In Defense of American Tort Law

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Long before my law school days, I was sitting in a class that was discussing money matters. For some reason the discussion became diverted and, like a car out of control on an icy road, it careened across other "lanes" of discourse until coming to rest on the topic of whether it was morally right to declare bankruptcy. Several technical questions arose concerning the legal effect of a bankruptcy that no one seemed able to answer, and the discussion came to an abrupt halt.

In any event, I looked over at the lone lawyer in the room, who sat thoughtfully, but silently, as others offered their opinions. I supposed there was a ready answer to this question sitting comfortably in his head, maybe even poised on the tip of his tongue. Yet he was not called on and did not volunteer his knowledge. The discussion suddenly died and the teacher then returned the class to the lesson at hand.

I must admit that I felt a certain sense of betrayal, or at least disappointment, that this lawyer had refused to share his knowledge with the group. I assumed at the time that he was disinterested or selfish or perhaps too pompous to bother with such trifles.

Later, I came to think that maybe the lawyer was simply wise. That is, he saw that the discussion was off track and that it would soon end if he did not speak up. Therefore, by his silence, he would help the teacher regain control.

After I went to law school, my analysis of this event changed again. Before law school I assumed that lawyers knew "the law." Bankruptcy, criminal law, contracts, probate—it was all "the law." Lawyers were supposed to know it all. When I got a glimpse at just how huge and dynamic the law was, my analysis of my friend's silence was that he probably did not know the answers to any of the burning questions on bankruptcy and prudently kept his mouth shut.

So here I stand before you with an invitation to speak on a law-related topic of my choice. My strong inclination is to look thoughtful, keep my mouth shut, and hope you will interpret my silence as wisdom. The danger of going further is that I will make you want to withdraw the offer of being the honored alumnus of this college. Since you may soon discover your error in bestowing this honor, I want to take advantage of this opportunity to say a few words on a topic of great interest to me.

I believe there are many societal benefits of the American tort system. I also believe that the recent attacks upon the system are unwarranted. Since some of you will be the legislators, judges, lawyers, and business leaders who will decide the future of the tort system, I hope you will agree.

The word "tort" is derived from the Latin "tortus," meaning "twisted." A tort then, is conduct that is twisted or crooked—not straight. The English equivalent is "wrong." Prosser says that "broadly speaking, a tort is a civil wrong, other than breach of contract, for which the court will provide a remedy in the form of an action for damages."[1]

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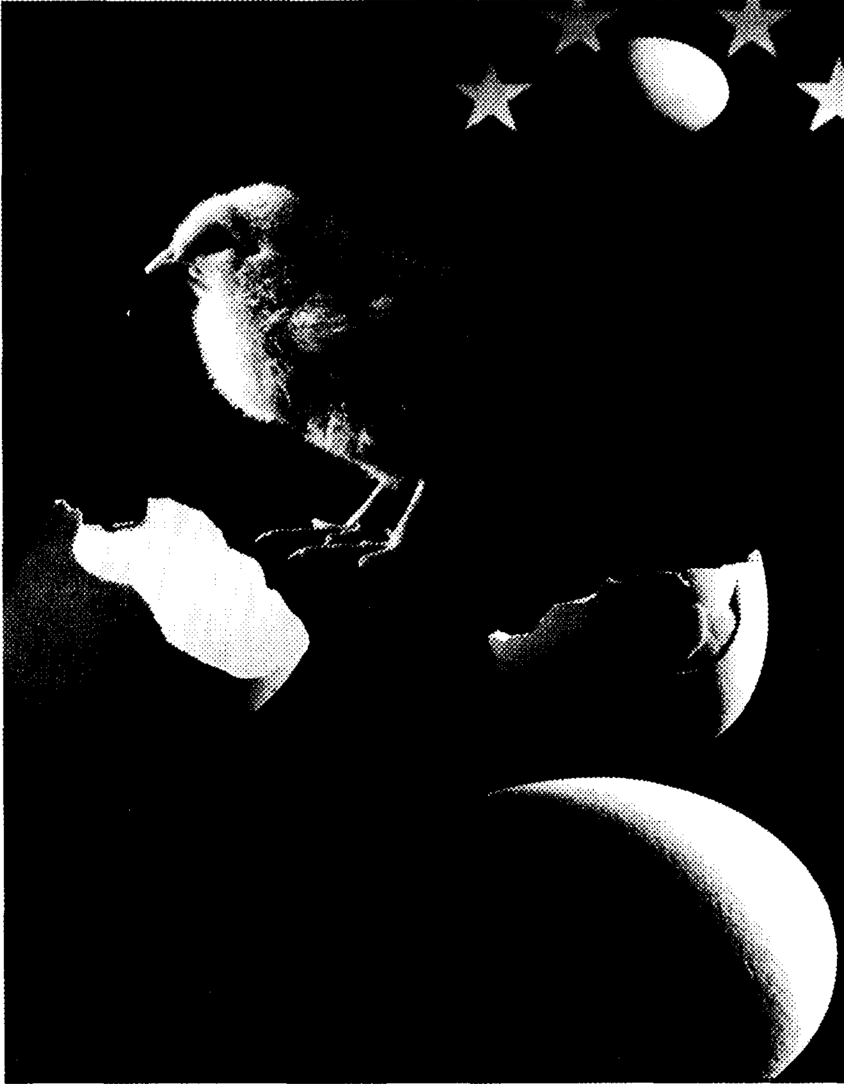


