

2008

There Will Be Blame: Misfortune and Injustice in the Sweet Hereafter

Timothy P. O'Neill
false

Follow this and additional works at: <https://digitalcommons.du.edu/selj>

Recommended Citation

Timothy P. O'Neill, *There Will Be Blame: Misfortune and Injustice in the Sweet Hereafter*, 5 U. Denv. Sports & Ent. L.J. 19 (2008).

This Article is brought to you for free and open access by Digital Commons @ DU. It has been accepted for inclusion in Denver Sports & Entertainment Law Journal by an authorized editor of Digital Commons @ DU. For more information, please contact jennifer.cox@du.edu, dig-commons@du.edu.

There Will Be Blame: Misfortune and Injustice in the Sweet Hereafter

THERE WILL BE BLAME: MISFORTUNE AND INJUSTICE IN *THE SWEET
HEREAFTER*

Timothy P. O'Neill †

INTRODUCTION

The scene is a January morning in a small town. A school bus on its regular route veers off a road, crashes through a guardrail, and sinks through the ice of a water-filled sandpit. Fourteen children are killed. One of the survivors is paralyzed for life. The bus driver escapes with relatively minor injuries.

There is no apparent reason for the crash. A man driving behind the bus did not notice any reckless conduct by the experienced bus driver. The bus simply left the road, killing fourteen children.

How does a small town react to this sudden loss of so many of its children? How does it explain to itself what happened? How does it begin to bind its wounds? This is the basic story of *The Sweet Hereafter*, a 1991 Russell Banks novel that Atom Egoyan turned into a film in 1997.

Judith Shklar divides disasters such as this into two categories: misfortunes and injustices.¹ A misfortune is a dreadful event that is caused by external forces of nature; because it could not be prevented, people must resign themselves to their suffering. An injustice, on the other hand, is a disaster brought about by human agency; because it could have been prevented, people express outrage, assign blame, and seek relief.

Injustices can result in legal recoveries; misfortunes do not. Much of the book and film follow an out-of-town personal injury lawyer in his attempts to enlist the grieving parents as prospective clients in a lawsuit. A lawsuit against whom? He does not know, but he is convinced that he will find some negligent human or corporate agent with deep enough pockets to result in

† Timothy P. O'Neill is a Professor at The John Marshall Law School.

¹ JUDITH SHKLAR, *THE FACES OF JUSTICE 1* (Yale University) (1990).

a financial bonanza for the parents ---- and, of course, for himself. It is clearly in his interest to view the bus crash as an “injustice.”

He is pitted, however, against several townspeople who see the crash as merely a “misfortune.” They are convinced that the crash was an accident and that no one was at fault. They want the out-of-town lawyer to leave so that the town can begin healing.

The conflict is resolved when a witness lies at a deposition. She tells the lie because she knows that it will destroy any possibility of a lawsuit. She succeeds. The lawyer leaves. The town goes on ---- without fourteen of its children.

The film of *The Sweet Hereafter* has attracted a number of law review commentaries. They largely reflect hostility towards the lawyer. They note the divisive effects of litigation on a community. They regard as heroes those townspeople who consider the crash to be merely an accident and thus refuse to sue. Some of the commentators even justify the lie at the deposition because it ended any possibility of a lawsuit.

The purpose of this Essay is to challenge this traditional law review reading of the film. In doing so, it will make several points.

First, it questions the idea that ---- when a disaster occurs with no obvious negligence ---- the “misfortune/injustice” dichotomy is in equipoise. Instead, it argues that the ordinary human reaction is to assume it is an “injustice” unless proved otherwise. In other words, “injustice” is the default position when people look at a bad outcome. In making this point, the Essay draws on new work by Charles Tilly on how human beings assign blame.²

Second, because “injustice” is the default mode, the lawyer’s coming to town does not stir up feelings that are not already present in the grieving townspeople. On the contrary, until the community positively believes it was a misfortune rather than an injustice, *there will be blame*.

² CHARLES TILLY, CREDIT AND BLAME (Princeton University Press) (2008).

The only issue is where that blame will be directed. The idea that without the lawyer the town would naturally come together and heal is a chimera.

Third, the Essay will look at the effect of the witness's lie. In both the book and the movie, the lie assigns blame to the innocent bus driver. Yet the film ---- and the law review commentaries ---- both gloss over what effects this had on the driver. The Essay examines how Russell Banks' novel, however, takes a hard, uncompromising look at what really happens when blame for what is considered an injustice is misdirected.

