

Is Finnish Tort Law in the Process of Being Americanized?¹

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1 Background

1.1 *Tort Law in Finland*

Foreign influence in Finnish law is naturally nothing new. Legal ideas and evaluations are transboundary. In the wake of increasing international trade and business activities a discussion sooner or later follows of the possible need to harmonize law, especially concerning the areas of contract, company, competition and taxation law. There already exist the Principles of European Contract Law, 1998 and UNIDROIT Principles of International Commercial Contracts, 1994. Be it that these principles have no status of legislation or other automatic binding force, they undoubtedly reflect the fact that representatives of different legal systems are capable of finding common solutions.² Considering the European Union, harmonization has been achieved at least at some level in company law, but especially in competition law. The European Union is active in other fields as well in this respect.³ The European Brussels and Lugano Conventions (1968 and 1988 respectively, with certain adjustments in the first-mentioned Convention) concerning jurisdiction of courts and enforcement of judgments in civil and commercial matters establish a harmonized procedural framework within the European Union, and also in the EFTA states. A corresponding global convention is planned.⁴ A final example is the American Law Institute launch in 1999 of

¹ Originally, the topic was introduced by the author at the annual speech of the Law Society of Finland in December, 1999. The speech was adjusted and published in the Finnish Law Society Journal in 2000. The present article repeats these sources, but simultaneously updates the information and further develops some aspects. The author is indebted to Professor Robert Force, Tulane Law School, New Orleans, for discussions and help.

² The *UN Convention on Contracts for the International Sale of Goods*, 1980 has reasonably convincing global support. By May 10, 2001, 59 states had adopted the Convention.

³ The idea of harmonizing private law *in toto* was introduced already in 1989 and repeated in 1994 by the EC Parliament, Resolution 1989 OJ (C 158) 401 and Resolution 1994 OJ (C 205) 518.

⁴ Preliminary draft *Convention on Jurisdiction and Foreign Judgments in Civil and Commercial*

transnational rules of civil procedure. In addition to the development on a formal level of international harmonization the factual relevance of international legal trends cannot be ignored. International communication naturally provides a basis for such relevance. The question of the Americanization of Finnish tort law is consequently only one part of a very nuanced network of a transboundary legal process.

What is then meant by “Americanization”? In view of Finnish tort law, and considering the general understanding of American tort law, it means that the basis of liability is stricter, the causation issue includes novel values, types of damages to be compensated are increased, the amount of damages rise and elements of economic punishment become relevant. At least this is the hypothesis in the presentation below. There is a special interest in comparisons, as mass media deal with court cases of public interest and often refer to such new elements in Finland. This has been clear both in a case⁵ dealing with the tobacco industry’s possible liability for the cancer of a smoker and in a case dealing with doping in sports.⁶ The Supreme Court of Finland dismissed the plaintiff’s claim in the tobacco case in June, 2001. This is interesting as practically on the same day a Californian jury returned a verdict in favour of the plaintiff against Philip Morris, see below.

It goes without saying that any evaluation in relation to Finnish tort law would be true also if changed to other Scandinavian law.

The Americanization question can be approached from two angles, one clarifying any possible influence *de lege lata*, the other *de lege ferenda*.

Before going to the trends in American, or rather US, tort law, it is necessary to recapitulate briefly the past and present trends in Finnish tort law. After general tort law concerning damages had merely been regulated in one short Chapter in the Finnish Penal Code, a vital reform took place by the introduction in 1974 of the Finnish Torts Act. This Act is comprehensive by nature, and the legislator’s original intention was for the Act to be supplemented by court practice. In other words, courts would develop tort law and not only interpret the wording of the Act.⁷ The Torts Act stipulates fault (negligence; culpa) as basis of liability. There is no reference to causation theories. Deaths and personal injuries and damage to property are compensated, as are consequential damages resulting from personal

Matters, adopted by the Special Commission on 30 October 1999 (amended version – new numbering of articles), adopted by the Special Commission on 30th October 1999, Hague Conference in Private International Law. Peter H. Pfund, *Intergovernmental Efforts to Prepare a Convention on Jurisdiction and the Enforcement of Judgments*, ALI, 1999.

⁵ Helsinki Court of Appeal 31.12.1998/judgment 3967/S 92/545.

⁶ Helsinki City Court 15.7.1999/judgment 99/4137. In this case, the question was of the possible liability of two radio reporters due to they having indicated that one top cross country skier had used doping, and this with the knowledge of the leaders of the Finnish Ski Federation. The City Court established amounts of damages that were considerably higher than what was considered practice in Finland. The Helsinki Court of Appeal later considerably reduced the sphere of persons entitled to damages and the amounts. This case was about to be finalized, when in connection with the Lahti world championships of cross country skiing in Finland in February 2001 several Finnish top skiers were caught for doping. This latter case led to an extensive discussion on sport and moral issues, and some legal measures, not brought to an end, were also taken.

⁷ Hans Saxén, *Skadeståndsrätt* (Tort Law), Ekenäs, 4.

injuries or damage to property. Non-pecuniary damages relating to personal injuries are also included, such as pain and suffering. Pure economic loss, i.e. loss not connected with death or personal injuries nor with damage to property, is compensated only under the following specified preconditions in accordance with the Torts Act, Chapter 5: the damage is the result of a crime or exercise of public authority or there are considered to be substantially heavy grounds for granting compensation. Mental distress is to be compensated, but only if it can be related to crimes against freedom, honour or trespass (at home), or any other similar crimes. Damage suffered by a third person is, according to the Torts Act, compensated only in two specific cases. The only adjustment made in Chapter 5 was in 1999 when close relatives to a deceased person were given the right under certain specified circumstances to receive compensation for mental distress due to the death.

The Torts Act applies the principle of full compensation,⁸ but there are no further criteria on how to calculate, for example, non-pecuniary damages. Court practice will show what levels of compensation are reached. For example, the recommendations of the Board of Traffic Accidents, a body established by law for traffic insurance purposes, have great importance in tort cases in general. It is noticeable in rough terms that the amounts for compensating non-pecuniary damage have risen during the years, and this not only due to inflation. Hans Saxén, a respected Finnish scholar in tort law, expressed this trend already in 1975 in his treatise on Tort Law on page 83: “Along with the standard increase and the increase in economic welfare in society, the negative consequences of certain personal disparities become more substantial, speaking for increased amounts of compensation”. There is a detailed analysis of non-pecuniary damages in Finnish tort law by Lena Sisula-Tulokas, 1995, including far-reaching details of *de lege lata* in this respect.

The Finnish Torts Act has been modified to a limited extent, but the truth is that important development in this area has taken place outside the sphere of this general Act. This concerns traffic accidents (separate legislation by tradition), medical malpractice, product liability and environmental damage.⁹ Both the Product Liability Act and the Act on Compensation of Environmental Damages show a stricter attitude towards principles concerning the basis of liability compared with the fault concept. Partly the specific areas of tort law are explained by insurance arrangements. Finland too has been affected by an increasingly nuanced nature of tort law, a necessary reaction to development in society in general.

A specific question is the status of pure economic loss or economic torts. As said above, this type of damages is compensated according to the Torts Act only under specific circumstances. In competition law development has been almost dramatic. Finland, being a Member State of the European Union, is bound by the EC Treaty. According to articles 81 (ex 85) and 82 (ex 86) of this Treaty different forms of cartels and the misuse of a dominant position in the relevant market are prohibited.

⁸ The Torts Act includes several rules on how adjustment of damages can take place in accordance with the discretion of the court in each individual case.

⁹ Environmental law and liability has been internationally debated for over a decade. On Finnish and Scandinavian aspects, Peter Wetterstein, *The Finnish Environmental Damage Compensation Act – and Some Comparisons with Norwegian and Swedish Law*, [1995] *Env. Liability*, 41.

According to the Finnish Act on Limitation of Competition section 18a, a business enterprise breaching the prohibitions included in the Act may be obliged to compensate other business enterprises having suffered economic loss due to the breach. Economic loss is specifically emphasized. Still about twenty years ago, a corresponding rule was more or less unknown in Finnish law.¹⁰

In EC Law, specific principles concerning state liability in damages apply. This liability is related to economic loss suffered by private individuals, not only to deaths or personal injuries or damage to property. Every Member State has the duty to implement EC law into its national law. Any omission of proper implementation may lead to state liability in damages. This has become especially clear in cases where a Directive suffers the fate of total non-implementation in a Member State.¹¹ But, other forms of non-application of EC law in a Member State may lead to liability as well, be it that the preconditions for formation of liability are somewhat higher than in the first-mentioned situation.¹²

In spite of continuous development of tort law in Finland, it is quite obvious that the Torts Act of 1974, a 27 year old piece of legislation, must be debated in light of reforms. This Act cannot meet the modern requirements of general tort law without going through a renewed scrutiny of values and their application. A working committee established by the Finnish Ministry of Justice has been dealing with questions of modern tort law. The committee gave its report dated June 23, 1998. The report contains a number of interesting discussion points quite clearly indicating that reforms are needed. Tort law consists, however, of so many details and variations and trends of society that it is unrealistic to expect that such legislation, new or not, would be able to fulfil expectations of foreseeability, information and flexibility simultaneously. In this field, courts will continuously have a role as developers of law, as was the case when the present Torts Act was introduced.¹³

In the discussion on reform, there is no clear-cut national approach. Finland is bound by the general trends in the international community, especially those relating to the European Union. On the other hand, there is always room for national evaluations as well. It is a question of the political climate and attitudes among professionals where the line of influence is drawn.

¹⁰ Naturally, in the law of intellectual property rights, such as patents, pure economic loss has by the nature of things been traditionally compensated.

¹¹ *Francovich v. The Republic (Italy)* [1993] 2 C.M.L.R. 66 and *Paola Faccini Dori v. Recreb Srl* 1994 ECR I-3325.

¹² In all other cases than total non-implementation of a Directive there seems to be the EC law standard of a “sufficiently serious breach” by the Member State in question. Otherwise, state liability is referred to national law. See the leading case of *Brasserie du Pêcheur v. Federal Republic of Germany* (C-46/93) and the *Queen v. Secretary of State for Transport, ex parte Factortame Ltd* (C-48/93) 1996 ECR I-1029 (*Factortame III*). There are several cases dealing with state liability, but references to other cases are found in *Konle v. Republik Osterreich* (C-302/97) 1.6.1999.