Tort law requires accountability for conduct that harms another Accountability requires the wrongdoer (or his indemnitor) to compensate the victim with money. In this fashion the law attempts, in a sometimes feeble way, to keep a balance in society by adjusting losses and injuries

Although the concepts of tort law are ancient, the collection of tort law cases into a single body of the law is fairly recent. The first English treatise on torts was not published until 1859 [2]

The law of torts comes from behavioral duties imposed by society, and many of these duties have a moral component akin to the Golden Rule You shouldn't assault, batter, slander, trespass, and injure a person's life, limb, property, reputation, or family relationships. When duties are breached and injury results, the offender is often required to compensate—providing restitution to gain societal absolution.

Though the law recognizes the victim's right to recover, society's response to the personal injury action is not so well settled The plaintiff is seen as anything from heroic to vindictive, from lucky to pitiful Seldom is the plaintiff or the cause regarded with indifference

In the 1957 article "Damage Suits: A Primrose Path to Immorality"[3] in *Harpers* magazine, the author spoke of plaintiffs as profiteers, feeding on society's sympathies and pocketbooks About those who bring lawsuits, he said, "Many Americans—working men included—are now learning the cash value of dishonesty "[4]

Another view, expressed a few years before the above article, characterizes the personal injury victim in a much different way

> In the wake of crippling injuries comes pain, family hardship, mental anguish and suffering, brooding, feelings of shame, embarrassment, humiliation, fears of pity and poverty, and loss of the ability to support oneself and [one's] family If the man is so badly injured that he cannot return to work, or if he can only do the work of part of a man, then the injured and his family may soon be cast as parasites on their relatives and friends, or as beggars upon charity and the community.[5]

Attitudes and perceptions in our community toward plaintiffs and would-be-plaintiffs in personal injury cases are at both ends of this spectrum (and at many points between) Some feel that to bring a lawsuit is to sin Such beliefs are often grounded in honest concerns about philosophies of forgiving those who trespass against us,[6] turning the other cheek to our assailants,[7] suffering the loss,[8] etc Yet, others see no evil or impropriety when someone brings a lawsuit They believe that "men should appeal to the civil law for redress of all wrongs and grievances for personal abuses inflicted"[9] and that they are "justified in keeping the law of the land,"[10] which, after all, provides a protection of rights and a redress of grievances.

