INTRODUCTION

For the last forty years, no body of law within the civil justice system has experienced greater ferment than has the law of torts. This dynamism withal, the most prominent identified objectives of tort law continue to be the creation of an optimally uniform body of law that gives notice to all that certain behaviors that cause injury or loss to others will trigger obligations, usually including (1) the cessation of the conduct; and (2) compensation of the injured party for harm caused in a measure that will place him, to the extent money damages can do so, in the *status quo ante*. More recently, these corrective justice motivations have been reevaluated and enlarged to include tort law justifications with an economic basis. These economic models have been assigned modifiers such as "law and economics" or "efficiency-deterrence" or "cheapest cost avoider." As a general proposition, the economic paradigms suggest that the informed and rational individual will make decisions that tend to ensure that the benefits he enjoys by his activities are not outweighed by the sum total of the internalized potential liability costs, including secondary and social costs.

The uneasy heterogeneity existing between the "corrective justice" and the "efficiency" models for tort norms is but one of the modern fault lines in the field. The movement, once seemingly inexorable, from fault-based liability to strict liability is now seen to have produced tort rules of responsibility that are either only nominally "strict," are limited to the most select of circumstances, or both. Whether the tort relates to personal physical injury or to other noncontractual harm, collective, group, joint, alternative, and market share liability have all been tested, and found effective in effectuation of these objectives in some instances, and of limited or no utility in others.

During the same time, state court and state legislators have added actively to the development of tort policy. State courts have initiated changes in the treatment of duty, proximate cause, compensable damages, aggregative actions,

and cases involving indeterminate defendants. Legislatures in virtually every state have passed laws affecting such subjects as statutes of limitation, statutes of repose, recovery for noneconomic harm, and the availability of punitive damages. The Supreme Court has established new standards for (1) the introduction of expert causation evidence, applicable both to complex medical and scientific matters and also to other more prosaic but nonetheless expert-reliant causation evidence; (2) the appropriate application of fundamental class action fairness safeguards to settlement class actions; and (3) punitive damages.

In this milieu, the American Law Institute commenced the broad-gauge Restatement (Third) of Torts. In terms of international attention to liability rules, following the European Economic Community's publication of its strict products liability Directive, there continues nation by nation code adaptation of liability provisions to respond to new types of injuries, together with new means, including collective actions, necessary to respond thereto. In Europe and elsewhere, more than one private law entity labors in an American Law Institute fashion to publish tort rules that might offer a coherence to tort law and its ever-broadening international application.

This collection is divided into four sections. The first, titled Tort Law in the New Millennium: Past as Prologue, includes two chapters that, each in their own way, provide a springboard for the volume. Chapter 1, titled *Tort Law through Time and Culture: Themes of Economic Efficiency*, is an investigation of the original stimuli for tort-type norms. My inquiry takes me from ancient Mesopotamia forward, with what I think to be several illuminating patterns that show a continuum of efficiency and deterrence motivations behind old and new tort norms alike. In Chapter 2, *Past as Prelude: The Legacy of Five Landmarks of Twentieth-Century Injury Law for the Future of Torts*, Robert L. Rabin selects for analysis five tort landmarks: (1) *MacPherson v. Buick Motor Co.*; (2) workmen's compensation legislation; (3) the concurring opinion of Justice Roger Traynor in *Escola v. Coca Cola Bottling Co.*; (4) the primarily legislative movement from contributory to comparative fault; and (5) *United States v. Carroll Towing Co.* As to *Carroll Towing*, Rabin maintains that its noteworthiness was reinvigorated when Judge Learned Hand's opinion came to be recognized as a cornerstone of the law and economics movement. The focal points of his chapter are the "rich thematic influence[s]" each decision or legislature movement had on torts among Western nations, and the respective effects, sometimes substantial, sometimes less so, that each is likely to have on the future of tort law.

Section II of the collection is titled Compensation and Deterrence in the Modern World. Together Chapters 3 and 4 provide an enriching

treatment of two central tort themes. Regarding compensation first, in Chapter 3, *Twenty-First-Century Insurance and Loss Distribution in Tort Law* Professor Kenneth S. Abraham first surveys the different sources of compensation for personal injury, illness, and death, and shows that there is a vast system of loss distribution, of which tort is only a small part. As to the gaps in the larger system, Abraham suggests, the question remains as to whether these gaps should be filled by tort law or by the other sources. Examining the relationship between tort and the rest of the loss distribution system, and exploring the impacts of four possible variants of the collateral source rule, the chapter looks at the rarely considered, distinct treatment accorded to life insurance and savings under existing rules. He then recommends an alternative approach that would afford first-party insurance policyholders the option of transferring all their tort rights of recovery to their insurers.

