TORT LAW AND POWER: A POLICY-ORIENTED ANALYSIS

Richard S. Miller*

"[I]t is the greatest symbol of our democracy that the little person can take on the rich and powerful, and win."[1]

I. INTRODUCTION

The forty years since I was privileged to attend Tom Lambert's Torts class have not dimmed the memory of lessons learned. The very first time I heard Tom speak was at a convocation at the beginning of the school year. I recollect a story about a small injured bird in the hands of a small boy; the lesson was that the bird's life, a symbol for what is good, was in the boy's hands, just as the future was in our hands.

It became evident, as the weeks passed, that Tom Lambert was an extraordinary teacher and lecturer—a master of the English language—and that his obsession, probably annealed by his experience as a prosecutor in the Nuremberg trials, was justice. Justice, in Tom's view, did not seem to be just an abstract idea, but an ideal that became very evident in concrete situations, often illustrated as only he could by live instances of injustice. The most important example, I think, was not in a torts class at all but at an open lecture he gave, along with other intrepid members of the Boston University law faculty, in courageous response to a then-raging threat to our Bill of Rights, Joe McCarthy. Lest we had any doubts, Tom left us with a strengthened conviction that what McCarthy was doing was unfair, unjust, unAmerican, in violation of the Constitution, and just plain dirty and wrong.

An example that leaps to my mind from Tom's Torts class, however, relates to recovery for negligently caused mental distress. I can recall with clarity the disdain heaped by Tom upon opinions that failed to recognize, in defiance of contemporary understanding, that emotional injury could be as serious as physical injury, that negligently inflicted mental injury deserved redress, and that irrelevant distinctions—whether one suffered a meaningless impact or not, or feared for one's own safety or for the safety of a loved one—ought not to lead to differences in outcome. Justice required that the negligently harmed victim be compensated.

Thus, I was lucky to have a front-row seat to the torts revolution,

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* Professor of Law, The William S. Richardson School of Law, University of Hawaii.

1. H. Lee Sarokin, U.S. District Judge (D.N.J.), *A Comment on Geoffrey Hazard's* Authority in the Dock, 69 B.U. L. REV. 477, 479 (1989).

whose generals, as varied in temperament and style as Civil War generals, included Roger Traynor in the courts, Fleming James and Tom Lambert in the halls of education, and Melvin Belli and F. Lee Bailey among the bar.

Now, however, the hard-fought justice that was wrenched from the courts over the last thirty to forty years by the power of reason and conceptions of fairness is much under attack.[2] Indeed, the view that tort law serves corrective justice has all but been rejected as an important consideration by the authors of a major study by the American Law Institute.[3] The remaining major theory that tends to support the tort system, economic efficiency and deterrence is itself cast into doubt by critics.[4] Indeed, one could get the impression, if one reads the recent scholarly literature on torts, that precious little by way of reason and philosophy supports the tort system.

Of course, there have been critics (other than Tom Lambert) of the critics, and the last word has not been said on the ability of the tort system to produce justice and deterrence.[5] I, however, suggest that there are other important goals served, or at least affected, by tort law that have not been given adequate attention; that not nearly enough has been done to examine and compare, with competing systems, the effects of the tort system on important values and on important value processes.[6] The assumption that the Law and Economics approach, along with the maximization postulate—the notion that people always act to maximize their values—adequately takes into account all important values seems subject to considerable doubt. To be more specific, merely evaluating primary, secondary, and tertiary accident costs and the law's effects in reducing such

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2. *See generally* PETER W. HUBER, LIABILITY: THE LEGAL REVOLUTION AND ITS CONSEQUENCES (1988); STEPHEN D. SUGARMAN, DOING AWAY WITH PERSONAL INJURY LAW: NEW COMPENSATION MECHANISMS FOR VICTIMS, CONSUMERS, AND BUSINESS (1989).

3. I A.L.I. REPORTERS' STUDY, ENTERPRISE RESPONSIBILITY FOR PERSONAL INJURY 24-27, 441-42 (1991) [hereinafter ENTERPRISE RESPONSIBILITY]. The authors state: "With respect to corrective justice, the tort system appears to perform reasonably well in the automobile accident context, but much less well with respect to medically caused injuries and environmentally related injuries. The corrective justice appraisal of product-related litigation is unclear." *Id.* at 441-42; *see* Gary T. Schwartz, *The A.L.I. Reporters' Study, in International Workshop, Beyond Compensation: Dealing with Accidents in the 21st Century*, 15 U. HAW. L. REV. 529, 538-39 (1993) (discussing various tort law rationales) [hereinafter *Beyond Compensation*].