Early tort decisions protected the interests of property owners and industry Harper and James attribute this attitude to what they call "individualism "[11] The idea is "I am *not* my brother's keeper, and he'd better take care of himself "[12] This type of philosophy produced the maxim *caveat emptor* (let the buyer beware) in contract law In torts it produced such doctrines as "contributory negligence" and "assumption of the risk." Contributory negligence is the policy of denying recovery of any kind to a victim of even monstrous negligence if he himself was even minimally negligent.[13] Assumption of the risk is the doctrine that says a worker injured in an unreasonably dangerous

environment might be precluded from recovering compensation for his injuries on the grounds that he could have quit and worked elsewhere if he really wanted to be safe [14]

Following World War II, we saw some significant changes in U S tort law I like to think those changes were the result of a nation growing to recognize its responsibility toward individuals—perhaps recognizing that *people* were as great a resource as *property* and deserved greater protection than they had received With the help of persuasive legal scholars and jurists, and sometimes legislators, we saw the pendulum swing away from ludicrous protection of industrial defendants and more toward the middle ground [15]

Contributory negligence and assumption of risk were replaced with concepts of comparative negligence Under the new doctrine, a victim would not be kicked out of court for being minimally negligent Instead, the victim's conduct would be compared with that of the tortfeasor to determine whether there should be some recovery [16]

The doctrine of strict products liability was adopted in many jurisdictions. This doctrine placed economic responsibility on the designers, manufacturers, and sellers of defective and unreasonably dangerous products for resulting injuries, without regard to whether specific negligent events during production could be proven.[17]

In other developments statutory caps on damages for wrongful death were repealed;[18] governmental immunity was abolished or at least modified to give persons injured as a result of government misconduct a chance to be compensated;[19] guest statutes were repealed or struck down as unconstitutional;[20] evidentiary rules restricting the admissibility of medical expert testimony from other than a strict locality were loosened,[21] etc

At the same time, consumer interests surged. Within the seven years between 1966 and 1973 the federal government created the National Traffic and Motor Vehicle Safety Administration (1966),[22] the National Highway Safety Administration (1970),[23] the Occupational Safety and Health Administration (1970),[24] the Mine Enforcement Safety Administration (1973),[25] the Consumer Product Safety Commission (1972),[26] and the Environmental Protection Agency (1972) [27]

Injured people began to complain and to win Industry, the professions, and their insurers took notice Since the mid-1970s, the public has been bombarded with claims that the tort system has run amok—failing and out of control—and that it must be reformed [28]