The Essay concludes by contending that commentators may be too quick to criticize lawyers who look at disasters as opportunities for lawsuits. If there is a natural tendency for people to view a bad outcome as an injustice for which there must be blame, the litigation process serves two purposes. First, if the tragedy turns out to have been a preventable injustice, litigation can direct the community's blame towards the proper parties. But, second, if investigation reveals that it was merely a misfortune, the litigation process can help defuse the community anger that had sought someone to blame. Without this knowledge that the litigation process can provide, we may be left with the worst of all worlds ---- blame directed against an innocent person. And this, indeed, this is what occurs at the conclusion of the Russell Banks novel. The refusal of Atom Egoyan's film ---- and its law review commentators ---- to acknowledge this sad truth must be challenged.

I. *THE SWEET HEREAFTER*: THE FILM

Atom Egoyan's 1997 film *The Sweet Hereafter* tells the story of a small Canadian town's reaction to a school bus accident.³ It is unclear what caused it. On the bus's usual morning run driven by its regular driver Dolores Driscoll, it suddenly left the road, crashed through a

³ *THE SWEET HEREAFTER* (Alliance Communications Corporation 1997).

guardrail, and sank through the ice on a lake. Most of the children were killed. One girl, Nichole Burnell, survived but was paralyzed from the waist down. Dolores survived with relatively minor injuries.

The film begins with the arrival of attorney Mitchell Stephens in the town, which is named Sam Dent. It traces Stephens' quest to retain clients for his proposed lawsuit. He first convinces Wendell and Risa Walker, owners of the local motel, to sign with him. The Walkers had a son die on the bus. Stephens tells them he is only looking for "good, upstanding neighbors" to join them in the lawsuit. They suggest Hartley and Wanda Otto, who lost their adopted Native-American son Bear in the crash.

The Ottos are not anxious to join in any suit. Stephens responds by telling them that he is there "to give your anger a voice, to be your weapon against whoever caused the bus to go off the road." He assures them that he has no interest in suing Dolores, their friend and the local bus driver. Rather, "the really deep pockets are in the town and the company that made the bus." When Mrs. Otto suggests that what occurred was merely an accident, Stephens responds "[T]here is no such thing as an accident. [S]omebody, somewhere made a decision to cut a corner They decided to sacrifice a few lives And now it is up to me to insure moral responsibility in this society." In the end, the Ottos agree to join the suit.

Stephens then talks to Nichole Burnell's parents. Sam, the father, is anxious to join the lawsuit, eagerly asking "When do they award the damages?" Stephens is particularly interested in the Burnells because Nichole ---- a very attractive young girl who is now partially paralyzed and confined to a wheelchair ---- will make such a compelling witness.

Intertwined with this story of Stephens' offering to compensate people for their lost children is the story of Stephens' daughter Zoe, his own "lost child." Zoe calls him collect

several times while he is in Sam Dent. In flashbacks as well as flash-forwards, we learn that Zoe is a drug addict. Unlike the cases Stephens litigates, this is a problem that for him is insoluble.

Not all the townspeople join Stephens' suit. Dolores Driscoll refuses when her husband Abbott advises her not to join. Billy Ansel also refuses. Ansel, the town's garage owner, was driving behind the bus waving to his two children when the accident occurred. His children were both killed. Convinced it was an accident, he angrily rejects Stephens' suggestions that he join the lawsuit.

In one of the crucial scenes of the film, Ansel goes to the Burnell house to try to convince them to drop the suit. He tells them, "I don't want a darn thing to do with it. Lawyers are suing lawyers, [and] people are pointing fingers at each other and making side deals and dickering over percentages. He [Stephens] is going to force me to testify in court. I was driving behind the bus and I saw it happen. He's going to force me to go over all this again. Then all those other lawyers are going to line up behind him and try to do the same thing." The Burnells refuse to drop the lawsuit.

Unbeknownst to Billy and the Burnells, Nichole is behind her bedroom door listening to this conversation. Throughout the film, we have learned several things about Nichole. We know that her father Sam had sexually abused her for years before the accident. We also know that Nichole was very close to Billy's family. She baby-sat for the two dead children. When Billy's wife died of cancer, Billy even gave Nichole some of his wife's clothes. It's clear that Billy's words have had an impact on Nichole.

The denouement is Nichole's deposition. Nichole ---- who up to this point has denied remembering any details of the accident ---- tells the defense attorney that "I remember it clearly now." She testifies that "[W]e were going too fast down the hill and I was scared. The

speedometer was large and easy to read from where I was sitting [Dolores] was going 72 miles an hour.”

Because Nichole’s lie places the blame on the person with the shallowest pockets, all the lawsuits are now dead.⁴ Nichole has succeeded in both helping Billy and hurting her abusive father. Stephens leaves Sam Dent.

In a flash-forward epilogue two years later, we see Stephens arriving in an airport in another city. From a distance he sees a driver of a hotel shuttle ---- it is Dolores. She sees him and smiles.