In Chapter 4, *Beyond Master-Servant: A Critique of Vicarious Liability*, Professors Jennifer H. Arlen and W. Bentley MacLeod examine important issues in the second element of the compensation/deterrence diad: the effectiveness of rules of vicarious liability in deterring *corporate* torts. To Arlen and MacLeod, for tort liability rules to regulate risk-taking efficiently, such rules must make it beneficial for corporations to take cost-effective precautions to regulate agent conduct. The authors proceed to show the ways in which current tort law falls short of this objective, and specifically how, by holding organizations liable for employee torts but not for the torts of independent contractors, vicarious liability discourages organizations from asserting direct control over agents, even when such control would be efficient.

Section III is titled Duty Rules, Courts, and Torts, and comprises chapters on themes including the vitality of duty rules; the practical limitations on litigation of design defect claims (be they programmatic or product-related); the contemporary role of the privity rule; the proper objectives for the Restatement (Third) of Torts; the viability of a legal regimen in which persons who are fully apprised of a risk or a hazard should be precluded from recovery in tort; the perils of the path the Supreme Court has chosen as regards standards for imposition of punitive damages; and the extraordinary effects, applications, and complexities of proportional liability, with particular attention to toxic substances causation.

In Chapter 5, *The Disintegration of Duty*, Professor Ernest J. Weinrib sounds a clarion warning that the relational underpinnings of common law duty have been in noticeable erosion. In answer to the question: "When does an actor owe a duty?," Weinrib begins with the defining 1932 decision of English negligence law, *Donoghue v. Stevenson*, in which Lord Atkin asserted that "there must be, and is, a general conception of relations giving rise to a duty of care."

Unfortunately, Weinrib writes, courts in more and more modern decisions have seemingly abandoned an effort to identify and apply this unitary conception of duty, and have opted instead to identify a multiplicity of particular duties that Lord Atkin would have deplored. Weinrib sets about the task of analyzing the landmark cases of the twentieth century to show how duty fits with other negligence concepts to connect the defendant's act to the plaintiff's injury in a normatively coherent way. He describes the internal structure of the duty of care, and what its constituents must be if it is to reflect a coherent conception of wrongdoing.

In Chapter 6, *Managing the Negligence Concept: Respect for the Rule of Law*, James A. Henderson Jr. evaluates the risks of open-ended judicial review of complex tort issues, and specifically "design" issues. "Design" issues are defined more broadly than they are in their familiar context of products liability law, and Henderson includes in this subject grouping medical malpractice and governmental "design" claims. Examining such issues as institutional competency, enterprise liability, the prima facie case, and evidentiary requisites, he concludes that courts have taken an appropriately "humble" approach, avoiding open-ended review in contexts in which the pressures to engage in such review are the greatest. After first reviewing products liability themes, the author turns to medical malpractice litigation, in which courts rely on professional custom to supply specific standards that render negligence claims adjudicable. In negligence claims against the government, courts and legislatures have built on the traditional principle of sovereign immunity to allow courts to impose tort liability on governmental actors while avoiding open-ended review of complex institutional programs of policies. In each setting, Handerson writes, courts have adopted approaches that successfully contain the negligence concept and keep it with in its proper bounds.

In Chapter 7, *Rebuilding the Citadel: Privity, Causation, and Freedom of Contract*, Richard A. Epstein identifies this watershed issue affecting compensation for physical and financial harm: whether to deal with these through tort law or through contract. The modern direction of cases, Epstein writes, seems to favor tort remedies over contractual arrangements, with the latter's frequent restrictions on the damages recoverable. Financial loss claims, in turn, find favor in contract. Epstein poses this question: Is there something about the structure of a physical harm claim versus that of a financial harm claim that is sufficiently similar to undercut the argument that only one, rather than both, should be subject to contract rules? A second part of Epstein's analysis is the examination of the decline of privity rules, and involves a new look at the venerable origins of privity. He notes a contrapuntal distinction between the original justification of privity and its actual history,

and concludes that, nevertheless, the privity limitation continues to play a role in a number of important contexts, including environmental and financial losses, in which potentially ruinous unlimited liability is thought to be of the greatest significance. Ultimately, Epstein defends both those limitations and the contractual efforts to restrict recovery for consequential losses.