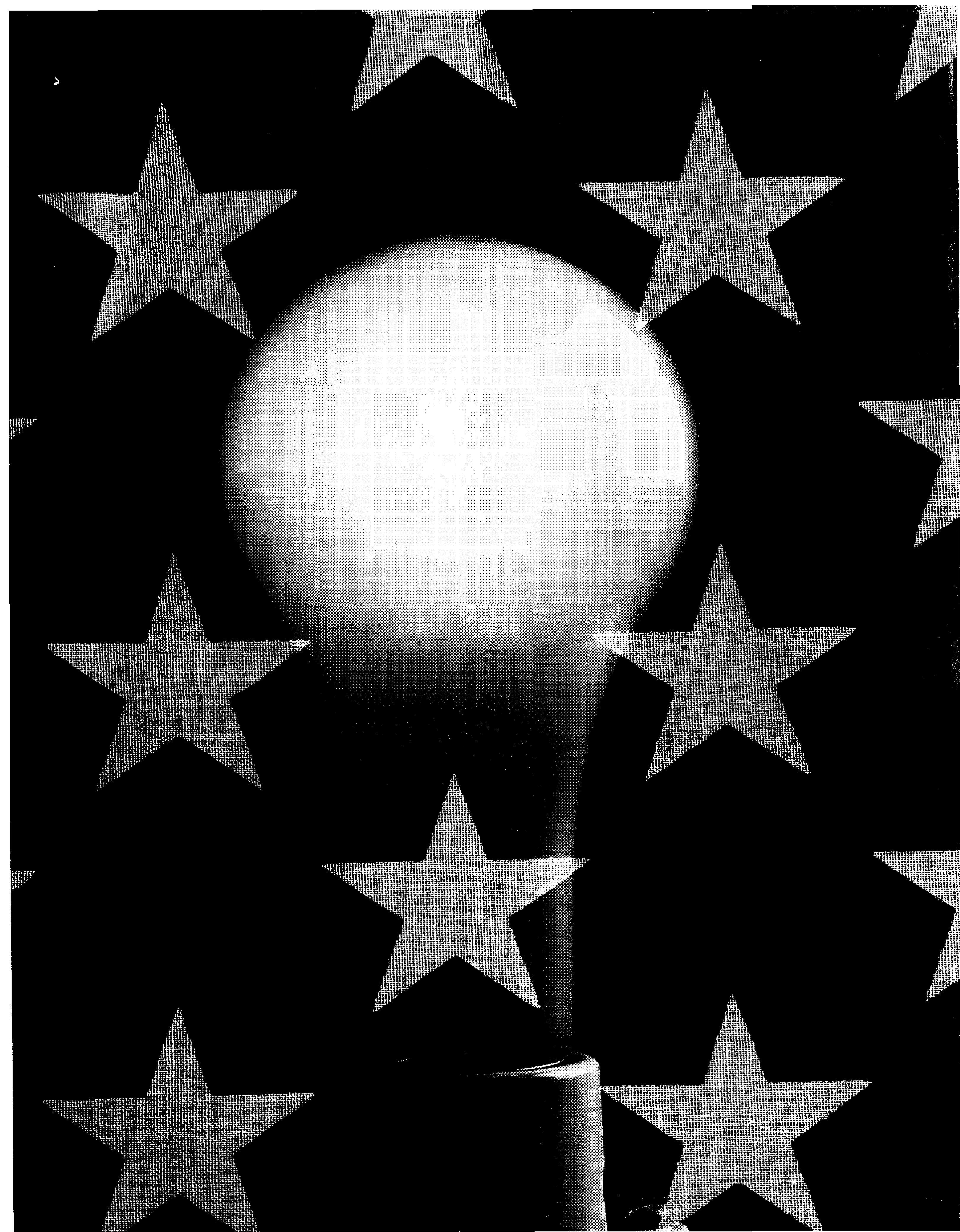
Despite the many articles that have been written exposing the so-called "liability insurance crisis" or the "tort crisis" as a fraud,[29] there is considerable evidence that the American people were *duped* into thinking that their interests were not being served [30] As a result, an avalanche of knee-jerk legislation was passed in many states to "reform" the tort system In Utah alone, since 1976, the following laws have been passed: The Utah Health Care Malpractice Acts of 1976 and 1986;[31] the Product Liability Acts of 1977 and 1989;[32] the Inherent Risks of Skiing Act;[33] the Revised No-Fault Insurance Act;[34] the Liability Reform Act of 1986;[35] the Punitive Damage Act;[36] and the Governmental Immunity Reform Act [37]

Many of these acts were passed without any supporting data. The results they produced include the following: For medical malpractice claims, the statute of limitations was reduced, the statute of repose was made stricter, laws of informed consent were eliminated, causes of action for breach of warranty and contract were restricted, and formal presuit notice requirements were imposed In addition, collateral source benefits were reduced, caps or ceilings were placed on noneconomic damages, attorneys' fees were limited, lump-sum payment of damages above a certain level was mandated, and a mandatory prelitigation screening process was instituted [38]

The drain cleaner manufacturers knew of the danger, yet they did nothing to remedy the problem until they were hit for damages in a lawsuit brought by a 48-year-old housewife who suffered total blindness when a can exploded in her face.

In other actions the Utah legislature abolished joint and several liability and the right of contribution among joint tortfeasors,[39] locked the courthouse doors to all but the most severely injured auto accident victims,[40] and placed restrictions on the award of punitive damages [41] It further immunized government and its employees against liability for even their nongovernmental activities,[42] sought to limit the liability of industry for providing defective products[43] and, in other ways, moved to restrict the rights and protections afforded to Utah citizens Unfortunately, Utah is not alone Such things are happening all over the country [44]

America tort law results from the reasoned and measured growth of the common law in



decisions that are often fact-specific and fully explored, using real evidence rather than anecdote, and has served well Lest this system be destroyed, several of its benefits should be considered: the system (1) fosters safety and serves as a deterrent to irresponsible conduct; (2) provides a means for recognition of the sanctity, uniqueness, and worth of the individual; (3) requires wrongdoers to accept responsibility and be accountable for their actions; and (4) can ease the healing process for an injury