4. *See generally* John A. Siliciano, *Corporate Behavior and the Social Efficiency of Tort Law*, 85 MICH. L. REV. 1820 (1987) (discussing theoretical versus realistic interpretations of tort system).

5. *See generally* Kenneth J. Chesebro, *Galileo's Retort: Peter Huber's Junk Scholarship*, 42 AM. U. L. REV. 1637 (1993) (reviewing and criticizing Peter W. Huber's GALILEO'S REVENGE: JUNK SCIENCE IN THE COURTROOM); Joseph A. Page, *Deforming Tort Reform*, 78 GEO. L.J. 649 (1990) (reviewing PETER W. HUBER, LIABILITY: THE LEGAL REVOLUTION AND ITS CONSEQUENCES (1988)); Jerry J. Phillips, *To Be or Not To Be: Reflections on Changing Our Tort System*, 46 MD. L. REV. 55 (1986) (discussing impact of tort system on field of insurance law).

6. *See generally* Richard S. Miller, *Revising the Torts Course*, 21 U. MIAMI L. REV. 558 (1967) (expressing author's early views about policy analysis of tort law).

costs does not seem to take adequately into account tort law's impact, both positive and negative, on values other than well-being and wealth.

It should be possible, however, systematically to examine tort law's effects on other values and value processes.[7] It has been suggested, for example, that tort law may serve to educate or enlighten[8] with regard to how people in society should conduct themselves and as to what risks of injury they should avoid. A study of the educative effect of tort law, therefore, would seem to be a promising venture. In like manner, important questions about the impact of tort law on other values, such as skill, affection, and respect might also be raised.

In this essay, however, I will discuss the effects of the tort law system—more specifically the tort law applicable to accidents—on power. Like other values, power may be sought for its own sake or, more relevant to the theme here, as a means of achieving other important values. Because of the potential dimension and complexity of this inquiry, however, the reader will understand why this particular effort will only be preliminary and tentative, and why I make no claim to exhaust the subject. In conducting this study, appreciation must be given to the seminal work of Professors Harold Lasswell and Myres McDougal,[9] who, like Tom Lambert, played an important role in my education as a lawyer and law teacher.

II. DEFINING POWER IN THE TORTS CONTEXT

The currently popular notion of "empowerment" captures, in a rough way, the concept of power that I will advance here.[10] More precision is needed, however. What is power? What kinds of power may be affected by tort law and how?

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7. *See generally* Richard S. Miller, *An Analysis and Critique of the 1992 Changes to New Zealand Accident Compensation Scheme, in Symposium: Future Prospects for Compensation Systems*, 52 MD. L. REV. 1070 (1993) (examining effect of New Zealand's accident compensation system on various values).

8. Charles Nesson, *The Evidence or the Event? On Judicial Proof and the Acceptability of Verdicts*, 98 HARV. L. REV. 1357, 1359 (1985).

9. 1 HAROLD D. LASSWELL & MYRES S. MCDOUGAL, JURISPRUDENCE FOR A FREE SOCIETY: STUDIES IN LAW, SCIENCE AND POLICY (1992).

10. By way of example, abolishing interspousal immunity may have empowered battered spouses against their abusive spouses, at least those with independent assets, by giving them leverage for a better property settlement in a no-fault divorce, by permitting them to bring a tort action against their spouse, and, hopefully, by deterring the abuse. The empowerment engendered by eliminating interspousal immunity was a significant factor, I believe, in the relatively recent repeal of Hawaii's interspousal tort immunity rule. *See* HAW. REV. STAT. § 572-28 (1994); *see generally* Richard S. Miller, *The Abolition of Interspousal Immunity—A Study* 128 (1991) (unpublished, available University of Hawaii School of Law Library).

A. *Power as the Ability to Affect Decisions*

For the purposes of this discussion, it is useful to think of power as the ability to make or to affect decisions,[11] both formal and informal and official and unofficial.[12] Thus, the broad question asks to what extent tort law enables accident victims to make or affect decisions significant to their own values or the values of others.[13]

With regard to personal injury tort law in general, the immediate goal of the exercise of decisional power is to recover compensation for an accident victim. A secondary goal may be to secure the adoption of law and policy that favors compensation and deterrence. The actual effects may be much broader, and on many other values.

B. *Decision-Making Functions of Power*[14]

While it is customary to think of formal power in terms of the institution that exercises it, such as judicial power, legislative power, administrative power, or executive power, these distinctions are not very useful in identifying the specific forms or functions of power that tort law may produce or affect. Rather, it will be far more illuminating to recognize that there are several different power *functions*[15] and then to ask which of these, if any, become accessible to victims of value deprivations, such as accident victims, by virtue of tort law.[16] The following is a description of these functions, along with some examples:

The Prescribing Function—This function describes the making of law and policy. While we most often think of legislatures as the bodies spe-

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11. *See* LASSWELL & MCDOUGAL, *supra* note 9, at 399-452 (discussing concept of power).