The film ends with a voice-over by Nichole: “[T]wo years later, I wonder if you realize something. I wonder if you understand that Dolores, me, the children who survived, the children who died, that we are all citizens of a different town now, a place with its own special rules, its own special laws, a town of people living in the sweet hereafter.”

II. LAW REVIEW COMMENTARY ON THE FILM

The film has been the subject of a number of law review articles written by law professors and lawyers. They are almost uniformly critical of Stephens and supportive of Billy and Nichole.

First, consider Austin Sarat’s analysis of the legal issues in the film.⁵ Sarat sees it as “telling two stories at once.”⁶ The first is a story about civil law’s need to turn a serendipitous

⁴ For the purposes of the story, the reader must accept the fact that Nichole’s perjury destroys the lawsuit. Whether this would be true in real life is questionable. See Margaret J. Fried & Lawrence A. Frolik, *The Limits of Law: Litigation, Lawyers, and the Search for Justice in Russell Banks’ THE SWEET HEREAFTER*, 7 CARDOZO STUD. L. & LITERATURE 1, 14 n.55 (1995) (contending that Banks is merely using “poetic license” to heighten the drama of Nichole’s perjury, the authors explain how under the law of New York (where the accident occurs in the book) Dolores’ speeding would not necessarily break the causal connection between negligence on the part of either the town or the state and the plaintiffs’ injuries).

⁵ Austin Sarat, *Exploring the Hidden Domains of Civil Justice: “Naming, Blaming, and Claiming” in Popular Culture*, 50 DEPAUL L. REV. 425 (2000).

⁶ *Id.* at 431.

“misfortune” into an “injustice.”⁷ It does this through a three-stage process Sarat calls “naming, claiming, and blaming.” Law begins by re-defining the misfortune as an injury (the “naming” stage). It then transforms the perceived injury into a grievance; it does this by attributing the injury to the “fault of another individual or social entity” (the “blaming” stage). Finally, law provides a vehicle for the injured party to voice its grievance to the party it believes is responsible and to ask for a remedy. This final stage is the “claiming” stage. Thus, the film shows us Stephens gathering the parents of Sam Dent as clients for his lawsuit by convincing them that what happened to their children was a preventable injustice, rather than a mere misfortune.

Sarat contrasts this with the film’s second story. This concerns those people of the town who refuse to use law as a vehicle for their misfortunes. Abbott Driscoll, Billy Ansel, and Nichole Burnell insist on what Sarat calls the “continuing claims of community over law, of fatalism over blame.”⁸ These are the people who insist that the crash was a misfortune rather than an injustice. These are the people who resist the allure of Stephens’ “Pied Piper.”⁹

As Sarat views it, Stephens “represents the alien presence of legality, with its habits of assigning guilt and constructing hierarchy.” The community is “endangered by the law’s invitation to turn grief into greed.” Legality “threatens to pit people against one another,” advantaging some and disadvantaging others. And “[r]ather than providing closure, the law promises to prevent the healing of psychological wounds left behind after the accident.”¹⁰ Thus,

⁷ Again, this is how Judith Shklar has made this distinction: “[W]hen is a disaster a misfortune and when is it an injustice? Intuitively, the answer seems quite obvious. If the dreadful event is caused by external forces of nature, it is a misfortune and we must resign ourselves to our suffering. Should, however, some ill-intentioned agent, human or supernatural have brought it about, then it is an injustice and we may express indignation and outrage.” SHKLAR, *supra* note 1, at 1.

⁸ Sarat, *supra* note 5, at 431.

⁹ See ROBERT BROWNING, *THE PIED PIPER OF HAMELIN* (Everyman’s Library 1993) (1888). The image of the Pied Piper leading away the town’s children is a motif that runs through the film, but does not appear in the novel. At different times in the film, The Pied Piper may describe Stephens the lawyer, Nichole’s sexually abusive father, or even the bus crash itself.

¹⁰ Sarat, *supra* note 5, at 432.

Sarat traces what he terms Stephens' "seductions" of the Walkers, the Ottos, and the Burnells into his lawsuit.

