The California State Bar Association
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I am greatly honored by this opportunity to address the State Bar of California. It is good to return to my home state, see old friends, and talk about our common interests.

I had the pleasure while at the American Bar Association meeting in England in June to join some of you of the California Bar at the dinner at Blenheim Castle. There is no question that the California Bar distinguished itself at that London conference by having the most elaborate and finest dinner of any bar association. As a matter of fact as some of us walked up the steps we were greeted by the sound of trumpets — a whole new era of law practice opened up as to what we might do when we came back home. Unfortunately, on a limited governmental budget we can't do that in the Justice Department.

In any event, your president Burt Critchfield certainly deserves great credit for putting that event together as well as for the outstanding leadership that he has exhibited as President of the California State Bar during the past year.

It's been a great pleasure for me to know an individual who has done such a great job; indeed, he continues a long series of outstanding bar president's that I've had the privilege of working with in one way or another. I talked this morning with your new President Dave Hover, and was most interested to learn of the growth of the California State Bar. Some 25 years ago I was a delegate from Alameda County. It is interesting to note that in that year, 1960, the membership of the bar was about 25,000. Today of course that number has grown nearly 400% to approximately 90,000 lawyers. A similar situation faces our nation.

Now I'm proud of being a lawyer, proud of our profession. And you obviously share that pride, otherwise you would not be devoting the time and energy to serve the needs of the profession and the interests of our legal system and the public by your participation in the work of the State Bar. And that statement certainly needs no amplification as far as your dedication is concerned; you look outside and see what a beautiful day it is in San Diego, and yet you are tending to these matters and pressing business here in this hall.

I hope you will agree with me that this annual meeting presents an unusual opportunity for the attorneys of this State to take stock of our profession and to analyze and examine some of the problems and issues that are involved in practicing law today. Our daily activities don't often allow us the chance to ask such questions as: How does the practice of law relate to the common good of the American people? How does the case I'm now working on contribute to the well-being of our nation? Or, how do my efforts affect the public perception of the legal profession?

This conference provides an excellent opportunity to address such questions and I would like to offer my perspective on some of them. Obviously we each have a different conception of the practice of law. I would present some ideas today not so much from the standpoint of advocating a certain point of view (although that necessarily will be inherent in some of the points that I make), but rather to stimulate our thinking about these matters so that we as a profession can do a better job as we relate to them. Considerations of how our practice and how our work relates to the overall good of society may seem irrelevant to the real world practice of law — at least for some. But I would suggest that this group has demonstrated your realization of the necessity of periodic self-examination of the legal profession.

Legal scholars, commentators, news media, and even the Chief Justice of the United States frequently analyze the trends in our profession. These analyses often dwell on the ethics, the integrity and the competence of the legal profession. I know these are subjects that concern the California Bar also. This bar should take pride in its past history of pioneering continuing legal education, of innovative disciplinary procedures and public service commitments (in which California literally has been the leader of the nation and caused many other bar associations throughout out country to follow the example of California lawyers). But as the number of lawyers, the complexities of the legal system and the attacks on our profession increase we must exercise continuing vigilance to maintain our leadership and to develop professional responses that are equal to the emerging challenge.

Current issues I would suggest to you require greater cohesiveness among all the aspects of the legal system — the judges, the lawyers, the law schools, professional associations — everyone is involved so that we cannot only cure the defects in the justice process but must also restore and maintain the confidence of the public in our profession. A recurrent theme of many critics of our profession, especially during this past decade is the so-called litigation explosion. I almost hesitate to broach this weighty subject after such a busy day of activity here. But I feel the importance of the topic requires even the possible imposition on your time before you are able to adjourn. We have all heard the figures about the so-called litigation explosion to a tremendous extent. The number of attorneys in the United States, per capita rate of court filings, burgeoning court dockets — the list is almost endless.

It is one thing to be alarmed as many people are by these trends. It is something else to interpret them, and more difficult still to figure out what, if anything, can and should be done about them.