12. When we talk about power in relation to tort law and decisional functions, we are referring to decisional processes that are usually *lawful*—those that are both authoritative and controlling. *See* LASSWELL & MCDOUGAL, *supra* note 9, at 399-400 (introducing concept of power).

13. Lasswell and McDougal have identified principal values—things that people seek, including power, enlightenment, wealth, well-being, skill, affection, respect, and rectitude. LASSWELL & MCDOUGAL, *supra* note 9, at 375-556. When a value is sought for its own sake, it is called a *scope* value. When it is employed as a means of acquiring other values, it is a *base* value. LASSWELL & MCDOUGAL, *supra* note 9, at 340. Obviously, power may be sought for its own sake and as a means of acquiring other values.

In the interspousal tort immunity example, the question would be whether the abused spouse's ability to bring a tort action against her spouse might affect decisions of a court, the abusing spouse's insurer, the abusing spouse, or the entire class of potentially abusing spouses. This might affect her own and others' values, such as well-being, wealth, respect or rectitude. *See supra* note 10 (discussing interspousal tort immunity).

14. *See generally* LASSWELL & MCDOUGAL, *supra* note 9, at 161-67 (discussing intelligence, promotion, prescription, invocation, application, termination, and appraisal as functions of authority).

15. *See* LASSWELL & MCDOUGAL, *supra* note 9, at 29 (explaining breakdown of authority functions).

16. *See* LASSWELL & MCDOUGAL, *supra* note 9, at 399-400 (discussing power outcome).

cialized to the prescribing function, in the tort law context this function may also be seen in a case where a litigant seeks to create a new precedent that favors, or for that matter disfavors, recovery of damages for a particular tort. That is, convincing an appellate court to recognize a new tort or a new tort rule involves the exercise of power in relation to the prescribing function. In this case, however, the appellate court, not the litigant, is doing the prescribing (the law making).

The Intelligence Function—We have all heard the aphorism, "knowledge is power." In the tort context, knowledge is all important. The ability to gather information, especially from an unwilling adversary, is at the heart of pretrial discovery, and is often essential to the success of the claim. Whoever disseminates information to a decisionmaker, such as a trial or appellate court or legislative body, is wielding a form of power, and whoever deprives an adversary of information that might help to influence a decision or who prevents an adversary from bringing information to a decisionmaker is exercising power.

The Promoting or Recommending Function—Who has the decisionmaker's ear? Those who have the ability to have their recommendations delivered to and considered by a decisionmaker involved in making law or policy (prescribing) are exercising the promoting function. Once the decisionmaker, whether an arbitrator, trial court, jury, appellate court, or legislative committee, refuses (or simply fails) to listen, the counsel has lost the ability to promote (or recommend) the application or making of law and policy.[17]

The Invoking Function—This is probably the most important power function provided to individuals by tort law. It is the ability to set a decisional process in motion. Whoever has that ability has an important form of power. In the criminal law context it will normally be an act by the police, a prosecuting attorney, or a grand jury that may lead to the application of the criminal law to particular conduct. In the tort process, however, it is the individual who claims to have suffered a deprivation, or more specifically, her lawyer, who ordinarily starts the process of claim, and possibly the judicial process, in motion.[18]

The Applying Function—This is, perhaps, the power function we most

17. I recall observing an appellate argument in Michigan many years ago where the judges became so unhappy with the argument of the attorney presenting oral argument that one turned her swivel chair around so that her back was toward the attorney and most of the remaining judges left their seats and walked out of the courtroom. This was a graphic example of an attorney being denied the opportunity to further pursue the promoting or recommending function on behalf of his client.

18. For clarity, the performance of the invoking function in tort may be contrasted with the performance of the invoking function in some administrative proceedings, such as NLRA and OSHA proceedings. In those cases, it is usually a labor union official and an OSHA inspector, respectively, who hold the power to invoke, rather than the affected individual employee.

often think of in relation to the judiciary. It involves the actual application of law and policy to a particular situation and the rendering of or the refusal to render a sanction, such as a judgment for damages, a fine, or a prison sentence. Normally, of course, we think of courts, particularly trial courts, as being specialized to the performance of the applying function; that is the power function that they are exercising when they decide cases. It should be noted, however, because roughly ninety-five percent of all civil cases are settled, that in those cases the application function is performed by the person or entity that finally decides to approve or reject the demand of an accident victim, ostensibly the defendant's lawyer or a claims adjuster. Furthermore, alternative dispute resolution methods, particularly arbitration, are often used to resolve tort claims. Obviously, however, the availability of a court to apply the law to particular facts and the development of law by appellate courts drives the settlement or ADR process.