Sarat contrasts this with the reaction of Dolores's husband, Abbott. When Stephens asks Dolores to join the suit, Abbott responds forcefully, if inarticulately (because of his disability). Dolores tells Stephens that Abbott told her not to join the lawsuit: "Abbott said that the true jury of a person's peers is the people of her town. Only they, the people who have known her all her life and not twelve strangers can decide her guilt and innocence."¹¹ Sarat characterized Abbott's reaction as "introducing a story of community against law."¹²

As for Billy, Sarat sees him as heroically resisting the siren song of the lawsuit. Billy insists to Risa that "It was an accident" and that no one was to blame.¹³ When Billy refuses Stephens' invitation to join the lawsuit, Sarat characterizes this as Billy's allying himself "with the community and its interests, acting as its protector even as he expresses deep incredulity that his neighbors would use the law to respond to their loss."¹⁴ When Billy asks the Burnells to drop their suit and tells them he will pay for Nichole's expenses, Sarat calls it a "classic confrontation between good and evil, between fidelity and greed."¹⁵

As for Nichole Burnell, Sarat concedes that her assertion that Dolores was speeding was indeed a lie. Yet he insists that it was also an "act of love," because she "saves Billy from the law he so deeply dreads" and by doing so "she asserts the priority of ethics over duty."¹⁶

This theme of a sense of community being threatened by civil law is reiterated by other commentators. Naomi Mezey and Mark C. Niles refer to the source of Billy Ansel's disgust as being "The gap between what the law can provide in the form of compensation or comfort and

¹¹ *Id.* at 443.

¹² *Id.*

¹³ *Id.* at 445.

¹⁴ *Id.* at 446.

¹⁵ *Id.* at 448.

¹⁶ *Id.* at 449.

what a united community can provide.”¹⁷ Tony McAdams states that “[A] crusade to assign blame [which forms] the core of Western jurisprudence, is precisely the determination the people of Sam Dent do not need.”¹⁸ Jeffrey Abramson describes the movie as a “story about the unraveling of a community in a small town when the outside plaintiff’s lawyer descends upon simple folk and overrides their initial honest reaction that accidents sometimes happen.”¹⁹ Referring to Nichole’s lie that placed the blame squarely on Dolores, Robert Waring insists that “If the film has a hero, it is Nichole [who has] the courage to single-handedly terminate the lawyer’s efforts to secure clients for a negligence case.”²⁰ Not content to merely describe Nichole’s lie as heroic, Carrie Menkel-Meadow ups the ante by describing Nichole’s lying as actually “telling her own truth.”²¹

Richard Weisberg stands out as a commentator willing to criticize the film.²² Reminding us that Atom Egoyan’s movie is based on Russell Banks’ novel of the same name, he flatly states that “The film is quite different from, and simply not as good as, the novel.”²³ He suggests that Egoyan may have been “caught up in the mid-1990’s anti-lawyer atmosphere” that caused him to settle on Mitchell Stephens, Esquire, as the “one villain” in the story.²⁴

¹⁷ Naomi Mezey & Mark C. Niles, *Screening the Law: Ideology and Law in American Popular Culture*, 28 COLUM. J.L. & ARTS 91, 152 (2005).

¹⁸ Tony McAdams, *Law and Film: Blame and THE SWEET HEREAFTER*, 24 LEGAL STUD. FORUM 599, 605 (1999).

¹⁹ Jeffrey Abramson, *The Jury and Popular Culture*, 50 DEPAUL L. REV. 497, 499 (2000).

²⁰ Robert Waring, *Film Commentary*, 24 LEGAL STUD. FORUM 301, 313 (2000).

²¹ Carrie Menkel-Meadow, *Can They Do That? Legal Ethics in Popular Culture: Of Characters and Acts*, 48 UCLA L. REV. 1305, 1328 (2001). For an example of one of the few articles willing to explore the possibility that the lawsuit might actually have been beneficial, see Alexander Scherr & Hillary Farber, *Popular Culture as a Lens on Legal Professionalism*, 55 S.C. L. REV. 351 (2003) (“[I]s it not plausible that the lawsuit may have the effect of preventing future harm? Is this not a means toward ensuring some kind of responsibility, moral or otherwise in our society?”).

²² Richard H. Weisberg, “*The Verdict*” Is In: *The Civic Implications of Civil Trials*, 50 DEPAUL L. REV. 525 (2000).

²³ *Id.* at 532. Weisberg criticizes Sarat for incorrectly maintaining that Egoyan’s film leaves the book’s plot “intact.” *Id.* at n.30. Indeed, Sarat has made this contention in at least two articles. Sarat, *supra* note 4, at 426; Austin Sarat, *Imagining the Law of the Father: Loss, Dread, and Mourning in THE SWEET HEREAFTER*, 34 LAW & SOC’Y REV. 3, 20 (2000).

²⁴ Weisberg, *supra* note 22, at 531, 532.

What is disturbing in so much of the law review commentary is a tendency to see the film in a simplistic, dichotomous way. The lawyer looking to assign blame is the “bad guy” seeking to destroy a community in his attempt to make a fast buck. Billy and Nichole are the “good guys” for stonewalling any attempt to discover if there was any culpability ---- legal or otherwise ---- involved in the bus crash. They wish to preserve the community by simply accepting the children’s deaths and moving on. And for some commentators, “preserving community” even justifies Nichole’s lie that inculpates the innocent bus driver.²⁵

But in the face of such tragedy, is it realistic to expect that a community will simply eschew any attempts to discover if there was human culpability involved in the deaths of its children? Is it possible --- indeed, is it *healthy* ---- for a community to avoid blaming and simply “move on”?

