extending the frontiers of protection.
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> Suffice it to say that the *relation* as an interest recognized and protected by law has taken its place on an equality with *personality* and *property*, and as the social order becomes more and more dependent upon the *group* as the core of its existence, the importance of relations will increase and courts and legislatures will find their efforts more and more devoted to the adjustment of relational conflicts.[6]

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6. L. GREEN, W. PEDRICK, J. RAHL, E. THODE, C. HAWKINS & A. SMITH, *Foreword* to INJURIES TO RELATIONS ix-x (1968) (emphasis in original).

IV. Some Parting Observations

It will be a great day for tort law and its function in society when the burden of processing relatively routine claims for unintended physical injuries are removed from the courts and treated as a part of the larger social problem resulting from accident and sickness, with social insurance. The very best part of tort law will remain. A great need for lawyering skills will remain, for the common feature of tort claims of the future will be the fashioning of individualized remedies appropriate to protect the interests affected.

It is inevitable that the new torts will, to a much greater extent, be enmeshed with and affected by legislation and administrative regulations. That circumstance in itself is a considerable guarantee of the future of tort law. The march towards greater regulation of society is inexorable. Cries for return to a simpler era strike chords of nostalgia, but that is all. Similarly, the propensity to submit disputes under new regulatory systems to some formal tribunal, a court or some facsimile thereof, seems endemic to our society.

So the answer, Virginia (and all your friends who are planning to study law twenty, forty or sixty years from now), is that yes, there is and will always be a law of torts. The field will be one of importance to society and a challenge to the legal profession. The subject matter will continue to be a staple of legal education. As a matter of fact, in the law schools torts will improve as a fundamental and intellectually stimulating educational experience. After all, negligence law, as an intellectual apparatus, has been rather completely undressed by the realists to the point where the mystery is largely gone.

But torts of the future will offer intellectual challenges aplenty for law students, professors, lawyers and judges and administrators. The focus will be not on claims for physical injuries but on assorted harms to personal dignity, to financial interests, to interests in relationships with the changing family, groups, traders, the community, the political system and a variety of now unimagined claims to protect the quality and opportunities of life for the individual citizen. To process and adjust those claims in negotiation and before the appropriate forums will provide challenge and reward for a legal profession that will ever more broadly serve society in the century ahead.