The Appraising Function—Who evaluates the efficacy of existing law and policy? Normally we think of committees of the legislature or law revision commissions as the formal appraisers. Appellate courts, however, are notorious appraisers of existing law, and lawyers and scholars who write journal articles and books and private interest groups who evaluate and criticize existing law are also engaged in exercising the form of power known as the appraising function.

The Terminating Function—This function represents the converse of the prescribing function: putting an end to an existing law or policy. Of course, repealing a law does involve the exercise of policy-making, but it may be useful for purposes of discussion to distinguish the making of new law and policy, prescribing, from the repeal or rejection of existing law and policy, terminating. Again, we think of legislatures as the primary terminators or repealers, but we know that appellate courts also exercise that function. It is also important to recognize that unofficial but important decisionmakers, such as liability insurance companies, may also make decisions that effectively terminate existing legal policies.

It is worth noting that these decision functions are necessarily interrelated. The ability to *promote* or to *recommend* plaintiff-favorable law and policy to an appellate court, for example, may depend on the plaintiff's ability to gather necessary information (*intelligence*) and to *invoke* the process of claim (to bring suit) that will lead to a trial court's *application* of law to the facts of the case and only then to an appeal in which law and policy are to be *prescribed* or *terminated.*

Having identified the relevant power functions, the critical question is how, and to what extent, tort law creates opportunities for various actors, principally victims of accidents, injuries to property, defamation and other torts, to involve themselves in or meaningfully to affect these decision

functions. For the purposes of brevity, however, the discussion here is limited to participation in decision-making by victims of accidents.

Before addressing that question, however, it is necessary to describe some guidelines by which to determine whether a particular involvement or effect is to be viewed as positive or negative from a public policy perspective. It is thus necessary to clarify our policies as to the extent that we believe it appropriate for relevant actors, such as those who claim to be victims of tort, to play a role in the exercise of the power functions.[19]

III. CLARIFICATION OF POLICY WITH REGARD TO POWER IN THE TORTS CONTEXT

Wide sharing of lawful power among all citizens is seen as a *sine qua non* for human dignity in general, and, more specifically, as a condition of a democratic society.[20] With regard to the conventional organs of power, granting the right to vote for the executive, the legislature, and in some states, the judiciary, is seen as the principal effective way to share power among all citizens. Nevertheless, there are situations where the right to vote may not be sufficient. These situations exist where decisions involving an individual's rights are being considered, or where public policy is being made by bodies to which elected representatives do not have automatic access.

To be more specific, the right to vote coupled, perhaps, with the right to appear and testify before the legislature is a basic requirement of the democratic values of human dignity. But where an appellate court is seized with an opportunity to make law or policy, as they often are, and especially where an individual's rights and duties under the law are in question, the right to have voted for those who are appointed to a judicial or administrative tribunal does not suffice. In those situations, greater access to the decision-making arena is required to ensure fairness to the individual and perhaps to the group, such as accident victims, to which the individual belongs. With regard to fairness to the individual in specific cases, the federal and state constitutions of course provide for due process rights, including rights to exercise forms of power within the tribunal charged with the decision. On the other hand, notwithstanding permission occasionally granted to groups seeking to file amicus briefs, there are usually no express rights of particular non-party individuals or groups to intervene in appellate court proceedings or to participate in policy making

19. LASSWELL & MCDOUGAL, *supra* note 9, at 36. Other tasks elemental to effective policy analysis include describing past trends in decision, analyzing conditions that affect decision, projecting future trends, and inventing and evaluating policy alternatives. 1 LASSWELL & MCDOUGAL, *supra* note 9, at 36-38.

20. *See generally* Lasswell & McDougal, *supra* note 9, at 737-45.

(the promotion and intelligence functions). Furthermore, there is no obligation on the government to furnish counsel to individuals, such as accident victims or alleged accident causers, who seek to prosecute or defend a civil claim based on law or policy.

It is suggested, however, that a policy based on human dignity and democratic values should seek to provide wide opportunities for accident victims, and those who represent them, to participate in the performance of decisional functions, as described above, where their important values are or may be affected.