Charles Tilly, a professor of social science at Columbia, has recently addressed these issues in his book *Credit and Blame*.²⁶ Tilly notes that it is a basic human response to look for causes and culpability when tragedy occurs. Tilly writes that “On the whole, victims of visible damage do not settle for ‘Things happen. It was the breaks.’ They look for someone or something to blame.”²⁷ And victims become “indignant if authorities say that no one was to blame.”²⁸ Tilly adds, “Blame occurs in public debate, in courts, and in everyday life. Although the word ‘justice’ alone often calls up a warm glow, justice commonly consists of fixing blame, then of imposing penalties for blame....[W]hen carried out successfully....*blaming brings struggles to an end.*”²⁹

²⁵ See, e.g., Menkel-Meadow, *supra* note 20, at 1328 (Carrie Menkel-Meadow’s characterization of Nichole’s lie as simply Nichole’s way of “telling her own truth.”).

²⁶ TILLY, *supra* note 2.

²⁷ *Id.* at 16.

²⁸ *Id.* at 94.

²⁹ *Id.* at 119 (emphasis added).

Is it odd that some of the parents of the dead children in Sam Dent are trying to fix blame for the deaths through a lawsuit? Indeed, it would be odd if they did not.

There is nothing oxymoronic about a “community” seeking to affix “blame.” Tilly calls blaming a “fundamentally social” act. This is true for two reasons. First, people who live with others are not content to attribute results to luck or fate. They demand that whoever caused the results should take responsibility for them. Second, people are willing to expend great effort to assign responsibility ---- be it blame *or* credit ---- on others in the community.³⁰

When there has been a bad outcome, Tilly says there are three inquiries that are part of the process of assessing blame: agency, responsibility, and competence. Agency refers to proof that the person actually caused the outcome. But beyond simple causation is proof of responsibility, *i.e.*, that the person did not perform the acts accidentally or unwittingly. Finally, the actor must be competent, *i.e.*, capable of deliberate action. We do not “blame” either small children or the mentally disabled for bad results they have directly caused. Thus, we blame agents to the extent they have exercised competent responsibility for the bad outcome.³¹

Tilly summarizes with a striking image: “We should salute just blame’s creative destruction.”³²

So much for “just blame.” But what about the destruction caused by “unjust blame”?

The unsettling part of so many of the law review commentaries is their refusal to consider the effect of Nichole’s lie on Dolores Driscoll, the bus driver. In viewing Nichole’s lie as a “heroic” act to preserve “community” in Sam Dent in the face of the onslaught of the civil law system, the articles overlook the shocking victimization of Dolores. Of course, the reason the

³⁰ *Id.* at 4.

³¹ *Id.* at 12, 15.

³² *Id.* at 119.

commentary ignores Dolores' victimization is that Egoyan's film ignores it.³³ And what is even more troubling about this omission is that it was very much a part of Russell Banks' excellent novel.

III. *THE SWEET HEREAFTER*: THE NOVEL

Russell Banks' novel *The Sweet Hereafter* was published in 1991. Contrary to Austin Sarat's contention that the film leaves the novel's plot "intact"³⁴, the book differs from the film in a very significant way: it explores the effect of Nichole's lie on Dolores Driscoll's life.

The book is organized very differently from the film. It consists of five chapters. The first four chapters present the "testimony" of four narrator-witnesses who each give their views of the bus crash: Dolores Driscoll, Billy Ansel, Mitchell Stephens,³⁵ and Nichole Burnell. It is similar to reading a trial transcript or a deposition. The reader, as a kind of juror, "is thus put upon to sort out the 'real facts' by establishing the chronological order of the events, uncovering the motives of the witnesses, discarding the irrelevancies, and deciding which narrators are finally credible."³⁶ The film picks and chooses from these four chapters, rearranging time, and adding several elements.³⁷

Yet the fifth chapter of the book is not in the film. This final chapter, like the first, is narrated by Dolores Driscoll. But, unlike the film, it deals directly with the effect of Nichole's lie on Dolores' life. Ironically, this chapter is probably the most cinematic in the book and yet was

³³ Indeed, Egoyan has acknowledged that his interest in Nichole's choice led him to essentially ignore the impact of Nichole's lie on Dolores. See *The Charlie Rose Show* (interview with Atom Egoyan, January 9, 1998). The film excludes the last chapter of the novel that deals with precisely this issue.