I was most impressed by the talk that was given by the President of the American Bar Association Bill Fallsgrath yesterday in which he pointed out (as reported in the news today) that it is not true that the number of lawyers drives the amount the litigation, but rather that attorneys respond to the demands of society. So long as there are people who will say, "there ought to be a law," or "let's sue," lawyers have no course but to respond to those demands. At the same time I think that whether we represent plaintiffs or defendants or whether we are in some other field of law it is well worth our while as representatives of the bar to think about these matters and particularly about what the public response is at the current time.

Beginning especially with the 1981 publication of Jethro Lieberman's book, entitled *The Litigious Society,* the American legal community has engaged in a lively debate about how the volume of litigation relates to the rule of law generally. The fundamental assumption underlying this debate is that only by understanding the causes and consequences of our increasing litigiousness can we accurately evaluate what — if anything — ought to be done about it. I would suggest to you that it is important for lawyers themselves to consider these matters, rather than have remedies imposed upon us by those in legislative halls or in other areas where they have the opportunity to tell lawyers how to conduct business which is essentially that of our profession.

Therefore I would suggest that we spend some time today considering recent trends in the area of tort liability. Now, I am well aware that many lawyers and judges believe that the expansion of tort liability is having a beneficial impact upon the law, and this is also a reasonable subject for debate. But if we're concerned about the status and integrity of our profession, we must be willing to examine the ultimate impact of such changes on society as well as the long-term ramifications for our legal system.

I concentrate on tort liability for a number of reasons. First of all, I think it is one of the causes of some of the public unrest with our legal system today. Another I admit frankly is somewhat parochial. The Department of Justice serves as general counsel for the United States government. Our clients, the taxpayers, have a vital stake in the development of tort law. For example, you might consider the figures in the growth of our litigation. At the end of fiscal 1983, the Justice Department's Civil Division was defending the taxpayers in 9,101 tort law cases involving claims of $33 billion. When the 1985 fiscal year ends on the 30th of September, this month, these numbers will have increased to 11,141 tort cases involving claims of $72 billion. A dollar increase of over 100% in just two years. The point that I'm making is that the changes in tort law affect the federal government and private institutions alike. The current trend has social as well as political and legal ramifications.

Another reason for choosing to talk about tort law today is that the recent trends in this field reflect the trends towards increasing litigiousness generally. We have abandoned some of the traditional aspects of tort law in favor of new doctrines, the logic of which we are currently seeing played out throughout our judicial system. By looking at tort law in particular we can see most clearly the problems and perhaps as some would phrase them, dangers of the litigation explosion generally.

What, then, are these developments to which I am referring? Well, I would suggest to you that there are three primary trends.

First, there has been a radical expansion of strict liability doctrines in the area of design defect and failure to warn. Traditionally, as most of us realize, strict product liability was itself a fault-based system; that is, a plaintiff could only recover where the defendant had engaged in an activity that society deems harmful and wishes to deter — and wishes to deter to the point that strict liability was imposed. The negligence standard used in some tort law areas is one way of ascertaining whether an activity falls within this category.

The decision to dispense with the negligence standard in product suits stems from a 1944 California case, which, while not totally dispensing with fault as an element of tort liability, did considerably relax the traditional negligence standard. Well, much has happened in the ensuing 30 years. Modern expansions of tort liability have gone further in undermining this role of fault in determining liability.

In a 1982 case, for example, the New Jersey Supreme Court held that manufacturers of asbestos would be liable for injuries caused by it even if it was impossible for them to know of the risks that were caused by exposure to their product. Now, while I do not want to comment on the asbestos cases now pending before the courts, I mention the 1982 case because of its implications for tort law generally. Surely it doesn't make much sense to deter conduct if there are no known harmful effects at the time of the occurrence of the conduct. Yet the court's disregard for the ability of the manufacturer to have avoided the injury, even theoretically, illustrates the sharp and troubling deviation from the concept of fault which should be at the basis of strict product liability.