¹³ This was stated by Saxén, 3-4.

1.2 *The American System*

In the following, the main outlines in American tort law are explained. There is no intention to maintain that there is American influence in Finnish tort law or that it would be desirable. The same goes for European tort law in general. It is up to the reader to draw comparative conclusions after the American state of law has been discussed.

It is impossible to present a clear-cut picture of American tort law. This is due to several circumstances. American tort law is even more diversified than what was said above about Finnish (and, consequently, Scandinavian) tort law. The presentation below omits nuances, details and special circumstances. For example, specific liability rules concerning damage to the environment cannot be taken into consideration.

There are federal and state courts in the United States. State courts possess general jurisdiction, while federal courts have jurisdiction only in specially regulated cases. Perhaps the most important group of jurisdiction for federal courts is diversity jurisdiction, where the litigating parties are not from the same state.

Applicable law is not dependent on jurisdiction between federal and state courts. Federal law becomes applicable in most cases only due to federal legislation. There is federal common law to a limited extent, except in case of admiralty law.¹⁴ From this follows that should the federal Congress not interfere, ordinarily substantive state law, either legislation or common law or both, would be applied.¹⁵ This is the case with the great part of tort law. When discussing Americanization of tort law, it is correct to say that there are 50 states, Washington DC and the territories, each with their evaluations of law, that must be taken into consideration. Even when specifying the question as above, there is room within the United States for variations of tort law. Comparisons with external jurisdictions become difficult already at the start.

American tort law is, however, not out of control thinking about harmonization. There are similar trends of tort law in the states. American Law Institute ALI collects through its reporters data from the states. On the basis of these data the law as applied by courts is concentrated into Restatements. There are at present eleven Restatements and new proposals. In tort law, Restatement of the Law. Torts 2d must be taken into consideration. The first version of this Restatement was introduced in 1939, the second is from 1965. Restatement 2d contains in the form of black letter law the summary of tort law in the several states, and commentaries of and references to case law. The system has its obvious problems. Courts are not formally bound by the Restatements. Certain rules have practically no importance, while others have a strong and harmonized application, for example, the rule on product liability. Restatement 2d is under revision and there is new black letter law

¹⁴ Federal admiralty law is, however, not clear to its limits and lately there has been increasing pressure towards looking at admiralty law through state law. The exact limits have been problematic especially in marine insurance. Michael Sturley, *Relating the Law of Marine Insurance: A Workable Solution to the Wilburn Boat Problem*, (1998) 29 J.Mar.L. & Com. 41.

¹⁵ On jurisdiction and applicable law, Hannu Honka, *Punitive Damages in the United States. International Aspects with Reference to Admiralty. The Jurisdiction Question*, Åbo 1995, 8 - 14 and 24 - 28.

for product liability. In 1997, this regulation was introduced as the first part of Restatement of the Law. Torts 3d. A restatement-based application of law would be excluded when state legislation regulates the question at issue.

This simplified background shows that the use and appreciation of legal sources in American law are complicated and not easy to grasp. In addition, the content of law fluctuates like waves. Research on an empirical basis is not a possibility without massive investment of labour and time. I looked up the search word “damages” with variations in a well-known and reliable data base. Including cases from the year 1889 onwards I received a reply on more than 1,255,000 cases¹⁶ concerning damages. Not all judgments are reported, usually not the ones only based on a jury verdict. A modification of American tort law has been discussed for at least the past 20 years. This tort reform, which I shall return to, has during the last ten years led to more than 2,500 data registered and published articles. If one counts that each article in average contains 40 pages the result is more than 100,000 pages of research, arguments and opinions about the reform.

American tort law is characterized by big markets which have led to quantitatively impressive, but simultaneously unmanageable mass litigation. Perhaps the most striking piece of such litigation has been the one dealing with liability issues connected with asbestos. The asbestos cases were initiated already in the 1960's. In 1991 about 100,000 cases had been decided, but a similar number was still pending. These remaining cases were estimated to bring a cost level for the defendants of totally about \$ 13 – 30 billion.¹⁷ Damage to property is not included. Especially multiple punitive damages is a real problem in mass tort cases.¹⁸ Litigation can to a certain extent be consolidated and the claims can be arranged by class action.¹⁹ The following mass litigation lies in the tobacco industry. A great number of tort liability incidents has already arisen.²⁰ The most recent when writing

¹⁶ The result was received in May, 2001. The previous result of 1,182,000 cases was received in autumn 1999.

¹⁷ About the history, for example, *Central Wesleyan College v. W.R. Grace & Co* 6 F.3d 177 (1993, 4CCA), *In re School Asbestos Litigation* 789 F.2d 996 (1986, 3CCA), Lester Brickman, *The Asbestos Litigation Crisis: Is there a Need for an Administrative Alternative?* (1991-92) 13 Car LR 1819 passim. The asbestos cases have a clear social dimension because a great number of claimants did not enjoy the protective network of social benefits, for example, *Russell v. Monongahel Ry.Co.* 262 F.2d 349 (1958, 3CCA). Even if the main set of cases was started in the 1960's, the problems go back to the war industry during the Second World War.

¹⁸ Dan B. Dobbs, *Law Of Remedies. Damages-Equity-Restitution*, St. Paul, Minn. 1993, 335 - 336.

¹⁹ Concerning consolidation, John G. Fleming, *Mass Torts*, (1994) Am. J.C.L. 507 et seq. and Courtland H. Peterson & Joachim Zekoll, *Mass Torts*, (1994) Am.J.C.L. 79 et seq.

²⁰ For example, the state of Minnesota and Blue Cross advanced a claim against the tobacco industry a couple of years ago and the interest is \$ 1,77 billion. During the litigation the court required the defendant to produce 39.000 documents considered relevant according to the plaintiff. In Congress an agreement is dealt with concerning compensation, the interest being \$ 368,7 billion, Los Angeles Times 28.3.1998, Home edition. On the other hand, the Supreme Court of Iowa has dismissed the claims against the tobacco industry, Los Angeles Times 23.4.1998, Home edition. Class action about the same issue has been pending in a federal court in Ohio, Bergen Record Corp (Bergen County, NJ), The record 25.2.1999, but the claim was dismissed by the jury, The Patriot Ledger 19.3.1999. Recently, the counties of Wisconsin have instigated proceedings against the tobacco industry, Milwaukee Journal Sentinel 10.12.1999. Philip Morris have admitted the causal link between lung cancer and cigarette smoking, Austin

this article is the *Philip Morris v. Boeken* case where a Los Angeles jury in June 2001 ordered Philip Morris Inc. to pay more than \$3 billion in damages to a 56-year-old smoker with lung cancer. The verdict marks one of the biggest jury awards in history. The plaintiff was awarded \$5.54 million in compensatory damages and \$3 billion in punitive damages.²¹ Compare this with the result of the Finnish tobacco case, mentioned above.

In addition, the basic belief of plaintiff friendly jurisdictions has led to junk law suits, more or less incomprehensible in foreign jurisdictions.

2 Tort Law in the United States – Compensatory Damages

The starting point in US law is that the claimant shall be provided with full and just compensation.²² This evaluation is related to compensatory damages. The other form of damages, i.e. punitive damages or exemplary damages, is dealt with in Chapter 3.

The first question is what is understood with tort law. American tort law includes a number of specific subgroups, such as negligence, strict liability, trespass, product liability, assault and battery. There does not seem to be a comprehensive approach to tort law as such, but perhaps the common denominator is that one deals with a civil wrong.²³ General tort law is thus in a way more nuanced to its basic starting points than the Finnish corresponding area of law, “non-contractual law on damages”.

In US tort law, economic torts have become an important basis for compensation in economic relations. For example, wrongful termination of employment contracts or franchise contracts, non-payment in bad faith of insurance compensation are considered to be economic torts. Interestingly, economic torts are naturally combined with pure economic loss, thus to be compensated once an economic tort has been established. In Finnish law, as said above, pure economic loss would in general tort law be compensated under specific conditions only.

The following aspects of US tort law are dealt with concerning compensatory damages: 1) basis of liability, 2) causation, 3) what type of damages can be compensated, 4) the amount of non-pecuniary damages.

American-Statesman 13.10.1999. See also, (2000) 113 Harv.L.Rev. 1963, Recent Cases: Statutory Interpretation – Second Circuit Holds That Health Care Funds Lack Standing to Sue Tobacco Companies under RICO – *Laborers Local 17 Health Benefit Fund v. Philip Morris, Inc.* 191 F.3d (2d Cir. 1999).

²¹ The National Journal Group, Inc., *American Health Line* June 7, 2001.

²² Californian state legislation can be mentioned as only one example reflecting this principle, Ann.Cal.Civ.Code § 3333 Measure of Damages: “For the breach of an obligation not arising from contract, the measure of damages, except where otherwise expressly provided by this code, is the amount which will compensate for all the detriment proximately caused thereby, whether it could have been anticipated or not”.

²³ *Prosser and Keeton on the Law of Torts*, W. Page Keeton, Dan B. Dobbs, Robert E. Keeton, David G. Owen, St. Paul Minn. 1984, Pocket Part 1988, 1 - 7 (Prosser).

2.1 *Basis of Liability*

Negligence is generally speaking the basis of liability in deaths, personal injuries and damage to property,²⁴ but in some cases, as in connection with abnormally dangerous things and activities, the basis of liability is strict.²⁵

Development in tort law has led to a situation where different kinds of duties of control or care are established. The breach of such a delictual duty leads to liability. For example, in *Kelly v. Gwinell* 476 A.2d 1219 (1984, Supreme Court of New Jersey) the host had been serving alcoholic beverages to his guest who, under the influence of alcohol, had injured another person whilst driving a car. The injured person had the right to claim damages by the host who had served the drinks to the driver.

Some of the court arguments are interesting and worth quoting:

“We therefore hold that a host who serves liquor to an adult social guest, knowing both that the guest is intoxicated and will thereafter be operating a motor vehicle, is liable for injuries inflicted on a third party as a result of the negligent operation of a motor vehicle by the adult guest when such negligence is caused by the intoxication.