³⁴ See Waring, *supra* note 20.

³⁵ Significantly, the chapter heading reads "Mitchell Stephens, Esquire".

³⁶ Fried & Frolik, *supra* note 4, at 2.

³⁷ For example, the film has Nichole read "The Pied Piper" to the Ansel children whom she is babysitting. The poem's images resonate through the machinations of Stephens to put together his lawsuit, as well as with Nicole's father's blandishments in leading her into an incestuous relationship. Another addition is a plane trip two years after the bus accident in which Stephens sits next to a childhood friend of his daughter Zoe. This provides the film with an opportunity for Stephens to tell his stories about Zoe that appear in the novel.

not included in the film.³⁸ The entire chapter takes place at the Sam Dent County Fair's Demolition Derby.

The Derby takes place about eight months after the bus crash. Dolores tells us that the school board terminated her shortly after the crash.³⁹ Since that time, she and her husband have stayed away from the Sam Dent community. She describes herself and her husband as having "faced our life toward Lake Placid."⁴⁰ She now drives a hotel van.

For the Driscolls, attending the Demolition Derby is important not only because they attend it every year, but because this year they wish to see if the town has accepted them back as members of the community.

As Dolores pushes Abbott in his wheelchair towards the racetrack, she notices that none of the townspeople will acknowledge them. And unlike previous years, none of the townspeople offer her assistance in moving the wheelchair up the stairs. Suddenly, a drunken Billy Ansel appears with a drunken woman Dolores does not recognize. Billy helps her with the wheelchair and then sits down with them.

The crowd begins cheering when Nichole Burnell arrives, with her father pushing her in her wheelchair. When Billy's girlfriend asks why the crowd is cheering, Billy responds "That kid has saved this town from a hundred lawsuits. She's kept us all out of court, when it looked like half the damned town wanted nothing else but to go to court."⁴¹

When Abbott looks quizzically at Billy, we realize for the first time that he and Dolores do not know anything about Nichole's lie at the deposition. Dolores asks what Nichole said and

³⁸ Interestingly, Egoyan said he did not use the Demolition Derby in the film because he ironically found it too "cinematic" for the movie. Likewise, Banks has said that although he liked the use of the Pied Piper in the film, he could never have used it in the book because he considered the device too "literary." See "Before and After THE SWEET HEREAFTER", a video discussion of the book and film on the DVD of the film (New Line Home Video, N4654, 1998).

³⁹ RUSSELL BANKS, *THE SWEET HEREAFTER* (Harper Perennial Books 1992) (1991).

⁴⁰ *Id.* at 224.

⁴¹ *Id.* at 239 (emphasis in original).

Billy tries to avoid answering. Finally, when he can no longer ignore Dolores, he tells her that Nichole testified that Dolores was driving 72 m.p.h.

Dolores' thoughts are worth quoting at length: “[The townspeople] were learning that Dolores Driscoll, the driver of the school bus, was to blame for the terrible Sam Dent bus accident last January. They were learning that Dolores had been speeding, that she had been driving recklessly, driving the bus in a snowstorm at nearly twenty miles an hour over the limit....Dolores Driscoll was the reason why the bus had gone off the road and tumbled down the embankment and into the icy water-filled sandpit. Dolores Driscoll was the reason why the children of Sam Dent had died.”⁴²

While Dolores is thinking this, she is watching a car she used to own in the Demolition Derby. It is an old Dodge station wagon that Dolores used as her first school “bus” in Sam Dent. She had jokingly named it “Boomer,” and indeed the driver in the Derby had painted the name on the top. Dolores observes that “[E]very time Boomer got hit, no matter who hit it, the crowd roared with sheer pleasure.”⁴³ The car is bashed again and again by the other cars, always to the cheers of the crowd. Yet Boomer refuses to die and is one of the last three cars running. When Boomer appears stuck, the other two cars come at it from either side, with the entire crowd applauding its imminent demise. Yet somehow Boomer moves and the two cars end up ramming each other. Now the crowd is rooting for, not against, Boomer. Boomer finishes off the other cars and wins, to the cheers of the crowd.

Dolores tells us that after Billy told her Nichole's lie she “had come to feel utterly and permanently separated from the town of Sam Dent and all of its people [All of the children on the bus whether living or dead] and I, Dolores Driscoll ---- we were absolutely alone And

⁴² *Id.* at 247.

⁴³ *Id.* at 250.

even if we weren't dead, in an important way which no longer puzzled or frightened me and which I therefore no longer resisted, we were as good as dead."⁴⁴ After this, she and Abbott leave.