Turning this rather abstract statement of preferred policy into concrete terms under today's conditions is not very difficult: In contemporary society, the individual is often overwhelmed by the size, wealth, and power of impersonal organizations, both in the private and public sectors.[21] Of particular, although not exclusive, concern are huge private corporations, often multinational in character, which may owe no particular allegiance to any nation-state or to any sub-grouping of individuals except perhaps to their own shareholders. In the accident context, those organizations are not limited to those who make products or conduct activities that may cause injuries to others, but also include those that provide insurance or reinsurance protection to those who make such products or conduct such activities. Such organizations, because of their enormous wealth—and sometimes because of their ability to avoid accountability by seeking protection from friendly or sympathetic governments—can bring to bear enormous power to influence the making and application of law and policy that favor their preferences. Both the current popular movement in the United States for lobbying and campaign spending reform and the failure of Congress to achieve such reform are vivid examples of the extraordinary power of such entities to influence decision-making that relates to the making of law and policy affecting them.

A preferred policy, therefore, is simply to provide accident victims—those individuals who have already become victims and the generic group of future accident victims—with countervailing decisional power sufficient to ensure fair and adequate consideration of their claims for compensation and for accident prevention and mitigation by those powerful and wealthy actors who cause accidents and their insurers.[22]

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21. *See generally* CORPORATIONS AND SOCIETY: POWER AND RESPONSIBILITY (Warren J. Samuels & Arthur S. Miller eds., 1987); Leslie Bender, *Feminist (Re)Torts: Thoughts on the Liability Crisis, Mass Torts, Power, and Responsibilities*, 1990 DUKE L.J. 848 (1990) (discussing ailments and advantages of tort system); Allen Linden, *Tort Law as Ombudsman*, 51 CANADIAN B. REV. 155 (1973) (analyzing effects of tort law on society).

22. The authors of the A.L.I.'s study refer to "[t]he populist goal of tort litigation . . . to empower the private citizen to act as an effective one-person lobby against . . . abuses [of corporate power]." ENTERPRISE RESPONSIBILITY, *supra* note 3, at 26. With regard to accident law, this draws the goal too

A situation of a somewhat different order, however, has been identified by many outspoken critics of the American tort system. They argue that accident law, particularly the law of products liability, provides too much power in the hands of accident victims to stifle useful and important activities, such as developing useful new drugs. Such overdeterrence, they argue, has adverse effects on many values, but particularly wealth and well-being. It should be noted that such overdeterrence, if it exists, may be caused as much by existing law and policy, including damage rules, permissible causes of action, and limited defenses, as by excessive decisional power in the hands of accident victims. The concern here, however, is an examination of decisional power. Thus, whether trial lawyers as a group wield excessive recommending power to dictate accident tort law and policy is relevant; whether a particular rule goes too far in favoring accident victims is not relevant unless it can be shown to be a product of excessive power to affect decisions.

Another preferred policy, then, is to ensure that decisional power in the hands of accident victims—while adequate to protect their interests—is sufficiently balanced to avoid excessive and adverse effects on other important values. If these attempts at policy clarification seem somewhat vague and indeterminate, the antidote is to continue to clarify the preferred policy goals as particular power functions and particular situations are examined.

It is appropriate now to examine each of the decision functions described above to analyze the extent to which these goals are currently being achieved or might be refined.

IV. TRENDS OF DECISION AND DECISION-MAKING FUNCTIONS

In discussing the access of accident victims or their advocates to the decisional functions, it will be useful to draw comparisons with legal systems other than our own. I will thus draw comparisons to the New Zealand accident compensation system, with which I am reasonably familiar,[23] to the Japanese civil law system, with which I have limited familiarity,[24] and occasionally to the English tort law system, about which I am largely dependent on the wisdom of others.[25] Before addressing each

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narrowly. The purpose is to furnish the accident victim with sufficient power to gain redress against the powerful entity that caused the injury and to participate in decisional processes that will deter such accidents in the future.

23. *See generally* Miller, *supra* note 7; Richard S. Miller, *The Future of New Zealand's Accident Compensation Scheme*, 11 U. HAW. L. REV. 1 (1989); Schwartz, *supra* note 3.

24. *See generally* Richard S. Miller, *Apples vs. Persimmons—Let's Stop Drawing Inappropriate Comparisons Between the Legal Professions in Japan and the United States*, 17 VICTORIA U. WELLINGTON L. REV. 201 (1987).

25. *See generally* John F. Vargo, *The American Rule on Attorney Fee Allocation: The Injured*

of the seven decisional functions, however, a preliminary matter of critical importance that is very relevant to each of them deserves discussion: the availability of counsel.

A. The Availability of Counsel

Because individual accident victims seldom possess the skills of advocacy and argument necessary to be effective either in pressing their claims for individual redress or in seeking changes in law and policy more favorable to their cause, access to or the existence of professional advocates is likely to be a critical factor in determining the extent to which victims possess or exercise decisional power. This question applies to all of the seven decisional functions discussed above.