We impose this duty on the host to the third party because we believe that the policy considerations served by its imposition far outweigh those asserted in opposition. While we recognize the concern that our ruling will interfere with accepted standards of social behavior; will intrude on and somewhat diminish the enjoyment, relaxation, and camaraderie that accompany social gatherings at which alcohol is served; and that such gatherings and social relationships are not simply tangential benefits of a civilized society but are regarded by many as important, we believe that the added assurance of *just compensation to the victims of drunken driving* as well as the added *deterrent effect of the rule on such driving* [note: italics by the author] outweigh the importance of those other values. Indeed, we believe that given society's extreme concern about drunken driving, any change in social behavior resulting from the rule will be regarded ultimately as neutral at the very least, and not as a change for the worse; but that in any event if there be a loss, it is well worth the gain. The liability we impose here is analogous to that traditionally imposed on owners of vehicles who lend their cars to persons they know to be intoxicated. If, by lending a car to a drunk, a host becomes liable to third parties injured by the drunken driver's negligence, the same liability should extend to a host who furnishes liquor to a visibly drunken guest who he knows will thereafter drive away.

Some fear has been expressed that the extent of the potential liability may be disproportionate to the fault of the host. A social judgment is therein implied to the effect that society does not regard as particularly serious the host's actions in causing his guests to become drunk, even though he knows they will thereafter be driving their cars. We seriously question that value judgment; indeed, we do not believe that the liability is disproportionate when the host's actions, so relatively easily corrected, may result in serious injury or death. The other aspect of this argument is that the host's insurance protection will be insufficient. While acknowledging that homeowners' insurance will cover such liability, this argument notes the risk that both the host and spouse will be jointly liable.

The point made is not that the level of insurance will be lower in relation to the

²⁴ Prosser 160 ff.

²⁵ *Idem* 534 ff.

injuries than in the case of other torts, but rather that the joint liability of the spouses may result in the loss of their home and other property to the extent that the policy limits are inadequate. If only one spouse were liable, then even though the policy limits did not cover the liability, the couple need not lose their home because the creditor might not reach the interest of the spouse who was not liable. We observe, however, that it is common for both spouses to be liable in automobile accident cases. It may be that some special form of insurance could be designed to protect the spouses' equity in their homes in cases such as this one. In any event, it is not clear that the loss of a home by spouses who, by definition, have negligently caused the injury, is disproportionate to the loss of life of one who is totally innocent of any wrongdoing.

The goal we seek to achieve here is the fair compensation of victims who are injured as a result of drunken driving. The imposition of the duty certainly will make such fair compensation more likely. While the rule in this case will tend also to deter drunken driving, there is no assurance that it will have any significant effect.

The lack of such assurance has not prevented us in the past from imposing liability on licensees. Indeed, it has been only recently that the sanction of the criminal law was credited with having some significant impact on drunken driving. We need not, however, condition the imposition of a duty on scientific proof that it will result in the behavior that is one of its goals. No one has suggested that the common-law duty to drive carefully should be abolished because it has apparently not diminished the mayhem that occurs regularly on our highways. We believe the rule will make it more likely that hosts will take greater care in serving alcoholic beverages at social gatherings so as to avoid not only the moral responsibility but the economic liability that would occur if the guest were to injure someone as a result of his drunken driving.”

In *Kelly v. Gwinell*, the court discussed the problem of whether it was more appropriate to leave it to the legislator to regulate this type of liability. The court considered, however, that it could develop the basis of tort liability by common law.

The arguments that for the court were relevant reflect the basics in tort law thinking. The primary functions of tort law and damages are to repair and prevent.²⁶ Prevention is looked at extensively, in this case meaning that the court wanted to provide an example of sanctions that can be applied if a person allows another person to drive recklessly under the influence of alcohol. The number of traffic accidents was a serious problem in New Jersey. There was no scientific verification of the preventive effect of this type of liability, but the court, nevertheless, considered that this was no obstacle to establishing liability. The reparative function was also emphasized in the arguments. The court said that liability would ruin the persons liable, but it was more important to provide compensation to the totally innocent injured person. A signal was given to potential claims in future in similar cases. The *Kelly* decision reflects an expansion of the duty of care.²⁷

In addition to tort issues, the case reflects the role of courts in American society.

²⁶ The priority has caused debate, for example, Gary T. Schwartz, W. Page Keeton *Symposium on Tort Law: Mixed Theories of Tort Law: Affirming Both Deterrence and Corrective Justice*, (1997) 75 *Tex.L.Rev.* 1801.

²⁷ Prosser Pocket Part 3.

The difference between legislation and exercise of judicial power is perhaps not always clear and courts have undoubtedly more leeway in creating and applying law than what is considered to be the case in Finland. American courts also have the possibility to test the constitutionality of federal and state legislation. The application of the federal Constitution, which was formulated at the end of the 18th century, may result in extensive exercise of power.

In *Banks v. Hyatt Corp.* 722 F.2d 214 (1984, 5CCA) a medical doctor had been robbed and shot in New Orleans in 1979 outside his hotel (Hyatt). The robbery took place on a public street, but close to the outside door of the hotel. In the case pursued by the family of the deceased against Hyatt, the court established that the hotel had a special duty to protect its guests against threats also on a public street directly outside the hotel. This was true, especially considering that there was information based on experience about serious risks against people's health. For example, during the last three months before the death, 16 robberies, 11 of them with arms, had been committed in the same area. One of the previous incidents had also taken place outside the hotel. The court stated that Hyatt had not taken enough measures in order to protect its guests on the street outside the hotel. The claimants were awarded a compensation of \$ 975,000.

There are several interesting arguments in the case of which the following can be quoted:

“Tort law has become increasingly concerned with placing liability upon the party that is best able to determine the cost-justified level of accident prevention. See G. Calabresi, *The Costs of Accidents: A Legal and Economic Analysis* (1970); Calabresi & Hirschoff, *Toward a Test for Strict Liability in Torts*, 81 *Yale L.J.* 1055, 1060 (1972); Posner, *A Theory of Negligence*, 1 *J.Legal Stud.* 29, 33 (1972). Holding a negligent innkeeper liable when there is a third-party assault on the premises is sensible, not because of some abstract conceptual notion about the risk arising within 'the course of the relation', but because the innkeeper is able to identify and carry out cost-justified ('reasonable') preventive measures on the premises. If the innkeeper has sufficient control of property adjacent to his premises so that he is capable of taking reasonable actions to reduce the risk of injury to guests present on the adjacent property, the innkeeper should not be immune from liability when his failure to take such actions results in an injury to a guest. As between innkeeper and guest, the innkeeper is the only one in the position to take the reasonably necessary acts to guard against the predictable risk of assaults. He is not an insurer, but he is obligated to take reasonable steps to minimize the risk to his guests within his sphere of control.”

In addition to the duty of care, an element concerning causation was mentioned in *Banks v. Hyatt*. The duty of care was to be established on the basis of cost-related possibilities to take preventive measures. A risk factor was also relevant.

The duty of care has been applied in other connections too, for example, concerning the active duty of public entities to prevent risks and damages.²⁸

²⁸ Prosser Pocket Part 3. In Finland, there is an interesting case dealing with the duty of communal authorities to take measures in order to prevent pupils harassing other pupils in schools. In one case the communal authorities were liable in damages for not having taken sufficient preventive measures.

2.2 Causation

The requirement of causation is a constant problem for lawyers, also in the US. The basic and well-known term used for describing the requirement is “proximity”. In US tort law, however, several specific principles have developed of which some will shortly be related here. For example, two different causation theories are applied. The first relates to assessing the foreseeable risks of negligent behaviour. The other includes liability for all direct consequences and those indirect consequences which are foreseeable. Such short descriptions are not, of course, particularly informative, but they show how problematic it is to create a proper content for the causation question. The establishing of delictual duties also affect causation provided that those duties are described in a certain manner. They then will in many cases also solve the causation issue.²⁹ There is flexibility in causation issues.

In addition to the above-mentioned evaluations the doctrine of concert liability (alternate liability) is applied in US tort law. This means that persons acting together are both liable unless one of them proves that he could not have committed the tort. This doctrine has practical importance for example in multiple traffic accidents.

There are special solutions in product liability cases. For example, in defective medical products that have caused personal injuries the claimant might not be able to prove which producer had manufactured the medical product. In *Hymowitz v. Lilly* 539 N.E.2d 1069 (1989, Appeal Court New York) the drug manufacturers were made to pay compensation to a mother and her baby where the mother could not identify the manufacturer of the drug diethylstilbesterol (DES) that the mother had used during her pregnancy. This drug had allegedly injured them. The court adopted a national market-share theory for apportioning liability and affirmed that the defendant drug manufacturers were liable in accordance with their national market share of the product.³⁰ It was not, however, a question of joint and several liability. In addition, there is also the enterprise liability doctrine according to which all manufacturers in a specific branch are liable in case the plaintiff is unable to identify a specific manufacturer the product of who caused the injury. The requirement is that the branch controlled the risk.³¹

²⁹ One example is *Dillon v. Legg* 441 P.2d 912 (1968, Supreme Court of California). The mother was considered entitled to damages by a motorist as she had been present in a traffic accident where her daughter had been killed. The judgment includes a detailed analysis of causation theories and the relation between duty and causation.

³⁰ The doctrine was established in *Sindell v. Abbott Laboratories* 607 P.2d 924 (1980, Supreme Court of California); cert.den. 449 U.S. 912.