SAFETY AND DETERRENCE

In a 1985 products liability case the Utah Supreme Court said, "The effect of strict liability has been to encourage safer manufacturing practices and product designs, thereby reducing the incidence of death and injury " (*Berry v Beech Aircraft*)[45] I submit that not only strict liability but the entire tort system has produced a safer environment for the American public

The reason you hear a warning signal when construction equipment and other types of machinery move backward is because of a lawsuit filed on behalf of an individual plaintiff injured by a vehicle not so equipped [46] Many injuries have been prevented by such a simple means

Drain cleaners used to be marketed in metal cans with screw-on lids If water got into the can, the interaction with the caustic chemicals caused pressure to build to explosive levels The drain cleaner manufacturers knew of the danger, yet they did nothing to remedy the problem until they were hit for damages in a lawsuit brought by a 48-year-old housewife who suffered total blindness when a can exploded in her face [47] Subsequently the manufacturer substituted a flip-top lid that came off with high pressure [48]

Many people are familiar with the case that resulted in the recall and redesign of the Ford Pinto automobile [49] A woman was killed and a child severely burned when their six-month-old Pinto automobile stalled on the highway and was hit from behind by a larger car traveling between 28 and 37 MPH The gas tank was designed and positioned such that an impact of only 20 MPH would cause it to rupture and spray the passenger compartment with gas. A tort lawsuit revealed that the management of Ford Motor company was aware of the danger and was further aware that the danger could be eliminated at a cost of about $11 per car The company did a cost-benefit analysis in which it was determined that it would supposedly be cheaper to pay for injuries than to correct the defect The dangerous vehicle was therefore marketed to the unsuspecting public Not until Ford realized that tort law provided a way to punish such irresponsibility by hitting the company on its bottom line did the vehicle get recalled [50]

Other defective and dangerous products have also been removed from the market or modified in the interest of safety due to tort law It is difficult to compute how many lives have been saved and how much suffering avoided thanks to the demise of the Dalkon Shield,[51] flammable baby clothes,[52] the tip-over vaporizer,[53] the use of asbestos in building construction,[54] super-absorbent tampons,[55] etc The design of machine guards and dead-man switches was not undertaken until someone thought it might make economic good sense [56]

One-third of manufacturers surveyed by the Conference Board (a probusiness organization) reported that product liability concerns led them to improve the safety design of their products [69] Health care professionals also acknowledge that, with an eye on the financial threat of a lawsuit, they have—among other things—started sponge and instrument counts and electrical grounding of anesthesia machines and provided padding to shoulder bars on operating tables [57]

In a market economy, short-term financial interests and public lack of sophistication in determining what is safe will often deter a provider of goods or services from making safety a significant concern In the short run it is often thought to be cheaper to ignore safety Tort law restores lost perspective by providing an economic incentive for companies to do the right thing Society is the beneficiary

In the short run it is often thought to be cheaper to ignore safety. Tort law restores lost perspective by providing an economic incentive for companies to do the right thing.

RECOGNITION OF THE SANCTITY, UNIQUENESS, AND WORTH OF THE INDIVIDUAL

A tenet of religious belief among members of the LDS Church states that "no government can exist in peace, except such laws are framed and held inviolate as will secure to each individual the free exercise of conscience, the right and control of property, and the protection of life "[58] I do not want to be guilty of "wresting" the scriptures to serve improper ends, but I believe that such a statement recognizes the singular importance of the individual in society

The United States Constitution also makes a significant statement on the importance of the rights of individuals [59] Viewed purely as a statement of principle, the Bill of Rights acknowledges the worth of the individual The amendments that resulted from the Civil War further refine those concepts [60] I believe tort law, as it has been developed by the courts in the common law tradition, has been true to a philosophy that recognizes and protects the uniqueness of individuals