In the United States, of course, the legality of the contingent-fee arrangement has been the single most important factor in ensuring that victims of serious accidents will be able to exercise decisional power effectively.[26] Plaintiffs' counsel, by reason of their effectiveness and the wealth they, or their organizations, have accumulated, represent their existing and future clients in virtually all phases of tort law decision-making.[27] For example, their ability as a group, until recently, to forestall congressional efforts to place restrictions on products liability and medical malpractice is widely recognized.[28] Not only do plaintiffs' counsel engage successfully in promoting their views of law and policy in Congress, but, at least until this year, they have been very effective in preventing plaintiff-favorable state law and policy from being terminated.[29] Through their lobbying, they have thus engaged effectively in the intelligence function and promoting functions as they relate to prescribing and terminating.[30] Their primary function is to represent victims in particular cases, and here, too, they are generally effective in invoking (initiating cases), promoting or recommending their clients' positions, and in providing client-favorable intelligence to the decisionmakers, be they arbitrators, courts, or insur-

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Person's Access to Justice, 42 AM. U. L. REV. 1567 (1993).

26. *See generally id.*

27. An example of such an organization is the Association of Trial Lawyers of America.

28. *See* Joan Biskupic, *To Discourage Lawsuits, House GOP Would Preempt State Laws*, WASH. POST, Dec. 15, 1994, § 1, at A25 (reviewing "Common Sense Legal Reform Act"); Peter Passell, McGovern vs. Nader, *by Mail, on Changing Civil Justice System*, N.Y. TIMES, Dec. 16, 1994, at 21 (discussing current issues concerning tort reform).

29. In 1994, the General Aviation Revitalization Act, 49 U.S.C § 40101 (1994), was passed. This was the first piece of federal legislation to impose limits on product liability suits. Ruth Gastel, *The Liability System*, INS. INFO. INST. REPS. (Nov. 1994).

30. While plaintiffs' counsel participate in the same decisional functions at the state level, they have had considerably less success in preventing, prescribing, or terminating outcomes that restrict or limit victims' tort rights. *See generally id.*; *Regulatory and Legal Developments; Tort Reform*, DER (BNA) No. 123, at A-2 (June 29, 1987).

ers.[31]

When one considers that future accident victims, who are happily not personally identifiable in advance of the event, cannot themselves organize to lobby for favorable law and policy, and that there are few organizations that represent accident victims or their interests,[32] the extent that victims exercise power through associations of plaintiffs' lawyers is impressive indeed.

Whether victims' power is excessive is another question: Their access to decisional *fori* has been almost unhampered, but it is clear that their success with regard to federal law[33] has not necessarily been matched with regard to state law, where "tort reform" has been progressing apace.[34] This fact, taken together with the combined resources of those organizations that seek to control or limit tort law, suggests, at least on preliminary view, that the power exercised by plaintiffs' tort lawyers in aid of victims' interests is probably not excessive or out of balance.[35]

Notwithstanding the favorable power position of tort victims achieved through legal representation based on the contingent fee, there are still some areas of considerable weakness, especially with regard to the application of law and policy to particular cases. Thus, for example, the costs of litigation prevent victims of medical malpractice who suffer relatively "minor" injury—such as damages worth less than $100,000—from retaining attorneys on a contingent-fee basis,[36] and the amount the system provides for such injuries makes it uneconomical for even an adventurous victim to pay an attorney to represent him or her on an hourly basis.[37] Further, not only are there few agencies, even legal aid societies, willing to accept such cases, but also, the one device that often provides holders of small claims access to decisional power, the class action, is ordinarily unavailable, for obvious reasons, to victims of medical malpractice. It is thus virtually impossible for such victims to invoke the process of claim to

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31. Having access to decision-making arenas, however, does not guarantee success. Indeed, the trend of trial outcomes seems to significantly favor defendants over claimants. *See generally* DEBORAH R. HENSLER ET AL., TRENDS IN TORT LITIGATION, THE STORY BEHIND THE STATISTICS (discussing trend of trial court decisions).

32. Consumers Union and Public Citizen, groups associated with Ralph Nader, are, perhaps, the most influential.

33. That success has not always been unqualified. *See generally* Pacific Mut. Life Ins. Co. v. Haslip, 499 U.S. 1 (1991) (upholding punitive damages as constitutional, but suggesting potential for significant limits).

34. *See supra* note 30 and accompanying text (discussing tort reform).

35. Examples include the American Tort Reform Association, the Defense Research Institute, and the Insurance Information Institute.

36. PAUL C. WEILER ET AL., A MEASURE OF MALPRACTICE: MEDICAL INJURY, MALPRACTICE LITIGATION, AND PATIENT COMPENSATION 159 n.33 (1993).