³¹ A.L.R. 5th 195 on concert liability and the definitions on market share liability and enterprise liability: “Market-share liability is a theory developed by the California Supreme Court in a case involving an injury caused by the drug diethylstilbesterol (DES), a fungible or generic drug the plaintiff’s mother took to help prevent a miscarriage, that could not be traced back to its manufacturer when, years after the product was ingested, the plaintiff manifested an injury. --- Under market-share liability, when the plaintiff is unable to identify the specific manufacturer of a fungible product that caused the plaintiff’s injury, the plaintiff may recover damages from a manufacturer or manufacturers in proportion to each one’s share of the total market for the product. Liability is based on the defendant manufacturer’s membership in an industry that

2.3 *Types of Damages*

According to US law, pain and suffering both in a mental and physical sense is compensated in connection with personal injuries. This includes compensation for loss of enjoyment of life which in Finnish tort law would more or less be covered by “permanent insufficiencies”.³²

Compensation for pure emotional distress (not involving personal injuries) has historically been looked at restrictively. There has not been a tort based protection concerning the right to emotional stillness. This has in US law been combined with difficulties to produce evidence and with efforts to prevent fraudulent litigation. Several torts are, however, not looked at quite in such a restrictive fashion. The restrictive trend showed some deviations already in the 1930's with the argument that it was fictional to draw a line between emotional distress that is not compensated and mental personal injuries that is compensated. In very mild cases of personal injuries, pain and suffering could be compensated while compensation for pure emotional distress was not possible, unless the case concerned a specific tort such as defamation.³³ According to Restatement.Torts 2d section 46, extreme and outrageous conduct causing severe emotional distress may result in liability in damages. The behaviour of the defendant must have been intentional or reckless. This Restatement rule was established in 1948. Also negligence combined with the risk of physical personal injuries may lead to compensation of emotional distress.³⁴ On the other hand, in the Restatement section 436A, it is established that ordinary negligence resulting in emotional disturbance alone cannot lead to liability for emotional distress.

Liability for emotional distress has, however, become more common than before. Restatement section 46 includes a supplementary comment according to which this rule did not fully reflect present development at the time of the comment. On the other hand, there still seems to be an attachment to the requirement of extreme and outrageous conduct combined with intentional or reckless causing of emotional distress. There is no possibility here to analyse in further detail the exact criteria for the compensation of emotional distress, but, for example, in *Ford v. Revlon Inc*, 734 P 2d 580 (1987, Supreme Court of Arizona) the employer was considered liable for the emotional distress of an employee as the

produced a dangerously defective product and is not dependent on proof that the specific manufacturer being sued actually produced the product that injured the plaintiff. Sometimes, however, the plaintiff is required to join in the action a substantial share of the relevant market. --
 – Enterprise liability is a theory used to hold all manufacturers in a specific industry liable when the plaintiff is unable to identify the specific manufacturer whose product caused the harm, and when the industry jointly controlled the risk, generally through use of a trade association. It must be shown that the defendant manufacturers delegated responsibility for safety standards to their trade association”. Enterprise liability in *Hall v. E. I. Du Pont De Nemours & Co., Inc.*, 345 F. Supp. 353 (1972, EDNY). Prosser Pocket Part, 3 et seq.

³² Dobbs 646 et seq.

³³ Prosser 54 et seq. and Pocket Part 17 et seq.

³⁴ This wording has sometimes been further described by courts, such as in *Rice v. Van Wagoner Co* 738 F.Supp. 252 (1990, MD Tenn): “... so outrageous in character, and so extreme in degree, as to go beyond all possible bounds of decency, and be regarded as atrocious, and utterly intolerable in a civilized community”.

employer had permitted continuous sexual harassment of the employee by a foreman. Emotional distress caused by fraud is also known to have been compensated.³⁵

Perhaps the cases where damages for emotional distress have not been awarded are just as interesting. This was so, for example, in the following cases:

– A heavy equipment operator for over 13 years had suffered several on-the-job injuries during the course of his employment and received workmen's compensation benefits at various times. The employee was injured again on the job and, as a result, appeared to have been totally disabled. Following this injury, he continued to receive full health benefits and workmen's compensation payments a certain period at which time the health benefits were suddenly terminated by the defendant employer; the employer was not liable for emotional distress, *Barksdale v. Clair County Com.* 540 So.2d 1389 (1989, Supreme Court of Alabama)

– A photograph was published on the front page of a newspaper depicting a person lying in a bed at the East Alabama Medical Center and describing her as dying of cancer. When the photograph was published, this person had been dead for two years; the newspaper was sued by the descendants of the deceased for invasion of privacy, libel, and outrageous conduct, *Fitch v. Voit* 624 So.2d 542 (1993, Supreme Court of Alabama)

– A nursing home had failed timely notification to the wife of her husband's death, *Watts v. Golden Age Nursing Home* 619 P.2d 1032 (1980, Supreme Court of Arizona)

– Plaintiffs, husband and wife, had sought medical insurance from the defendant insurer that would have covered them on out-of-country trip, but plaintiffs were never notified of the status of their application, and defendant refused coverage due to a traffic accident, the plaintiffs sought compensation for emotional distress due to delay in providing insurance, *Continental Life v. Songer* 603 P.2d 921 (1979, Court of Appeals of Arizona)

– The defendant religious foundation had made efforts for the plaintiff's son to join the foundation, the son had been repudiating his family in a way that had caused the plaintiff severe emotional distress, *Ark-Orlando v. Alamo*, 646 F.2d 1288 (1981, 8CCA).

Emotional distress belongs to compensatory damages and must not be mixed with punitive damages.

The possibility of compensation for pure economic loss is, as stated above, dependent on what type of tort is the basis for liability. This type of damage has not in general terms been excluded.

Non-contractual economic liability is under constant development. Interference with economic relations, as further specified, is in many cases considered to be a tort. The traditional type of tort, however, where pure economic loss has been compensated is defamation, but other types of torts presumably exist with the

³⁵ In *Gable v. Boles* 718 So.2d 68 (1998, Court of Civil Appeals of Alabama) the seller was held liable to pay damages \$ 5,000 to the buyer for mental anguish. The buyer had had to repair the boat that he had purchased. The seller had fraudulently warranted that the boat had been in store during the winter which had not been the case.

possibility of compensating pure economic loss too.³⁶ One of the ideas of economic torts is the need to protect legal relations, such as contractual relations.³⁷ Litigation involving claims based on intentional or bad faith interference with contractual relations seems to have become more common than before. The termination of an employment contract by an employer in bad faith would be a tort and a similar approach would be applicable to franchisees, the status of which is comparable with that of an employee. In *American Business Interiors Inc v. Haworth* 798 F.2d 1135 (1986, 8CCA), the franchisor had terminated the contract. Before termination he had refused to provide the franchisee with information necessary for the customer of the franchisee to place an order. This was considered to be an economic tort by the court. The franchisee was awarded nominal compensatory damages \$ 1, but to this was added \$ 250,000 in punitive damages.

In connection with personal injuries there are specific rules and principles, among others, showing that the interests of third persons can under some conditions be compensated. The same is true in cases of death. These matters cannot be further commented upon in this connection.³⁸

2.4 *Quantum and Non-pecuniary Damages*

Compensation for death, personal injuries, damage to property and pure economic loss is ordinarily verifiable. If the amounts awarded in damages are higher in US practice than, for example, in Finnish practice the difference is simply explainable by different general cost levels and accepted methods of calculation. There are a number of nuances showing varying approaches in deciding what the amount of compensation is to be.³⁹ A typical US nuance in compensating disability (invalidity) is the use of life expectancy statistics.⁴⁰ Certain groups do not perform as well as others. The male population of African-Americans does not have the same life expectancy as the white male middle class population. The use of statistical material in view of non-discrimination legislation is not without problems.⁴¹

Jury based verdicts on non-pecuniary damages vary greatly.⁴² The situation has been criticised as it shows that legal protection is not provided on equal grounds. On the other hand, there is statistical verification that existing variations are not

³⁶ Prosser Pocket Part, 4 et seq., for example: "Economic torts – those involving no physical injury or damages – are immensely important in contemporary litigation". Prosser 962 et seq.

³⁷ Prosser 978 et seq. Interestingly, interference with economic relations has also an industrial dimension. In pursuing the idea of protecting legal relations from intentional interference, the result has sometimes been that industrial action by workers has fallen under this category of torts.

³⁸ Further details, Dobbs 660-661 and 670 et seq, Prosser Pocket Part 3.

³⁹ See in a comparative light, *Personal Injury Awards in EU and EFTA Countries, An Industry Report*, prepared by David McIntosh & Marjorie Holmes, second edition, Southampton 1994.

⁴⁰ The calculation might be complicated. *Salgado v. County of Los Angeles* 967 P.2d 585 (1998, Supreme Court of California) concerning the grand total in relation to invalidity and life expectancy.

⁴¹ Dobbs 677 - 679.

⁴² *Idem* 659.

particularly problematic. Some judges have made efforts to avoid excessive jury verdicts by creating statistical models.⁴³

There are thousands of case reports concerning non-pecuniary damages. One way of systemizing the source material is the nature of physical injuries. This way has been chosen in American Law Reports A.L.R.. Naturally, the material shows that the more serious the physical harm is the higher the compensation is for non-pecuniary damages too. As jury verdicts are not systematically collected into reporters information is received via appeals systems. In the following some examples are given.