Jane Stapleton begins Chapter 8, *Controlling the Future of the Common Law by Restatement*, by noting how daunting it is to restate a common law for the United States, a nation of such a state-by-state diversity in liability rules and remedies. She analyzes the architecture of the current Restatement (Third) of Torts, and considers the extent to which tort standards can be crystallized in bright-line rules, as well as how the underlying institutional competition between the trial judge and the jury imposes a unique dynamic to the restatement process. For example, Stapleton argues, in "traditional" duty contexts, that is where the defendant's own affirmative careless action directly caused physical injury, and also in special prior relationship settings, the Reporters can find sufficiently objective and determinate criteria on which a rule of law might clearly be based, thereby facilitating directed verdicts. Outside these areas, however, the rationale for denial of liability rests on the absence of the sort of contextual facts that are usually seen as relevant to the breach or scope of duty issues, matters traditionally decided by the jury. If, therefore, the Restatement proposes to allocate to the trial judge institutional power to enter a directed verdict in the defendant's favor in such cases, Stapleton suggests, it will need to formulate the criteria on which he or she might do so in terms of what have hitherto been seen as no-breach or outside-scope factors in the particular case.

Chapter 9, *Information Shields in Tort Law*, by David G. Owen, begins with that proposition that a person possessed of correct information about the nature of a dangerous thing or situation is more likely to make informed, safe, and efficient choices about how or whether to confront such risks, and the more likely such choices are to be cost-effective and rational. The chapter inquires into the extent to which tort law should impose responsibility on actors for harm to persons who possess full and complete risk information. Owen presents a model Liability Shield statute that would preclude failure to warn liability for manufacturers who provide consumers with full information of product hazards. For the attractions of such an approach, he proceeds to note, such a rule may place unrealistic reliance on multiple assumptions about human rationality, and about the nature and abilities of the central institutions in a program of this type: manufacturers, safety agencies, and insurers. The chapter thus concludes that today's tort law has correctly moved beyond the wooden construct of no-duty rulings to the flexible assessments of victim responsibility permitted by comparative fault.

Guido Calabresi, in Chapter 10, *The Complexity of Torts: The Case of Punitive Damages*, addresses the tension between those, be they courts, legislatures or scholars, who view tort law as serving numerous (or multidimensional) goals, and those who may be quick to identify a single, simple goal – whether it be economic efficiency, furthering loss spreading, or anything else – and, having examined tort doctrines and cases on that basis, are properly attacked for being reductionists. His thesis is that pursuit of one-dimensional goals in tort law is fraught with risk. Calabresi is troubled by the ever-increasing incursions by federal courts into the tort process, a problem that is worsened when the incursion is by the Supreme Court. Concentrating on punitive damages, Calabresi states that exemplary awards in tort law can further at least five very different objectives, including: (1) a desire to enforce societal norms, through the use of private attorneys general; (2) a desire to employ "the multiplier," in the sense that the proper measurement of the deterrent assessed is not the harm to any one victim but, rather, that harm multiplied by all those victims whose harms, although real, are not otherwise likely to be charged to the injurer; (3) the "Tragic Choice" Function, such as is represented in the Pinto case; (4) Recovery of Generally Non-Recoverable Compensatory Damages; and (5) Righting of Private Wrongs. Calabresi suggests that the Supreme Court's modern decisions regarding punitive damages fail to take into account the multiple functions a state or states may have intended that these awards perform, and that it is rare that such single mindedness as the Court has demonstrated can fully appreciate a slowly developed field of law such as torts.

Proportional liability is identified by many as one of the most important developments in modern tort law. In Chapter 11, *The Future of Proportional Liability: The Lessons of Toxic Substances Causation*, Michael D. Green analyzes the reform of contributory negligence into a scheme of comparative fault through the lens of environmental and toxic tort litigation, the most notable of which have included case aggregations involving asbestos, Agent Orange, DES, silicone gel breast implants, and tobacco. Litigation of such cases relies on probabilistic evidence, the most probative of which is epidemiology. Green writes that the confluence of comparative fault principles and probabilistic evidence of causation in toxic substances cases raises the question of whether liability should be imposed proportionally based on the probability of causation. He critically assesses the potential for such an approach by examining the precision and fallibility of epidemiological evidence, and concludes that proportional liability would not provide the deterrence benefits many have claimed for it.