37. *See* PATRICA M. DANZON, MEDICAL MALPRACTICE: THEORY, EVIDENCE, AND PUBLIC POLICY 196 (1985) (noting expense to plaintiff).

recover tort damages, let alone present evidence or promote a result favorable to them. Furthermore, such is the weakness of their position that there are virtually no advocates standing up for them; even those who urge that a no-fault system replace the tort system for medical malpractice recommend that minor claims be allowed to rest where they fall or be handled by other systems.[38] Such systems may not be adequate to deal even with economic losses suffered by such victims. In short, victims of minor medical malpractice are virtually powerless, in the sense that we have been discussing power.

Another serious problem that has surfaced in the United States with regard to the ability of a tort victim to invoke the process of claim, notwithstanding the contingent-fee system, is the ability of very powerful and wealthy defendants to so burden the court's performance of the applying function with costs as to discourage any legal representation under a contingent-fee. The paradigm case is that of smoker Rose Cipollone, whose law firm, after succeeding, as no other firm had, in winning a favorable verdict in her case against a tobacco company, ultimately dropped her potentially favorable lawsuit and seven other suits against tobacco companies because the pursuit of such actions became excessively expensive.[39] Cases such as these may have the effect of causing lawyers to deny contingent-fee arrangements to victims of alleged torts, especially toxic torts, committed by large and wealthy entities where novel legal theories may be needed or where difficult problems of proof of causation or discovery exist.

It is also possible in the U.S. that impecunious victims of tortious accidents may also find themselves powerless. Large damages, including pain and suffering and emotional distress, are usually built upon large economic losses. Poor accident victims suffer few actual economic losses, however, and may not seek or have access to effective counsel. On the other hand, the generally generous rules of general and punitive damages, the

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38. *Cf.* WEILER ET AL., *supra* note 36, at 101-03 (urging deductible period of at least two months).

39. *See* Alison Frankel, *Another Smoking Victim*, AM. LAW., July/Aug. 1993, at 60 (discussing *Cipollone* case). Frankel states:

> Combating what one Budd Larner partner called 'a strategy of attrition' by the tobacco industry, the firm had laid out more than $500,000 in out-of-pocket expenses (not counting the cost of more than a million photocopies) and another $3.75 million in lawyer and paralegal time. Depositions alone had consumed a total of four years of lawyer hours. After almost ten years Budd Larner was sick of relentless motions, endless depositions, and foot-long lists of expert witnesses. The firm foresaw no returns on its investment in smoker suits—only what one partner later called 'a bottomless pit' of litigation.

Id.; *see also* Henry J. Reske, *Cigarette Suit Dropped—Lawyer for Estate of Rose Cipollone Says Litigation Too Expensive*, A.B.A. J. (Feb. 1993) at 30 (discussing *Cipollone* case). *But see* Gary T. Schwartz, *Tobacco Liability in the Courts*, *in* SMOKING POLICY: LAW, POLITICS, AND CULTURE (Robert L. Rabin & Stephen D. Sugarman eds., 1993) (reviewing smoking litigation).

collateral source rule, the availability of the contingent-fee contract, as well as aggressive attorney advertising in areas with poor people, may in fact ensure that even they can gain adequate representation when they suffer tortious injury. That the tort system is regressive, in that it tends to benefit the wealthy more than it benefits the poor, is true, but it does not follow that the poor do not have access to the processes of invocation and claim when they suffer serious injury.[40]

By contrast with the United States, nations such as Japan, which does not allow a fully contingent fee,[41] and England and New Zealand, which prohibit the contingent fee altogether,[42] tend to leave their citizens who suffer tortious injury relatively powerless to seek redress through the tort process—to invoke tort law and policy—except in limited situations. In Britain, where the accident victim must agree to pay his or her own legal fees and costs and may even have to pay the legal fees and costs of the opposing party if the claim fails, the only people who are likely to have the representation necessary to invoke the tort law are the poor or near-poor who are represented by legal aid, workers who belong to unions willing to finance tort actions for their members, and the wealthy willing to accept the risk to redress a wrong.[43] While the losing party in Japan does not usually have to pay the legal fees and costs of the winner, there is a requirement that a part of the fee, based on a percentage of the amount of the claim, be paid in advance. This (together with court filing fees, which increase with the size of the claim) can be prohibitive if the claim is a large one. Other factors peculiar to the Japanese legal system, especially a shortage of *bengoshi* (trial lawyers), inhibit accident victims from retaining lawyers to invoke and prosecute their tort claims.[44]