When injured clients consult me to determine if they might be represented,

some of their initial questions are often, Do I have a case? What will it cost to pursue it? What is it worth? Because of the respect that the law has for *individuals*, those questions are rarely answerable immediately Duties and risks, as well as costs, depend on individual circumstances Cases do not fit very neatly into pigeon holes Facts change outcomes—and facts are different in every case

People are not bumpers and fenders One cannot refer to a table and say that an amputated finger is going for "x dollars" today Which finger is it? Is the victim a concert violinist? Typist? Singer? Is she old? Young? Pretty? Liability, causation, and damages are highly individualistic Thus, the initial answers to a client's burning questions are the same: It depends

In a personal injury case the court will instruct the jury that in awarding damages they are not to apply any specific formula Rather, they are to consider the degree and character of a victim's suffering, both mental and physical, its probable duration and severity, and the extent to which the particular victim may be prevented from pursuing the ordinary affairs of life that he or she has enjoyed [61]

Tort law recognizes the uniqueness and worth of individuals by allowing a court or jury an opportunity to know the individuals involved before passing judgment

ACCOUNTABILITY OF WRONGDOERS

Many voices today clamor for the adoption of no-fault systems for all forms of tort liability [62] Some people want to establish compensation pools financed by potential victims to pay money for injuries without involving the wrongdoers who cause them Such proposals ignore the obvious value of the principles of personal accountability

When a would-be tortfeasor is faced with the prospect of having to answer financially for his misdeeds, he is deterred from certain types of conduct Taking away that incentive would give the wrongdoer license to be irresponsible Without consequences for our actions, how will we be guided?

Imagine that Megacorporation, the most powerful entity in the community, is debating whether to place an unsafe product into the stream of commerce Which circumstance is more likely to result in a safe product? (1) The corporation will never have to answer for its conduct, or (2) it must answer to a group of citizens representing the community where it placed the product

Some people have argued that having an insurer or indemnitor pay for the wrong all but eliminates personal accountability. I don't agree A person's or entity's claims history will often have a bearing on the type of insurance that is obtainable, its cost, and its availability—just ask a drunk driver

I suggest that a key to preserving the salutary effects of the principles of personal accountability in tort law is to protect the contingent-fee system A marvel of our day is the way in which the law permits the Davids of society to keep the Goliaths in check An American tradition allows a victim to obtain legal counsel by paying a percentage of any amount he may recover This allowance provides the "key to the courthouse" for thousands whose circumstances would otherwise deny them access to legal remedies Greed and power are checked and rendered less dangerous when there is accountability

HEALING OF THE WHOLE INJURY

Of all my opinions about the benefits of tort law, the one that might draw the sharpest criticism is the suggestion that a lawsuit can help to "heal" the victim of an injury I am acutely aware that there are doctors who contend that their patients do not get better until the suit ends Insurance companies express sarcastic wonder at what they call the remarkable healing powers of the "greenback poultice." "Just throw money at the victim and the pain goes away," they say

However, from my point of view I see people who have had more than their bodies hurt They have suffered tremendous indignities, often inflicted callously by people whom they really trusted They try to understand what happened and are rebuffed or ignored. Insult is added to injury Sometimes they come to me simply to find out what happened

"We asked the doctor how mom could die so suddenly when everything seemed okay, and he just shrugged and walked away," they say, or "The doctor won't return my calls, and I don't think it's right that I'm blind from surgery on my arm "

These people are frustrated—sometimes angry—and hungry for an acceptable explana-

tion for what happened. Tort law, administered according to the Rules of Procedure and Evidence, can provide an opportunity for the sword of anger and frustration to be laid down Legitimate questions cannot be ignored in a lawsuit, and the accuracy of answers can be tested against principles established by experts

I have had several clients who seemed consumed by their cases—until their depositions were taken The cathartic effect of simply telling their story to someone who listened and didn't interrupt seemed to have a therapeutic effect. Once having testified, they seemed to calm down.