Brain or head injuries:

– \$ 4,000 traffic accident; cervical strain, mild concussion and a bruised sternum, hospitalized for one day, two sessions of physical therapy, mild pain in the neck, *McDaniel v. DeJean* 556 So.2d 1336 (1990, Court of Appeal of Louisiana, 3rd)

– \$ 25,000 fight in a nightclub; broken nose, two linear temporal skull fractures, one basilar skull fracture, a concussion, and lacerations to the face, *Bradford v. Pias* 525 So.2d 134 (1988, Court of Appeal of Louisiana, 3rd)

– \$ 115,000 traffic accident; shock, high blood pressure, lung damage, concussion, 28 days in hospital, sleeplessness, repetitive visits to hospital, *Price v. Watkins* 678 S.W.2d 762 (1984, Supreme Court of Arkansas)

– \$ 500,000 arrest due to suspicion of crime, beaten up by police; fractures of the skull, black eyes, injuries to the face, neck and right leg, other bruises and contusions, unconsciousness during beating up, *Daigle v. City of Portsmouth* 534 A.2d 689 (1987, Supreme Court of New Hampshire)

– \$ 1,000,000 a truck driver shot in the head by the police due to a dispute of stopping at a control; intentional withholding of relevant documents by the city of Houston; brain surgery, temporary paralysis, headache, ache in the neck, *Pressey v. Patterson etc & City of Houston* 898 F.2d 1018 (1990, 5CCA)

– \$ 1,900,000 27-year-old man fell during work on the railroad; fractured hip, pelvis, wrist, jaw, and severe concussion, lost seven teeth and much bone from jaw, and suffered from TMJ syndrome, pain in shoulder, knee, neck, dark lines across vision, seven surgical procedures in three years, 41 medical specialists and more than 300 doctor visits, permanent brain damage including epileptic disorder known as complex partial seizures, which permanent condition caused dizziness and nausea, requiring anti-epileptic medication to be taken indefinitely, permanent functional brain deficits included loss of memory, difficulty with attention and concentration, and difficulty with verbal communication, postconcussion syndrome or post-traumatic anxiety syndrome, *Templeton v. Chicago and Northwestern Transportation Co.* 628 N.E.2d 442 (1993, Appellate Court of Illinois)

– \$ 4,000,000 a 15-year-old damaged in connection with play; severe injuries when he was struck by vehicle driven by his 16-year-old friend while they were playing game of “chicken”; brain damage, massive skull fracture, broken arm, and broken leg, injuries caused memory loss, cognitive impairment, orthopaedic and

⁴³ For example, Judge Weinstein's launching of a statistical model in *Geressy v. Digital Equipment Corp.* 980 F. Supp. 640 (1997, EDNY). The jury had returned a verdict in favour of the plaintiff and had awarded \$ 1,8 million for “economic damages” and \$ 3,5 million for pain and suffering. The judge set aside the verdict.

other physical conditions, and depression and other emotional conditions, *Athridge v. Iglesias* 950 F.Supp 1187 (1996, District of Columbia)

– \$ 6,000,000 female registered nurse damaged in traffic accident (original verdict of \$ 6,000,000 reduced by trial court); lost left eye, excruciating pain at time of accident, surgery when efforts to save eye failed, able to return to work three months after initial hospitalization and performed well; record revealed her to be a productive member of society who made excellent adjustment to her injuries, *Simon v Sears, Roebuck & Co.* 508 NYS2d 39 (1986, Appeals Court, New York)

Injuries to legs and feet:

– \$ 750 woman cut ankle on jagged plastic strip of store counter, laceration required suturing and tetanus injection, *Chester v. Montgomery Ward & Co* 311 So.2d 572 (1975, Court of Appeal of Louisiana, 3rd)

– \$ 1,000 injured in automobile accident, abrasions on left ankle which became infected, bruise on right hip, mental anxiety and worry about unborn child, which was not affected by accident, *Adams v. Kimble* 208 So.2d 14 (1968, Court of Appeal of Louisiana, 1st)

– \$ 10,500 minor injured in automobile accident, injury to lip required stitches and cauterization, swollen ankle, keloid on shoulder required painful cortisone injections, *Smith v. Early American Insurance Co.* 344 So.2d 397 (1977, Court of Appeal of Louisiana, 1st)

– \$ 75,000 injured in accident caused by a hole in the street and suffered gash to left foot, serious soft-tissue injury to left ankle, pain in left knee, calf, and ankle, and injury to right leg requiring wire stitches that left scar, *Beoh v. Watkins, Allstate Insurance Co.* 649 So.2d 428 (1995, Supreme Court of Louisiana).

Such references could continue almost indefinitely, but it is easily detectable from the material above that non-pecuniary damages can reach considerable sums, at least compared with a Finnish approach.

3 Tort Law in the United States – Punitive Damages

The reason for punitive or exemplary damages is not reparative, but punishing and preventive. This type of damages is intended to deter potential tortfeasors from continuous misconduct.⁴⁴ Punitive damages are a reminder for outsiders not to misconduct in a similar fashion. Without such punishment it would be possible to pursue economically favourable but harmful activities in spite of the risk of compensatory damages. The aim of punitive damages is also to cover the costs of useful litigation.

Punitive damages are awarded in addition to compensatory damages. Punitive damages belong totally or partially to the person who has suffered harm due to the tort.

Punitive damages derive from Anglo-Saxon law in the 13th century. The tortfeasor was made to pay punishment money to the person having suffered harm (amercements). Punitive damages were accepted in US tort law in 1818, but it was a fairly uncommon phenomenon until the mid 1950s. The main reason for adjusted

⁴⁴ Dobbs 322 et seq.

attitudes from then on was the consumer protection movement. This in turn had to do with mass production and mass consumption which became the fundamental basis of US economy especially after the Second World War. This movement had the conviction that economic punishment of enterprises was justified. By its preventive effect, other consumers were protected. Awarding punitive damages quickly spread to include enterprises and professionals at large, and also private persons.

Undoubtedly, this type of compensation is a risk to the enterprise liable, especially in product liability cases. A somewhat dated statistics – but statistics nevertheless – shows that in the mid 1980s 35 % of court registered claims based on product liability included claims on punitive damages. And, it is a common understanding that they play a role in product liability and tort litigation. Not all such claims are supported, however. I shall come back to other statistics later.⁴⁵

The norms concerning punitive damages are created in the several states, but there is some federal legislation on the issue. This type of compensation requires some tort as basis.⁴⁶

Punitive damages are not related to contractual liability, but quasi-contractual relations may include them.

In many cases the conditions for punitive damages are regulated by state legislation, for example in California, Ann.Cal.Civ.Code § 3294: “(a) In an action for the breach of an obligation not arising from contract, where it is proven by clear and convincing evidence that the defendant has been guilty of oppression, fraud, or malice, the plaintiff, in addition to the actual damages, may recover damages for the sake of example and by way of punishing the defendant.

(b) An employer shall not be liable for damages pursuant to subdivision (a), based upon acts of an employee of the employer, unless the employer had advance knowledge of the unfitness of the employee and employed him or her with a conscious disregard of the rights or safety of others or authorized or ratified the wrongful conduct for which the damages are awarded or was personally guilty of oppression, fraud, or malice. With respect to a corporate employer, the advance knowledge and conscious disregard, authorization, ratification or act of oppression, fraud, or malice must be on the part of an officer, director, or managing agent of the corporation”.⁴⁷

⁴⁵ Richard Blatt, Robert Hammesfahr, Lori S. Nugent, David W. Alberts, *Punitive Damages. A State by State Guide to Law and Practice*, Pocket Part, St. Paul 1993, 1 - 15. Also, for example, Kimberley A. Pace, *Recalibrating the Scales of Justice through National Punitive Damage Reform*, (1997) 46 Am.U.L.Rev. 1573. Seemingly, punitive damages are known in Canada, but in Quebec they must be based on legislation. In Yukon territory the state of law is unclear, Blatt etc 55 not 2.

⁴⁶ Generally, Dobbs 311 - 312.

⁴⁷ The rule continues: “(c) As used in this section, the following definitions shall apply:

- (1) ‘Malice’ means conduct which is intended by the defendant to cause injury to the plaintiff or despicable conduct which is carried on by the defendant with a willful and conscious disregard of the rights or safety of others.
- (2) ‘Oppression’ means despicable conduct that subjects a person to cruel and unjust hardship in conscious disregard of that person's rights.
- (3) ‘Fraud’ means an intentional misrepresentation, deceit, or concealment of a material fact known to the defendant with the intention on the part of the defendant of thereby depriving a person of

Another example is Texas, Tex.Civ.Prac.&Rem.Code § 41.003: “Standards for Recovery of Exemplary Damages

(a) Except as provided by Subsection (c), exemplary damages may be awarded only if the claimant proves by clear and convincing evidence that the harm with respect to which the claimant seeks recovery of exemplary damages results from:

(1) fraud;

(2) malice; or

(3) wilful act or omission or gross neglect in wrongful death actions brought by or on behalf of a surviving spouse or heirs of the decedent's body, under a statute enacted pursuant to Section 26, Article XVI, Texas Constitution. In such cases, the definition of ‘gross neglect’ in the instruction submitted to the jury shall be the definition stated in Section 41.001(7)(B).

(b) The claimant must prove by clear and convincing evidence the elements of exemplary damages as provided by this section. This burden of proof may not be shifted to the defendant or satisfied by evidence of ordinary negligence, bad faith, or a deceptive trade practice.

(c) If the claimant relies on a statute establishing a cause of action and authorizing exemplary damages in specified circumstances or in conjunction with a specified culpable mental state, exemplary damages may be awarded only if the claimant proves by clear and convincing evidence that the damages result from the specified circumstances or culpable mental state”.

Both in California and Texas there are specific restrictions as shown in Chapter 5 below.

The basis of liability for punitive damages is connected with some kind of gross conduct. In some states, such as in California (above), malice is required, and in others, such as in New York, more than gross negligence is required, even if not malice. In some states, such as in Florida and Texas (concerning deaths, see above), gross negligence will suffice. In Louisiana and Massachusetts punitive damages are awarded only on basis of conditions set in state legislation. Punitive damages are not awarded in a minority of states (Nebraska, New Hampshire and Washington).⁴⁸ Alabama, whose countryside courts are generally understood to be some kind of plaintiff’s paradise against non-state based enterprises but having industrial plants there, applies the second above-mentioned basis.⁴⁹

These differences in the basis of liability are necessarily not dramatic. One deals with set terms which only indicate a certain evaluation. There are several detailed questions that have arisen in connection with punitive damages, such as the situation with multiple claims,⁵⁰ evidence (clear and convincing evidence) and

property or legal rights or otherwise causing injury.

(d) Damages may be recovered pursuant to this section in an action pursuant to Chapter 4 (commencing with Section 377.10) of Title 3 of Part 2 of the Code of Civil Procedure based upon a death which resulted from a homicide for which the defendant has been convicted of a felony, whether or not the decedent died instantly or survived the fatal injury for some period of time. The procedures for joinder and consolidation contained in Section 377.62 of the Code of Civil Procedure shall apply to prevent multiple recoveries of punitive or exemplary damages.”

⁴⁸ There is always the question of what is exactly understood by punitive damages. There are often elements of punishment included in tort law, such as in Michigan and New Hampshire, Blatt etc 55. Dobbs 358 et seq. on multiplied damages.

⁴⁹ Varying bases of liability, Blatt etc 57 - 63.