There are other cases that I could mention but rather than bore you with a long list of cases let me just cite the 1985 California Supreme Court case where the Court reversed a lower court's decision that granted summary judgment. I think the fact situation here is perhaps representative of what I'm talking about. An apartment tenant filed suit against his landlord, asserting causes of action of strict liability and negligence, for an injury the tenant incurred when he lacerated his arm after falling against an untempered glass shower door. Now

certainly that wouldn't seem to be a strict liability case. But the California Supreme Court held that the lower court erred in granting summary judgement as to both causes of action. Not only could the landlord be held strictly liable in tort for the injury; he could also be found to have a duty to inspect for dangerous conditions, and his lack of awareness of the condition did not necessarily preclude liability. These cases and this trend certainly have a critical implication for the direction of tort law. The implications of this case, clear for all to see, are cause for grave concern.

A second cause of the explosion in tort liability is the recent trend towards attenuated theories of causation. Perhaps the seminal case in this regard is the California case again in which the doctrine of "enterprise liability" was established. It was a case brought by plaintiffs who claimed to have been injured by the drug DES. The Court found it was highly probable that the plaintiffs' injuries had been caused by the DES, but the plaintiffs could not show which defendant had sold the DES that had injured them. It therefore permitted the defendant to recover from all DES manufacturers in proportion to their market share at the time of purchase, unless a particular manufacturer could prove a negative — that its DES was *not* responsible for the injuries.

Well, as you can imagine from your law school days reading Prosser, this was a revolutionary approach to causation in tort law. Since then courts have gone even farther. The extent to which they have carried this burden-shifting technique is well illustrated by a case in which the United States government was involved: the case of *Allen* v. *United States,* in 1984, which is now on appeal. This case involved the claim of Utah residents with injuries allegedly caused by exposure to radioactive fallout from early atmospheric atomic tests in that state. Despite overwhelming scientific evidence that the levels of radiation to which they were exposed do not present a health threat, the federal district court placed the burden on the government to prove that the injuries *could not* have been caused by this exposure. This burden, of course, proving a negative, could not possibly be met where there is at least a theoretical possibility that the radiation exposure caused the injury. The Court simply imposed on the government, the defendants, the burden of proving non-causation — a well-nigh impossible task.

The third and final area of tort law that I would like to discuss today is the increasingly inflated size of judgments. As many of you are keenly aware, once the plaintiff has won on the liability issue, too often the sky's the limit. Or, I should say, almost the limit. A new number was at least raised when in a recent case the Ninth Circuit reversed as excessive an $11.7 million award for personal injury under the Federal Tort Claims Act. But nevertheless, there has been a recent series of multimillion dollar awards in personal injury suits against the United States and similar large judgments against private entities. The desire for compensation has overcome a sense of balance so that these judgments now appear to be way out of all semblance of what only a few years was a reasonable standard. This leaves me less than encouraged.

Particularly troublesome in this regard is the current rash of sizeable punitive awards. Originally, such awards were intended to punish particularly egregious or malicious conduct. In a fault-based system, such damages may indeed serve to deter conduct that, while in the civil area, borders on the criminal. But the preliminary results of a recent Rand Institute study, their civil law study center there, indicates that the number and the size of punitive damage awards has increased dramatically in recent years. Why then, we might ask, while the courts are moving on the one hand away from fault, are these punitive damage awards also increasing in an extraordinary manner? I can't help suspect that they result more from sympathy for an un-

fortunate plaintiff than from a reasoned judgment that certain conduct should be discouraged above and beyond the actual cost of the injuries involved.

This extraordinary increase that I've talked about in tort awards is perhaps most clearly illustrated in the area of medical malpractice litigation. In roughly a decade, the average medical malpractice verdict has increased from approximately two-hundred thousand dollars to nearly one million dollars — this in a period that on the other hand has been marked by extraordinary advances in medicine, and in a nation that indisputably leads the rest of the world in the quality of its health care. It is no wonder that many in the medical community believe that such tort liability has created a crisis in the delivery of health care, that young physicians are unable to open up offices because they cannot afford the necessary liability insurance, and that well-established practitioners in "high liability" states choose to retire or relocate rather than continue their exposure to a system of law which they feel may threaten their financial ruin. Now I recognize that this matter was addressed by the California State legislature in 1975, in the Medical Injury Compensation Reform Act, but I suspect that there is in this hall great debate as to whether that was the proper remedy to handle this situation.

