TALKING TORTS

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Before I ever met Gary Schwartz, I had read his wonderful pieces on products liability and contributory negligence.[1] I therefore knew that he not only had the amazing capacity to wrap his arms around an entire field, but also a willingness to roll up his sleeves and slog through hundreds of nineteenth-century appellate opinions to see whether the received wisdom about contributory negligence was correct. He was an impressive legal scholar at a time when I was just starting out in law teaching, and I admired him because of his work.

What I did not know merely from reading Gary's work, however, was how much he loved everything that had to do with tort law. I was later to learn that he could talk torts, and would talk torts, from morning until night if he had people who would listen to him and to whom he could listen. Talking torts with Gary involved real conversation. He was not an ideologue; he did not zealously seek to convert his listeners. He was a seeker of truth, not someone who had already found it whole.

I met Gary at some point in the early 1980s, and for the next two decades we saw each other in many different settings. They were almost always concerned with torts: torts conferences, annual meetings of the AALS section on Tort and Compensation Systems, the two AALS programs for torts teachers that he ran about a decade apart from each other, sessions of the ALI project on Enterprise Responsibility for Personal Injury, meetings of the ALI Restatement of Products Liability Advisors, meetings of the Restatement (Third) of Torts: General Principles project for which he was the Reporter, and the ALI Council and Annual Meetings at which he presented and debated his work on the General Principles (now "Basic Principles") project.[2]

While there were lots of meeting rooms, hotels, and restaurants where we spent time together, I never saw Gary's home, and he never saw mine.

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1. Gary T. Schwartz, *Tort Law and the Economy in Nineteenth-Century America: A Reinterpretation*, 90 YALE L.J. 1717 (1981); Gary T. Schwartz, *Understanding Products Liability*, 67 CAL. L. REV. 435 (1979).

2. *See* RESTATEMENT (THIRD) OF TORTS: LIABILITY FOR PHYSICAL HARM (BASIC PRINCIPLES) (Tentative Draft No. 1, 2001).

We were friends on the road. And almost always what we talked about, whether it was just the two of us or a larger group, was torts. Gary never tired of talking about torts. Whether the issue was grand or tiny, he would go at it with the zest of a puzzle-solver. In my mind's eye, I can see him talking torts now, and I am struck that in this picture he is neither listening nor speaking, but pondering.

As I think about it, this is no surprise. In this era of different schools of thought, Gary had no obvious ideology. He could not automatically react positively or negatively to an idea. He would always ponder it. His "take" on torts was a mixture of instrumentalism, empirics, history, and foundational principles. To oversimplify, he believed that tort law serves both corrective justice and deterrence. At bottom, he was a pragmatist who understood tort law to be a product of mixed goals, and whose own goals for tort law were mixed as well.

He left his last great work, the Restatement, unfinished. But he left it far enough along for the legacy of that work to last. His friends and colleagues will carry it to the finish. I saw him attack the project from the outset, and as always, he did it with an open mind. He was an avid opinion-reader, and because he had an open mind, he found things in the case law that he did not expect. Once he was convinced of what he had found in the cases, however, he could be a bulldog about sticking to his position. On a few occasions I saw him temporarily discouraged by the pounding he had taken from those who had not read all the cases he had read, but his love of the subject always seemed to restore his enthusiasm. A session with his advisors would end and he would seem to be down. Yet two hours later when we got together for the evening, he would be prepared to go at it again. Having thought some more about the issues that had occupied the day, he would be ready to spend dinner discussing them from a new angle.

Now that Gary is gone, we will have no more arguments, no more dinners, no more insights like those he had about the Pinto case.[3] But we will all have our memories, and without doubt my best memories will be of Gary talking torts.

3. *See* Gary T. Schwartz, *The Myth of the Ford Pinto Case*, 43 RUTGERS L. REV. 1013 (1991) (discussing Grimshaw v. Ford Motor Co., 174 Cal. Rptr. 348 (Ct. App. 1981)).