IV. THE TRAGEDY OF DOLORES DRISCOLL

It is true that the Demolition Derby scene was in the book and not in the film. But it is nonetheless disturbing that ---- in their rush to condemn Stephens the lawyer ---- so many of the legal commentators who wrote about the film failed to consider the serious damage that Nichole's lie would obviously have caused Dolores. And the reason for this myopia may have been a naïve willingness to dichotomously believe that the alternative to the "name and blame" lawsuit was simply a community that could somehow "come together" and muddle through without any attribution of blame. As Charles Tilly's work shows, that belief is more than naïve ---- it is wrong.

Abbott, Billy, and Nichole wanted to believe that what happened was an accident or, in Judith Shklar's terms, a "misfortune." That is, they wanted to believe the bus crash was simply caused by some external force of nature and was not the product of some ill-intentioned human agent.⁴⁵ If this is true, there would be no need for divisive litigation.

Mitchell Stephens, on the other hand, wanted to believe that the crash was an injustice, rather than a misfortune. That is, he hoped to prove that there was some human or corporate culpability that resulted in the deaths of the children. And let us be clear: Stephens' reasons for wanting to believe this are purely self-serving and in his financial benefit.

Who was right?

⁴⁴ *Id.* at 253, 254.

⁴⁵ *See* SHKLAR, *supra* note 1.

We will never know for sure. Nichole's lie derailed any financial incentive for ferreting out culpability for the accident.

Note the irony. Stephens' reasons for not wanting to blame Dolores Driscoll are purely litigation-related. In the novel, Stephens says "I damn sure did not want to go after Dolores Driscoll.... Never mind that her pockets weren't an inch deep; she was well-liked.... Worse, the parents viewed her as having been victimized....and a jury would agree with them."⁴⁶ Regardless of the purity of his motives, Stephens had no intention of blaming Dolores.

Who is responsible for falsely blaming Dolores? The "heroic" Nichole, who by "telling her own truth" ostracizes Dolores from the community.

But how much can we really "blame" Nichole for what she did to Dolores? Recall Charles Tilly's test for blame in which he says that when faced with a bad outcome we must consider not only agency and responsibility, but competence. The last word that Mitchell Stephens says to Nichole ---- in both the novel and the film ---- after she has lied at the deposition is crucial: "You'd make a great poker player, *kid*."⁴⁷ And Nichole, after all, is just a "kid"; moreover, she is a child who had experienced serious sexual abuse. It could certainly be argued that her lack of "competence" would militate against placing formal "blame" on her. Yet ---- as Stephens undoubtedly realized ---- when she is no longer a "kid" she will nevertheless have to come to grips with the enormous injury her lie caused Dolores.

And how about Billy Ansel? Sarat characterizes Billy's urging the Burnells to drop the lawsuit as a "classic confrontation between good and evil, between fidelity and greed."⁴⁸ Billy is adamant in both the novel and the film that he does not want to testify. The legal commentators attribute this solely to his attempts to preserve a spirit of community in Sam Dent. Billy

⁴⁶ BANKS, *supra* note 39, at 129.

⁴⁷ *Id.* at 215 (emphasis added).

⁴⁸ SARAT, *supra* note 5, at 448.

apparently believes this so strongly that he is willing to forego learning if the crash that killed his children was caused by a negligent human or corporate agent. He even offers to pay for Nichole's hospital bills if the Burnells drop their suit.

But is Billy's civic spirit really the only conceivable reason he did not want to testify?

Consider this. If Billy had had to testify concerning Dolores' speed, the defense lawyers would certainly have explored just how carefully he was observing the bus. In both the film and the novel, Billy is talking on his cell phone to his married lover Risa Walker while he is following the school bus in his car. Billy ---- although apparently not the legal commentators ---- would have realized that the defense attorneys would have wanted to know if he had been distracted in some way while he was driving. A check of his cell phone records would indicate that he was not only on the phone at the time, but that he was talking to a married woman. Isn't it remotely possible that Billy's adamant opposition to anyone in town bringing a lawsuit may have had more to do with protecting his married lover than with preserving Sam Dent's sense of community?⁴⁹

Did Billy "cause" Dolores' ostracism? True, he never lied about her speed. And he did not know that Nichole was listening to his conversation with the Burnells. But his anti-lawsuit comments may very well have influenced Nichole's decision to smear Dolores.

And there is more. When Dolores in the novel tells us about Billy's informing her of Nichole's lie, Billy says:

"The girl has done us all, every single person in town, a valuable service. Even you, Abbott. Even you, Dolores, believe it or not."

⁴⁹ And Billy understood the consequences. The lawsuit ---- and his testimony ---- would be a way to conclusively exonerate Dolores Driscoll. Without the lawsuit, the community would not "come together"; it would continue to blame Dolores. As Billy admits in the novel, "Was it [the crash] Dolores's fault? A lot of people thought so." BANKS, *supra* note 39, at 73.