If this trend, not just in medical malpractice, but in tort law generally, toward massive increases in punitive and non-injury-related damages continues, the impact on our nation's economy could be devastating. Both the size and unpredictability of these awards threaten to suppress the commercial vitality upon which a free economic system desperately depends. This is a matter which I would suggest we as lawyers must carefully examine. We must consider the current state of our insurance industry. Now I realize that among some groups within our profession there is not an awful lot of sympathy for the insurance industry, but at the same time there are many others who have the responsibility for defending insurance cases. But I think the important thing is that the insurance industry is now in a position of precariousness where crucial economic and business decisions are being made which will have a profound impact upon the legal profession and upon the judicial system.

As you know, insurance companies calculate rates according to risk projections. They charge their clients the rates that will allow them to absorb a projected amount of legitimate claims. Of necessity, they base their projections upon the assumption that claims are legitimate only when an insurance client is found to be at fault. Whether that client be an individual, a company, or the federal government, insurance companies must assume that the liability will be assigned only when it is clear their clients have done wrong or at least are negligent. Furthermore, when fault has been determined, insurance companies must be able to calculate with some reasonable accuracy the amount for which their clients will be held liable.

Bear in mind the three developments of tort law that I have been describing: expanding strict liability, increasingly attenuated theories of causation, and sky-rocketing punitive and non-injury-related damages. All of these things have an impact upon the insurance industry as well as upon the results in the tort cases. Some insurance companies as a result are now refusing to provide financial protection of certain types of businesses. Very few industries of course can afford to function without the security of insurance coverage; yet we cannot expect the insurance industry to shoulder the burden of unpredictable tort judgments without serious deterioration or collapse of the system.

The current crisis in the availability of liability insurance, which is particularly affecting our ability to create new businesses, because obviously new businesses have some of the greater risks, is rapidly forcing our legal system as well to face the hard realities of the development of tort law in recent years. In only a decade, the *average* product liability award has tripled, and

today exceeds one million dollars. Many businesses throughout the nation are seeing their product liability insurance premiums skyrocket by 200 to 500 percent, in some cases by as much as 1,000 percent. And for some, liability insurance, as I mentioned, is not available at any price. While large companies can perhaps digest such premium shock, some small businesses — the businesses that are creating the new inventions and providing the new jobs — have no alternative but to go without insurance. They call it self-insurance but in reality it's no insurance. Should such a company be found liable for a serious injury, it may find itself in bankruptcy — thereby punishing not only the owners of the company, but also the employees who will lose their jobs, the community that will lose a productive enterprise, and, most ironically, the injured victim who may lose his opportunity to receive compensation at all. That's why I say that there are social costs as well as impacts upon the legal system. Something is certainly worthy of examination in tort law when the liabilities that are generated become so onerous and so unpredictable that they cannot even be insured.

Reform of tort law must entail the re-establishment of fault as the critical standard by which liability is determined. Fault is not some archaic vestige of tort law to be abandoned whenever it stands in the way of compensation. It is the only reliable vehicle for distinguishing socially beneficial from socially detrimental conduct. We must work together to ensure that tort law develops along some well-thought-out lines rather than a variety of individual rulings imposing liability in the absence of either fault and causation.

Well, I hope that this has not seemed an unduly ponderous analysis of what I consider a major challenge to our profession. It is very much a matter of concern to the public, the legislative bodies, as well as for many lawyers throughout the country. It is a topic which requires us to put aside parochial interests and to find good-faith compromises among competing objectives. I suggest that most of all, as I mentioned earlier, it behooves the legal community to come up with solutions to these problems before remedies are imposed by state and federal legislative bodies.

Jethro Lieberman's book, *The Litigious Society,* ends with the confident assertion that: "Until the day when our institutions can be trusted to serve us as fiduciaries and when we can be educated to understand the limitations of the world we have constructed, litigation will remain the hallmark of a free and just society." I believe that litigation is an important way to resolve the differences between parties. But it also must be administered in a manner which will not have an adverse impact upon society. As lawyers I suggest that together we have the ability and we have the responsibility to work out solutions and I am confident that California lawyers are equal to the task of making Lieberman's prediction come true.

Thank you.