⁵⁰ Dobbs 337 et seq.

vicarious liability,⁵¹ but they cannot be dealt with here.

Liability insurance may provide protection against punitive damages, but the validity of the insurance contract can be put under doubt based on the fact that deterrence and prevention otherwise would not have any meaning. Accepting a valid cover would be against public policy. In 20 states including Delaware, New Mexico and Wisconsin, nevertheless, such insurance protection is valid, even when liability is direct and not based on vicarious liability. The cover will naturally prevail in case of vicarious liability. In many states, such as in California, Minnesota and New York, cover will be valid if there is vicarious but no direct liability.⁵² Conflict of law rules in intra-US application might lead to unexpected results.⁵³

When discussing the amount of punitive damages, generally speaking the financial status and profits of the tortfeasor are taken into account, as is the preventive effect.⁵⁴

The relevance of the proportion between compensatory damages and punitive damages seems to have increased, perhaps to the extent that it could be said to be a general trend, mainly on the basis of *Brown v. Petrolite Corp.* 965 F.2d 38 (1992, 5CCA), 48.

The economic status of the person having suffered harm does possibly not affect the estimation. Punitive damages are found in connection with personal injuries and property damage, but the extreme cases quantitatively belong to product liability and interference with contractual relations.

One product liability case is *Grimshaw v. Ford Motor Co* 174 Cal.Rptr. 348 (1981, Court of Appeal of California, 4th). A driver of a Ford Pinto car had died when the car had burst into flames in an accident, and a 13-year-old passenger had been severely burned. It was maintained that Ford had known from crash-test results about design defects in the Pinto's fuel system. This had not been a safe product and the passenger was awarded \$ 125 million in punitive damages, but the amount was settled by the judge to the amount of \$ 3,5 million.

In *General Motors Corp. v. Moseley* 447 S.E.2d 302 (1994, Court of Appeals of Georgia) Moseley had collided with another car that had bumped into the left side of Moseley's car. The petrol tank placed under the seat exploded and Moseley was killed. GM was considered liable and Moseley's parents were awarded \$ 101 million in punitive damages.⁵⁵ In *John Deere Co. v. May* 773 S.W.2d 369 (1989, Court of Appeals of Texas, Tenth District, Waco) the buyer had been killed when a John Deere work machine had reversed on him. Apparently the gear in the machine was switched on by itself. The defendant local salesman had not applied John Deere's modification programme. The seller was liable up to \$ 550,000 in punitive damages.

In *Honda Motor Co. v. Oberg* (also sub nomine *Oberg v. Honda Motor Co.*) 114

⁵¹ Restatement. Torts 2d § 909.

⁵² It seems that cover is excluded in most cases in Ohio and Virginia.

⁵³ Generally, Blatt etc 73 et seq.

⁵⁴ Dobbs 328 et seq. and 352 et seq.

⁵⁵ Also, *General Motors Corp. v. Jackson* 636 So.2d 310 (1992, Supreme Court of Mississippi); cert.den. 115 S.Ct. 317.

S.Ct. 2331 (1994), the substance of the case having been reported in 851 P.2d 1084 (1993, Supreme Court of Oregon), product liability for Honda Motor Company was established when Mr Oberg had been driving a Honda three-wheeled all-terrain vehicle up a steep embankment and it had overturned backward on his head. Mr Oberg suffered multiple broken bones and brain damage. Compensatory damages in the first instances were \$ 700,000 and punitive damages \$ 5 million. The case was later dealt with in view of constitutionality.

An extreme example on economic torts is *Texaco v. Pennzoil* 729 SW.2d 768 (1987, Court of Appeals of Texas, 1st) when Texaco, due to undue interference with the merger contract between Getty Oil and Pennzoil was liable to pay Pennzoil \$ 3 billion in punitive damages, the grand total of the compensation being \$ 10 billion. Texaco had to file for bankruptcy as the company was unable to provide sufficient securities necessary directly on the basis of a judgment by the court in the first instance. The case was appealed⁵⁶ and it is uncertain whether factual payment ever took place.

Welch v. Metro-Goldwyn-Mayer Film Co. 254 Cal.Rptr. 645 (1989, Appeal Court of California)⁵⁷ concerned Ms Raquel Welch, the film star. Her contract had been terminated by the film studio. The formal ground was that Ms Welch continuously had not followed the make-up times. The filming was therefore delayed.⁵⁸ Ms Welch managed to prove, however, that the reason for the film studio having terminated her contract was that she was too expensive for the studio in view of budgeted means. She was awarded \$ 3 million due to breach of contract and \$ 7 million in punitive damages.

In general numbers too, one deals with serious economic interests. It has been maintained that during the years of 1979-1989 the total of punitive damages in the US reached a sum of approximately \$ 65 billion. This figure is an absolute minimum. In 1990 the biggest 20 judgements reached in grand total almost \$ 550 million in punitive damages.⁵⁹ On the other hand, statistical material seems to imply that punitive damages in individual cases are ordinarily below \$ 100,000. Even if the supporters of enterprise protection have made efforts to prove that the number of cases awarding punitive damages and the amounts of those damages have dramatically increased since the mid 1980`s, there is academic research which does not support such an argument. Professor Theodore Eisenberg`s study in 1997 shows that punitive damages were awarded only in 6 % of the cases that had been looked into. And, where punitive damages were given, they were on average 38 % higher than compensatory damages. Eisenberg thinks that the storm on punitive damages has been excessive.⁶⁰ Professor Marc Galanter has produced statistical material on

⁵⁶ The problem of security was dealt with in 107 S.Ct. 1519 (1987).

⁵⁷ Review granted 256 Cal.Rptr. 750 (1989, Supreme Court of California); transferred 264 Cal.Rptr. 353 (1989); review denied 1990 Cal.Lexis 1855.

⁵⁸ The film was based on John Steinbeck`s novel *Cannery Row*.

⁵⁹ Blatt etc 14 - 15.

⁶⁰ Theodore Eisenberg, John Goerdts, Brian Ostrom, David Rottman, and Martin T. Wells, *John M. Olin Program in Law and Economics Conference on "Tort Reform": The Predictability of Punitive Damages*, (1997) 26 J.Legal Stud. 623. Also, ABA Journal, September 1997, 68 - 72. Also, Joanne Martin and Stephen Daniels, Access denied, TRIAL, July 1997, 26, passim. One trial lawyer stated of Dallas, Texas of compensating pain and suffering: "Dallas has always been

the basis of which it is possible to show only a modest number of product liability cases where punitive damages were awarded.⁶¹ Compared with what has been stated above about punitive damages being a natural part of product liability issues, a hypothesis arises according to which punitive damages are claimed in a great number of cases, but either the claims are dismissed or the damages have no extreme nature. Consequently, cases published in mass media provide an erroneous concept of litigation and court judgment reality in the US.⁶²

It is quite another matter whether it is acceptable *de lege ferenda* to accept even the present situation. Punitive damages may in individual cases hit the defendant hard whatever general statistics show.

Serious dissatisfaction with levels of punitive damages has led to testing the problem with the aid of the federal Constitution. According to the Constitution Amendment XIV section 1, every US citizen is entitled to due process.⁶³ In several cases it had been stated that high levels of punitive damages did not reflect the constitutional right to due process. In the above-mentioned Honda case the starting point was that Oregon law prevented the re-examination of facts tried by a jury.⁶⁴ The federal supreme Court did not approve of this legislation and established that the right to due process as stated in the federal Constitution had been infringed. There was room to re-examine trials by the jury. In the leading case *BMW of North America v. Gore* an Alabama jury returned a verdict in favour of Gore meaning \$ 4 million in punitive damages. Mr. Gore had purchased a BMW car in the US. The seller had not represented to Gore that the car had been repainted due to damages caused by environmental pollution. The damage proper was \$ 4,000. The punitive damages were 1000 times higher than the damage proper. The appeals court reduced the damages by half in *BMW of North America v. Gore* 646 So.2d 619 (1994, Supreme Court of Alabama) by a remittitur of \$ 2 million. The federal Supreme Court came to the conclusion in 116 S.Ct. 1589 (1996) that Amendment XIV of the federal Constitution including the right to due process had been infringed. On certiorari, the United States Supreme Court reversed and remanded. It was held that the \$ 2 million punitive damages award was grossly excessive and hence exceeded the limit under the due process clause of Amendment XIV. The court provided opinions concerning the criteria which were relevant to estimate the

conservative, but they've gotten to the point now where they'll pay you more money for your beat up Mercedes Benz than they will for a beat-up body".

⁶¹ Marc Galanter, *Real World Torts; An Antidote to Anecdote* (1996) 55 Md. L. Rev. 1093.

⁶² For example, *TRIAL*, December 1996, 14: "Steven Garber of the Rand Institute for Civil Justice reported that business fears about large punitive awards are fed by media coverage of these verdicts. Newspapers cover plaintiffs' victories in punitive damages nearly 20 times more often than defendants' wins, according to Garber's study. He added that newspapers also rarely report instances where punitive damages are reduced".

⁶³ Amendment XIV, section 1: "... No state shall make or enforce any law which shall abridge the privileges and or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws".

⁶⁴ The Constitution of Oregon Art VII, section 3: "In actions at law, where the value in controversy shall exceed \$ 200, the right of trial by jury shall be preserved, and no fact tried by the jury shall be otherwise re-examined in any court of this state, unless the court can affirmatively say there is no evidence to support the verdict".

amount of punitive damages. These criteria were the following: 1) the conduct of the defendant (“none of the aggravating factors associated with particularly reprehensible conduct was present”), 2) the proportion between compensatory damages and punitive damages (“the award was 500 times the amount of the customer's actual harm as determined by the jury, and there was no suggestion that the customer or any other purchaser was threatened with any additional potential harm by the distributor's nondisclosure policy”), and 3) a comparison with statutory fines in similar cases (“the sanction imposed on the distributor was substantially greater than the statutory fines available in Alabama and elsewhere for similar malfeasance”). An exact limit was not mentioned by the court. The Gore case has been referred to in several other judgments.⁶⁵

4 The Reasons for the State of Law in the United States

The preventive and reparative aspects of tort liability in damages as understood in US law explain the state of present law, but not sufficiently. Further explanation is necessary.