Abbott said "Why us?" Billy looked like he understood him fine, so I didn't translate. What he did, though, was stammer a bit and then say something to the effect that what was good for the town was good for everyone in it⁵⁰

It seems inhuman that Billy could so cavalierly justify the ostracism ---- the civic death sentence ---- that Nichole's lie caused Dolores by simply pointing out that it was good for the town.

This observation by Charles Tilly has particular relevance to Billy Ansel: "[A]ssignment of blame also involves relations to other people....[U]tilitarians may imagine worlds in which relations to specific other humans don't matter so long as accounts come out right with the cosmos, with the gods, or with humanity at large. [If so,] [t]hey are rejecting their own humanity."⁵¹

But perhaps the saddest irony concerns Abbott Driscoll. He convinced his wife Dolores not to join Stephens' lawsuit because he thought that only the people who had known her all her life ---- and not a jury of twelve strangers ---- were capable of deciding her guilt or innocence.

Yet if Dolores had joined Stephens' lawsuit, her innocence would have been established. But, ironically, it was the people who knew her all her life who ---- based on a lie ---- sentenced her to civic death. Abbott had every reason to feel betrayed by the community; Dolores had every reason to feel as if she were "as good as dead."

Dolores Driscoll did not deserve the community's blame. But the community "killed" her anyway. The blame for a perceived injustice had to go somewhere; Dolores was available. And turning Dolores into a scapegoat functioned as a catharsis for the Sam Dent community.

⁵⁰ *Id.* at 244.

⁵¹ TILLY, *supra* note 2, at 3. And in the novel Dolores makes this observation about Billy at the Demolition Derby: "[W]hat frightened and saddened me most about him was that he no longer loved anybody. All the man had was himself. And you can't love only yourself." BANKS, *supra* note 39, at 237.

Dolores' story has eerie overtones of the story of another woman killed by her community. Her name was Tessie Hutchinson. She lived in a town where once a year a drawing was held to determine who would be stoned to death by the victim's neighbors. In Shirley Jackson's short story *The Lottery*, Tessie Hutchinson's name was drawn.⁵² The ritual killing of one citizen a year appeared to be a way for the community to purge itself of its collective anger and blame.

The weakness of the Egoyan film lies in not squarely facing the effect of Nichole's lie on Dolores. Her lie had two effects. First, of course, it unfairly placed all the blame for the children's deaths on Dolores. But equally important, by eliminating any possibility of a lawsuit, the lie destroyed any chance for Dolores to ever prove to her neighbors that she was indeed innocent. Nichole obtained revenge against her greedy father; Billy got his wish not to testify; his married lover remained a secret; and Dolores unfairly became the object of the town's hatred.

In the rush to celebrate how wonderful it was for the community to have Mitchell Stephens leave, the film ---- and its law review champions ---- are strangely silent about how the Sam Dent community actually did "heal": by killing Dolores Driscoll with their blame just as surely as another town killed Tessie Hutchinson with their stones.

V. CONCLUSION

On its surface, the film *The Sweet Hereafter* celebrates Nichole's (and the town's) victory over litigious lawyers and incestuous fathers. And it is the film, rather than the novel, that has attracted most attention ---- and praise ---- in the law reviews. Yet Russell Banks' novel takes a far more nuanced approach to the destructive effects of Nichole's lie.

This Essay is not a celebration of litigation *per se*. Litigation can be expensive, divisive, and acrimonious. But when "bad things happen to good people," there is a very human tendency

⁵² SHIRLEY JACKSON, *The Lottery*, in *THE GRANTA BOOK OF THE AMERICAN SHORT STORY* 62 (Richard Ford ed., 1992).

to try to assess blame. At its best, the litigation process may work to convince the victims that what occurred was simply a misfortune with no one to blame. Yet the process may also uncover culpable people or entities that deserve society's blame.

And as difficult as this process can be, it is wrong to discourage it. As Charles Tilly has written, “[B]laming brings struggles to an end. We should salute just blame’s creative destruction.”⁵³

When a tragedy occurs, we can be sure of one thing ---- *there will be blame*. The litigation process can either dissipate it or properly direct it. But when the legal process gets derailed, as in *The Sweet Hereafter*, the danger is that the blame will get placed on the blameless. For at the end of the day, *The Sweet Hereafter* is not about Mitchell Stephens’ defeat or Nichole Burnell’s revenge. It is about Dolores Driscoll’s final realization that, once her community mistakenly directed its blame at her, she was “as good as dead.”⁵⁴

⁵³ TILLY, *supra* note 2, at 119.

⁵⁴ BANKS, *supra* note 39, at 254.