Oliver Wendell Holmes said that a lawsuit was a substitute for private vengeance [63] I submit that often in an environment of decorum and respect, of rules and structure, a victim's anger and frustration can dissipate In the time it takes a case to wend its way through the system, passions can cool and hostility can abate, not while being ignored, but while being attended to The lawyer is thus a participant in a process that can sometimes heal gaping social wounds

Furthermore, obtaining a damage award can have a major therapeutic effect on a person who is injured. He can finally pay the bills that have been piling up She can finally get the medical care that she has been putting off He can quit worrying about how to feed the family She can stop depending on her mother for help That is what compensation is for—to try to restore to a victim what was lost because of an injury wrongfully inflicted by someone or something else

CONCLUSION

A distinguished lawyer whom I greatly respect recently told me that before I finished practicing law, the tort system, as I knew it, would be changed beyond recognition He forecasted the adoption of a decision matrix akin to the sentencing guidelines used in federal criminal law He predicted the end of the jury trial and the establishment of administrative mechanisms for handling all injury claims

I wanted to ask: What about fairness? What about justice? What about the Constitution? I hope that people much brighter than I will be able to articulate good, persuasive reasons for holding on to a tort law system that has met the needs of an ever changing society I also hope that among those who help to preserve our tort law system will be students of the J Reuben Clark Law School

Notes

1 W Keeton, **Prosser and Keeton on the Law of Torts** 2 (5th ed 1984)
2 *Id* at 1
3 Hunt, *Damage Suits: A Primrose Path to Immorality,* Harper's Mag , Jan 1957, at 67, 70
4 Praeger, *Computation of Damages in Personal Injury Cases,* 1955 **Kan. L. Rev.** 91
5 *See e g* , *Matthew* 6;14–15; 3 *Nephi* 12:14–15; *D&C* 64:8–9; *Matthew* 5:39; 3 *Nephi* 12:39; I *Corinthians* 6:7
6 *D&C* 134:11
7 *D&C* 98:5–10
8 F Harper, F James, Jr & O Gray, *Introduction* to the First Edition of 1 **The Law of Torts** at xli, xliii (2d ed 1986)
9 *Id* at §§ 21 4, 22 1
10 Page, Book Review, *Deforming Tort Reform,* 78 **Geo. L.J.** 649, 661 (1990)
11 W Keeton, *supra* note 1, at § 67
12 *Id* at §§ 97–99
13 Juenger, *Symposium: Conflict of Laws and Complex Litigation Issues in Mass Tort Litigation: Mass Disasters and the Conflict of Laws,* 1989 **U. Ill. L. Rev.** 105
14 Note, *The Proper Application of Judicial Decisions Overruling Established Tort Doctrines,* 65 **B.U.L. Rev.** 315, 323, 344 (1985)
15 Annotation, *Malpractice Test: Competency of Physician or Surgeon from One Locality to Testify, in Malpractice Cases, as to the Standard of Care Required of a Defendant Practicing in Another Locality,* 37 **A.L.R. 3d** 420, 426 (1971)
16 **J. Lieberman, The Litigious Society** 82–85 (1983)
17 Multiple references to articles on the subject appear in a publication of the Association of Trial Lawyers of America, entitled: "Justice for All," published during the 1987–1988 presidential term of Eugene I Pavalon *See also* 132 **Cong. Record** 38, *Solutions to the Liability Insurance Crisis,* remarks by Congressman LaFalce, before the 99th Congress, March 25, 1986 The attorneys general of several states have filed a lawsuit against several insurers alleging that a nationwide conspiracy to cut competition and increase prices was the source of the "liability crisis " *See, Was There a Liability Crisis?,* **ABA J.**, at 46 (January 1989)
18 **Utah Code Ann.** § 78–14–1, et seq
19 *Id* at § 78–15–1, et seq
20 *Id* at §§ 78–27–52 to 55
21 *Id* at § 31A–22–309
22 *Id* at §§ 78–27–37 to 43
23 *Id* at § 78–18–1, et seq
24 *Id* § 63–30–1, et seq
25 *Id* § 78–14–4 to 16
26 *Id* at § 78–27–40
27 *Supra* note 27
28 Utah Code Ann § 78–18–1
29 *Id* at § 63–30–2(4)

The notes have been edited for space considerations Complete documentation is available from the author