One of the core questions is that the US federal Constitution in civil cases guarantees the right to trial by jury consisting of laymen.⁶⁶ The same seems to be true for state constitutions. The jury derives from the Anglo-Saxon system which gained influence in the new continent in the colonisation process of the east coast of North America. For the American colonies, the jury system was excellent, as it gave the colonials the possibility through the jury to control the activities of judges sent from England. The jury system in civil cases is still one of the cornerstones of the American democratic and equal society. These evaluations are perhaps a bit high flying, but a reform of this cornerstone seems impossible even to discuss. The jury is and will remain in existence.

There are variations concerning jury competence. In general it is true to say that the jury alone decides facts, while the trial judge will decide upon law. Tort liability and amounts of damages belong to the jury according to the instructions given by the parties and the judge. There are both individual and “standardized” jury instructions. Standardized instructions are widely applied in order to avoid

⁶⁵ For example, *Trend Resources Inc. v. OXY USA Inc.* 101 F.3d 634 (1996, 10CCA) in which the court awarded punitive damages \$ 6 million from it having been \$ 30 million in the lower instance. The same court had previously refused to reverse.

⁶⁶ The federal Constitution Amendment VII was introduced in 1789 and accepted in 1791. The Amendment has the following wording: “In suits at common law where the value of controversy shall exceed twenty dollars, the right of trial by jury shall be preserved, and no fact tried by the jury, shall be otherwise reexamined in any Court of the United States, than according to the rules of the common law”. Note that the reference to “common law” excludes both equity (such as specific performance and injunction) and admiralty. These excluded areas can be tried without a jury. The litigating parties may also contract out of a jury trial. Amendment VI deals with jury trials in criminal cases. For state courts state law concerning juries apply. The idea of jury trials was included in early plans of the future sovereign United States. The Anglo-Saxon starting point was Magna Carta, to this part clarified in the Declaration and Bill of Rights 1689. For the U.S. the attitude is reflected in First Congress of the American Colonies (the Stamp Act Congress), 1765. Also, Honka 14 - 21.

procedural errors.⁶⁷ The instructions vary between the states.⁶⁸ The jury verdict can be re-examined by the trial judge, but only by the “verdict being monstrous, enormous, unreasonable or outrageous, manifestly showing jury passion, partiality, prejudice or corruption”.⁶⁹ There are different modifications in the states. It is self-evident that a trial judge would not disturb a jury verdict without extremely good grounds. In an excessive jury verdict in favour of a plaintiff and after complaint by the defendant the judge may offer the plaintiff a decreased amount by *remittitur*. If not accepted a new trial is ordered. The trial judge may also react to amounts which are too low and offer the plaintiff an added sum by

⁶⁷ An example of individual instructions from California in a case concerning negligence: The Law of Instructions to Juries in Civil and Criminal; Cases (3d ed. Supp. 1994). No. 2320, Negligence Defined: I would like to say this. First of all, negligence the ones that are in question here, first of all, N. C. You are to evaluate her conduct. Did she do something that a reasonable prudent person would not do; or did she fail to do something that a reasonable prudent person would do? Now, if you find that she did not, then she's not negligent.

If you find that she did, or failed to do something, then she is negligent.

And then the question is did that cause the fire; because the fire is the thing we're concerned about here.

I'd like to point out to you that the fact that the fire occurred doesn't mean that somebody has to be responsible for it. It's a question for you to evaluate what has been proved by the evidence here by a preponderance of the evidence that shows that something she did was wrong; or, something that she failed to do was wrong.

The next thing is when you start to talking about nondelegable duties, this goes to the conduct of the people who worked for her.

Now, the evidence indicates that Mr. G. did a job for her. It also indicates that another man came in there just a month before the fire; and nondelegable duties simply means that where you have a positive duty to take care of something, you cannot shift the responsibility of that because you've gotten somebody else to do it.

Now, this is a touchy subject in this particular case, because we're not quite in accord that it should even be applicable in this case; however, I have instructed you in that regard. But the point I'm trying to get at is it depends whose conduct you are concerned about whether you're concerned about what the electrical contractors did that went in there, or whether you're talking about Mrs. C.

Nondelegable duties have no application to the conduct of Mrs. C., because she's not delegating anything.

Nondelegable duties only arises in the event you're evaluating the work done by Mr. G. or this other electrician that went in there.

I hope you understand that.

Authority: Pappas v. Carson, 50 CalApp3d 261, 123 CalRptr 343 (1975).--- Mikialian v. City of Los Angeles, 70 CalApp3d 150, 144 CalRptr 794 (1978).

Standardized instructions may include a request of observance. One example is a federal instruction concerning the amount of punitive damages, Federal Jury Practice and Instructions, Civil No. 85.19 (4th Edition, 1990): “And you should bear in mind ... also the requirement of the law that the amount of such extraordinary damages, when awarded, must be fixed with calm discretion and sound reason, and must never be either awarded, or fixed in amount, because of any sympathy, or bias, or prejudice with respect to any party in the case”.

⁶⁸ Blatt etc 66 - 68 and 440 et seq. But, for example, Delaware, Hawaii and Utah do not seem to have standardized instructions for punitive damages. There are problems with formulations too, such as in describing causation and proximate cause. Prosser 319 - 321.

⁶⁹ This is of course a case of discretion. For example, Addair v. Majestic Petroleum Co. 232 S.E.2d 821 (1977, Supreme Court of Appeals of West Virginia). On appeal, for example, Standard Acc. Insurance Co. v. Winget 197 F.2d (1952, 2CCA), KLM v. Tuller 292 F.2d 775 (1961, Dist. Col/CCA) and New Amsterdam Cas. Co. v. Wood 253 F.2d 71 (1958, 5CCA).

additur.⁷⁰ Higher court instances may also react to the damages awarded, but specific circumstances are required before a jury verdict is disturbed. There are several specific legal problems relating to jury verdicts, such as the question in the light of the federal Constitution whether a federal appeals court may interfere with the jury verdict in the first instance. In such a case it seems that state law is not to be left unattended when deciding the right of that appeals instance to interfere.⁷¹

One of the accepted explanations not verifiable, however, is that a jury emphasizes the interests of the person that has suffered harm. The reparative aspect is strongly felt. This has been considered appropriate especially in view of defendant enterprises, the deep pockets, which are considered to present profitable activities, while the person that has suffered harm has no automatic social network to fall back upon. The lack of a fundamental socially protective structure in US society has led to the social needs being satisfied by the institution of damages administered by the court system including juries. The freedom of business activities in US society means fairly weak preventive control even if administrative safety rules do exist. Any gap is caught up by the institution of damages. In the eyes of a jury, there is a constant battle between enterprise protection and consumer protection. Such an understanding of tort law has relevance only in view of deaths, personal injuries and property damage to private individuals. Punitive damages and damages due to economic torts merely affecting another business enterprise would have to be explained in another setting.

There is also the basic American attitude that business life must function efficiently. By setting a risk of punishment and liability in damages, there exists a whip whereby efficiency is maximized. Prevention of harm thus becomes a key evaluation. This is true also in economic torts.

Non-pecuniary damages must in principle have a correspondence in reality. This is a fiction, as the jury and the court must take into consideration the fact that costs of litigation are carried by the parties themselves in spite of the outcome of the case. The plaintiff attorney charges his client. The fee is based on results, it is a contingency fee.⁷² Should the plaintiff win his case the attorney is entitled to 25-50 % of the damages awarded, often to 33 %. The same is true for punitive damages. Should non-pecuniary damages and punitive damages not take into consideration the system of contingency fees, the plaintiff's harm would never be completely covered. The possibility of non-pecuniary damages and punitive damages creates an attorney incentive system.

⁷⁰ For example, the definition in Eva Madison, Case note, (1997) 50 Ark.L.Rev. 591, 592.

⁷¹ *Gasperini v. Center for Humanities, Inc.* 116 S.Ct. 2211 (1996).

⁷² *Dobbs 276 et seq.* talks about the American rule. W. Kent Davis, *The International View of Attorney Fees in Civil Suits: Why Is the United States the "Odd Man Out" in How It Pays Its Lawyers?*, (1999) 16 *Ariz.J.Int'l & Comp.Law* 361. In some cases there is state law. For example, in New York in cases concerning medical malpractice, N.Y. CPLR § 5031(c): "Payment of litigation expenses and that portion of the attorney's fees related to past damages shall be payable in a lump sum. Payment of that portion of the attorney's fees related to future damages for which, pursuant to this article, the claimant is entitled to a lump sum payment shall also be payable in a lump sum. Payment of that portion of the attorney's fees related to the future periodically paid damages shall also be payable in a lump sum, based on the present value of the annuity contract purchased to provide payment of such future periodically paid damages pursuant to subdivision (e) of this section".

Historical reasons also dictate the state of law. There is the precedent system and it feeds itself. Preceding precedents are hard to develop or modify and comprehensive reform cannot be achieved by the exercise of judicial power.

5 The Tort Reform

There are several conflicts concerning the role and content of tort law. Politics is involved. The reform of the US tort system has been discussed at least since the beginning of the 1980's and diverse legislation exists. The aim of the reform has been to decrease the case load in courts, decrease the number of accepted claims and decrease the amounts of damages.⁷³ The consumer protection wing and plaintiff lawyers do not use the term tort reform, as they consider that there is a move to intentionally cut down the legal protection of private individuals.

The Republican party has supported the tort reform. The party considers business enterprises having become targets of damages to an extent that national and especially international competitiveness is under risk. The consumer protection wing considers that the planned and enforced reforms are not based on a correct analysis. According to Professor Marc Galanter, the reformists have ignored the fact that damages, even when it is a cost to the person liable, is not a loss in view of the national economy. It is merely a question of a just redirecting of means within the same economy. The reformists have according to Galanter not considered the social advantages of the tort system which are the right to compensation, increased security and the deterring effect of liability.⁷⁴ The conclusions by Galanter are interesting, because they repeat the traditional aims of tort law as elements in the social protection of consumer interests.