Section IV (the final section of this collection) is titled TORTS IN A SHRINKING WORLD. As the section's title suggests, and as the two chapters presented show, modern scholars and policy makers should take into proper account that civil code nations, among others, are responding to domestic and international tort-type challenges with sophisticated decisional, legislative and constitutional approaches. Federico Stella of the University of Milan contributed Chapter 12, *Causation in Products Liability and Exposure to Toxic Substances: A European View*. Stella examines the multitextured similarities and contrasts between the United States treatment of causation in toxic substances cases and that followed in Italy and also in a representative selection of other European nations. Explaining how many European nations have yet to elaborate a developed body of decisional law, individually or collectively, in the subject matters of toxic torts and products liability, Stella describes how many such claims have been brought as criminal matters. In the final decades of the preceding century, he continues, European nations, and Italy particularly, were confronted with a surge of such hybrid toxic tort-criminal liability suits that placed in issue the obstacles to proving individual causation. On a case-by-case basis, problems in proving causation might be overcome by the expedient of replacing the notion of *condicio sine qua non* with the standard of risk elevation and, beginning in 2000, in Italy and elsewhere, nations took this different tack. There followed, however, an influential decision of the Italian Supreme Court that held that simple risk elevation would not suffice to prove individual causation in criminal prosecutions. Rather, the prosecution would be required to prove not only "but for" cause but also sustain that burden beyond a reasonable doubt. Stella notes, however, that in an increasing number of Italian universities, professors of civil liability systems have begun to teach the evidentiary and doctrinal approaches to causation used by the American civil courts.

Suits to vindicate collective or popular rights are recognized in numerous nations. They represent means that are at once similar to and dissimilar from the aggregative suits (class actions and consolidations) that may be brought in the United States. At this date, such claims are not recognized in the form often taken in the United States, such as when numerous claims arise from the same tortious conduct. Instead, collective or popular actions are more likely to arise to challenge governmental action, or failure to act, that has deprived citizens of rights guaranteed by legislation or by the country's constitution. In the concluding selection to this collection, Chapter 13, *Collective Rights and Collective Actions: Examples of European and Latin American Contributions*, Colombian and French scholar Juan Carlos Henao takes on the ambitious task

of a comparative analysis of how such claims are provided for, and how they have been prosecuted, in France and in Colombia. Describing how achieving remediation for violation of collective rights is a well developed constitutional, legislative and decisional principle in many civil law countries, Henao explains how an increasing number of constitutions in civil law countries include, to name only two: (1) the right to a safe and healthy environment; and (2) the right to the preservation of open space. He explains the similarities between such claims and public or private nuisance actions in common law nations. Juxtaposing the law of France with that of Colombia, the chapter includes a critical assessment of how such approaches preserve separation of powers, democratic participation in the protection and preservation of public property, and the respective powers of the judge and the citizen.

M. Stuart Madden
White Plains, New York
May, 2005

SECTION ONE

TORT LAW IN THE NEW MILLENNIUM: PAST AS PROLOGUE

CHAPTER ONE

TORT LAW THROUGH TIME AND CULTURE: THEMES OF ECONOMIC EFFICIENCY

M. Stuart Madden

ABSTRACT. As human societies developed, a bedrock necessity was the development of expectations and norms that protected individuals and families from wrongful injury, property damage, and taking. Written law, dating to the Babylonian codes and early Hebrew law, emphasized congruent themes. Such law protected groups and individuals from wrongful injury, depredation of the just deserts of labor, interference with the means of individual livelihood, and distortion of the fair distribution of wealth.

Hellenic philosophers identified the goals of society as the protection of persons and property from wrongful harm, protection of the individual's means of survival, discouragement of self-aggrandizement, and the elevation of individual knowledge that would carry forward and perfect such principles. Roman law was replete with proscriptions against forced taking and unjust enrichment, and included rules for *ex ante* contract-based resolution of potential disagreement. Customary law perpetuated these efficient economic tenets within the Western world and beyond. The common law has pursued many of the same ends. From the translation of the negligence formula of Judge Learned Hand into a basic efficiency model to the increasing number of judicial opinions that rely explicitly upon economic analysis, efficiency themes can be predicted to enjoy a continued and increasingly conspicuous place in modern tort analysis.

I. INTRODUCTION

Tort law represents a society's revealed truth as to the behaviors it wishes to encourage and the behaviors it wishes to discourage.[1] From causes of action for the simple tort of battery to the more elegant tortuous interference with prospective advantage, the manner in which individuals or groups can injure

[1] There will be some rarified instances of behavior that tort law would not discourage, such as abnormally dangerous activities, but instead may wish to modify or limit, and in any event, assign strict liability.

M. Stuart Madden, Distinguished Professor of Law, Pace University School of Law. The author notes with appreciation the research assistance of Maryam Afif, Michael Stalzer, Natara Feller, and Lynn Belo in the preparation of this chapter.