The Republicans were active since 1994 both on federal and state level. The programme of the party called Contract with America contained a chapter on The Common Sense Legal Reform Act the main aim of which was to adjust the rules on product liability and put a cap on punitive damages on federal level. A bill was introduced in 1995 in Congress concerning an act on product liability and tort liability. The final proposal only included product liability.⁷⁵ The planned legislation was to have priority over state legislation. The President vetoed on the grounds that this federal initiative infringed the rightful interests of consumers. Also an intrusion in state law was one of the debating points. Other attempts in Congress did not lead to results either.

The situation is different in the states. Any material from the time before state tort reforms should be studied with some reservations. Already in the middle of the 1970`s several states introduced a cap for non-pecuniary damages in connection

⁷³ Concerning the federal tort reform, M. Stuart Madden, *Selected Federal Tort Reform and Restatement Proposals through the Lenses of Corrective Justice and Efficiency*, (1998) 32 Ga.L.Rev. 1017. For example, Pace, 1577, considers punitive damages as an enormous problem which negatively affect interstate trade. In the U.S. 70 % of trade in goods takes place across state borders.

⁷⁴ Galanter, *passim*.

⁷⁵ The Common Sense Product Liability Legal Reform Act 1996, H.R. 956; A Bill to establish legal standards and procedure for product liability litigation, and for other purposes, 1997, S. 648.

with medical malpractice. In 1996, 15 states applied some kind of cap.

The state reforms have targeted different parts of tort law. There is no exact general state of law covering all the states of the US though there are some similar outlines. When reforming tort law, one of the considerations is the relation of new rules to the federal Constitution. For example, state caps on non-pecuniary damages have in some cases been considered unconstitutional, in others not. The state of law on this point seems to be unclear.⁷⁶

In the following, the main reforms are mentioned in general terms, but, of course, there is neither any reason nor any possibility here to further penetrate the laws of the several states.⁷⁷

1. Non-pecuniary damages. The cap might, for example, be \$ 500,000, as in Illinois,⁷⁸ without specifications. In Texas, the cap is \$750,000.⁷⁹ In medical malpractice the cap might be lower, such as in California \$ 250,000.⁸⁰

2. Joint and several liability. Approximately 40 states have one way or another modified the traditional tort liability rule of joint and several liability. One of the several alternatives is that this form of liability only arises provided that the defendant's share of the guilt exceeds a certain percentage, such as in Florida.⁸¹ In some states, such as in Ohio,⁸² there is no joint and several liability in non-pecuniary damages.⁸³

3. Collateral sources. In US law it is common that the claimant's right to damages is not hampered by compensation of the same harm from other sources, such as from insurance.⁸⁴ Several states have adjusted this rule in the tort reform process.

4. Punitive damages.⁸⁵ Several different types of modifications have been accepted. a) A cap. For example, in Texas the cap is \$ 200,000 or, if the amount is

⁷⁶ For example, *Lakin, v. Senco Prods.* 987 P.2d 463 (1999, Supreme Court of Oregon) *Knowles v. United States* 544 N.W.2d 183 (1996, Supreme Court of South Dakota), *Greist v. Phillips* 906 P.2d 789 (1995, Supreme Court of Oregon) and *Henderson v. Alabama Power Co.* 627 So.2d 878 (1993, Supreme Court of Alabama). James Podgers, *Throwing Caps Out of the Ring*, ABA Journal, August 1996, 48 - 49.

⁷⁷ Dobbs 683 et seq. and Prosser Pocket Part, 1 et seq.

⁷⁸ 735 ILCS. Ann. 5/2-1115.1. There is an interesting addition: "There shall be no recovery for hedonic damages".

⁷⁹ Tex.Civ.Prac.&Rem.Code § 41.008. The text is unclear.

⁸⁰ Ann.Cal.Civ.Code § 3333.2.

⁸¹ Fla. Stat. Ann. § 768.81(3).

⁸² Ohio Rev.Code Ann. § 2315.19(D).

⁸³ As a further example Idaho can be mentioned showing that there is no joint and several liability except in concert liability and vicarious liability, Idaho Code § 6-803(3), (5). Acting in concert means the following: "... pursuing a common plan or design which results in the commission of an intentional or reckless tortious act". In some states the rule has been completely abolished, such as in Alaska, Alaska Stat. § 09.17.080(d). The wording is the following, (d): "The court shall enter judgment against each party liable on the basis of several liability in accordance with that party's percentage of fault".

⁸⁴ Dobbs 266 - 270.

⁸⁵ 46 states have introduced modifications, Pace 1576.

higher, twice the amount of compensatory damages.⁸⁶ In Connecticut punitive damages are limited in product liability cases to twice the amount of compensatory damages.⁸⁷ In Virginia the cap is \$ 350,000.⁸⁸ b) Distribution of punitive damages. A number of states have considered that the person who has suffered harm gains an inappropriate benefit by punitive damages. Part of the compensation is to be funded, the state being the beneficiary. The greatest proportion of funding is found in Georgia where 75 % of punitive damages awarded is to be paid to the state treasury.⁸⁹ In Missouri 50 % is paid to Tort Victims' Compensation Fund,⁹⁰ and in Oregon 50 %, exclusive of attorney's fees, is paid to Criminal Injuries Compensation Account.⁹¹ c) Increased requirements of evidence, such as "clear and convincing evidence" found in Californian and Texan law.⁹²

5. Product liability. A partial reform of Restatement, Torts 2d has been introduced in 1997. In Restatement, Torts 3d new liability rules are introduced. Product liability is still strict, but a fundamental modification is that the plaintiff must prove that the damage could have been avoided if the planning would have taken into consideration a reasonable alternative design and that lack of such option has caused the product not to be reasonably safe. This reasonable alternative design RAD has given rise to criticism. Restatements are not to create material but to record existing material. The problem is whether accessible material has been interpreted correctly or not.⁹³ Tort reform on state level has also been introduced.⁹⁴

One of the big problems with tort reform is that litigation costs and attorneys' fees in many legislative instances have not been taken into consideration.⁹⁵ Caps which have been introduced for non-pecuniary damages and punitive damages have caused a situation where no extensive investigation is made by the plaintiff side. The reforms mean that persons most in need of compensation have not litigation potential in the same way as before the reforms.⁹⁶ Tort reform is considered to

⁸⁶ Tex.Civ.Prac.&Rem.Code § 41.008.

⁸⁷ Conn. Gen.Stat. Ann. § 52-240b.

⁸⁸ Va. Code Ann. § 8.01-38.1.

⁸⁹ Ga. Code Ann. § 51-12-5.1(e)(2).

⁹⁰ Mo. Ann.Stat. § 537.675(2).

⁹¹ Or. Rev.Stat. § 18.540(1)(c).

⁹² Ann.Cal.Civ.Code § 3294 and Tex.Civ.Prac.&Rem.Code § 41.003.

⁹³ For example, Frank J. Vandall, *Constructing a Roof Before the Foundation Is Prepared: The Restatement (Third) of Torts: Product Liability Section 2(b) Design Defect*, (1997) 30 U.Mich.J.L.Reform 261, especially 279: "It is not a restatement of law and does not rest on an evaluation of cases and policies. It exists merely because it has governed sufficient votes ...".

⁹⁴ There are problems in specific areas of law, for example in U.S. maritime labour law, Robert Force, *Tort Reform by the Judiciary: Developments in the Law of Maritime Personal Injury and Death Damages*, (1999) 23 Tul.M.L.J. 351 passim.

⁹⁵ Federally, the Attorney Accountability Act 1995, H.R. 988 which has not led to results. Another part of the legislative packet was Private Securities Litigation Reform Act 1995, H.R. 1058, not resulting in legislation either.

⁹⁶ For example, about Texas, Martin & Daniels 33: "For the most part, there is no place for an injured worker to go in Texas. There are fewer places for a person to go who has soft tissue damage from an auto crash or from a premises incident that was not his or her fault. As a practical matter, 'tort reform' is about disenfranchisement".

provide an incentive for insurance, as tort protection is more uncertain than before.⁹⁷

The views on the “correct” tort law vary. Further uncertainty is to be expected in the way that US tort law is both dynamic at present and regional.

6 Final Comments

Returning to tort law in Finland, the first question is whether the present state of law and court practice reflects any of the trends characterizing US tort law. This is hardly so. No further arguments should be needed in this respect. In Finland, as in Scandinavia, obviously the main threat would be any influence as far as punitive damages are concerned, but this phenomenon is neither known nor applied in a US sense.

Is there anything that should be accepted *de lege ferenda* from the US tort system? US tort law naturally reflects American values, culture and society. These aspects are in many ways distant be it that American influence in several fields of life is obvious. On the other hand, a total disregard of the factors relating to US tort law would be unwise without some further discussion. For example, the emphasis of the reparative task as a basis for normative reality is hardly a drawback in Finnish legal life either.

The connection between US tort law with both social and consumer dimensions is explained by the fact that the protective network in other ways is not sufficiently substantial. From a Finnish perspective one could say that undermining the administrative social infrastructure and preventive administrative safety legislation will increase the pressure on tort law to catch up the cases that have fallen through the network. Judicial power in the US system has its obvious margins which do not find a corresponding extent in the Finnish court system. The pressure just mentioned would most obviously not be shown directly in the courts. The Finnish legislator is in another position. Tort law has to be seen as part of a wider compensation system in society. Should the above-mentioned undermining take place to a substantial extent and should such a change not be adjusted in the field of Finnish tort law or some nearby system, such as insurance, there would exist a situation whereby the status and true rights of the private individual in Finnish society would deteriorate, in the worst case, fundamentally.

There has for a long time been much talk of insurance arrangements covering needs of compensation. To develop tort law in this light into a subsidiary means of compensation as a whole, would not be satisfactory as the preventive function would largely be forgotten. Tort law can hardly be replaced totally or even substantially by other systems. In US tort law prevention is a major concern. When studying US case law it becomes quite clear that courts respect the possibility to apply and develop tort law with this target in mind. The most serious signal goes to business enterprises. Time will show whether the so-called tort reform or its successors will marginalize this preventive approach.

It is quite another matter that a comparison between Finnish and US tort law

⁹⁷ Dobbs 688.

must not make one blind to the real development in Europe, where the legislative activities of the European Union or corresponding co-operation might lead to a common tort law approach.