In New Zealand, which has substituted no-fault compensation for most aspects of the tort system, those who are injured have virtually no re-

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40. Most unfortunate in the United States, however, is the posture of the accident victim who does not possess a colorable tort claim. As recent attempts to reform the health system suggest, the victims of non-tortious accidents do not benefit from the contingent-fee system, and are without representation for their own claim, legal claim for benefits, or for law and policy changes that might benefit them. They appear, therefore, to be relatively powerless, except for the right to vote for elected officials who are or claim to be proponents of improved insurance or compensation. The examination of power in this situation is beyond the scope of this article. It should be recognized, however, that nations with national health systems, such as New Zealand and Great Britain, and nations with a no-fault accident compensation plan, such as New Zealand, provide greater rights to such accident victims and a process of claim that the victim may invoke, usually without the necessity of counsel.

41. *See generally* Miller, *supra* note 24 (discussing Japanese legal system).

42. *See* R.D. MULHOLLAND, INTRODUCTION TO THE NEW ZEALAND LEGAL SYSTEM 100 (1990) (discussing payment of costs in New Zealand legal system); Vargo, *supra* note 25, at 1578-90 (discussing exceptions to American rule on attorney fee allocation).

43. *See* 1 ROYAL COMMISSION ON CIVIL LIABILITY AND COMPENSATION FOR PERSONAL INJURY 78 (1978) (stating "only 6.5% of accident injuries in England nowadays attract any tort damages").

44. *See* Miller, *supra* note 24, at 202-07 (discussing lack of *bengoshi* in Japan).

course, no ability to invoke a process of tort claim, against their injurers. Product manufacturers, governmental agencies, health care providers, and other wealthy and powerful tortfeasors are, for all practical purposes, immune from personal injury actions.[45] This powerlessness may be assuaged to some extent in the case of an injured worker, because compensation for work loss—eighty percent of lost earnings—is fairly generous. In the case of non-earners, however, who turn out more often than not to be women or young people not in the work force, compensation for lost earning capacity is low or nonexistent and the independence allowance—forty dollars per week for one hundred percent disability, scaled down rapidly for lesser percentages of disability—is pathetically low.[46] They are virtually without power against their injurers,[47] where there might otherwise have been a tort claim, or against their own governmental corporation, which administers the system.[48]

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45. Sadly, injured persons have little ability, because of the relatively high cost of legal representation and the risk of losing and having to pay winners costs, to pursue a no-fault compensation claim if it is rejected by the Government's claims manager. *See* Michele Crawshaw, *ACC Ordeal—Frightening Mum's Needle Horror—After Months of Pain and a Frustrating Battle with Bureaucracy, She Sadly Admits Defeat*, N.Z. WOMAN'S DAY, Oct. 18, 1994, at 15-17 (relating much-publicized case of woman who suffered serious and extremely painful injury). For instance, in one case, where a needle was left imbedded in the plaintiff's vagina during a gynecological operation, she was denied $2,000 payment for the curative operation because she could not secure approval from the Accident Compensation Corporation for the operation until after it had taken place. *Id.*; *see generally* Peter J. Trapski, *Report of the Inquiry Into the Procedures of the Accident Compensation Corporation*, Jan. 30, 1994 (on file with author). More recently, a Complaints Manager, whose duties are to hear and resolve such complaints, has been appointed by the government corporation that manages the accident compensation scheme.

46. Accident Rehabilitation and Compensation Insurance Act, § 54 (1992). For example, those whose disability is 100 percent receive NZ $40 per week, while those with 90-99 percent disability receive only $31 per week. Accident Rehabilitation and Compensation Insurance (Independence Allowance Assessment) Regulations, Second Schedule, Part II (1993).

47. *See generally* Greene v. Matheson, 3 N.Z.L.R. 564 (1989) (discussing case). There, one of several women upon whom a physician experimented without their consent (the physician sought to determine whether cervical cancer would cure itself without treatment), brought suit against the physician for trespass, breach of fiduciary duty, and negligent failure to obtain informed consent. *Id.* The court held that all of these claims arose out of personal injury by accident and could not be the subject of a suit. *Id.* Rather, the court held, the accident compensation scheme provided the appropriate remedy for those who could not show significant earnings losses like most of the indigent women upon whom the physician experimented. *Id.* The scheme had very limited benefits, including medical care and a maximum award ($27,000 in the pre-1992 act) for non-economic losses. Conversely, a lawsuit is permitted to recover only exemplary damages if the defendant's conduct is proved to be sufficiently outrageous. *See generally* Auckland City Council v. Blundell, 1 N.Z.L.R. 734 (1986); Donselaar v. Donselaar, 1 N.Z.L.R. 97 (1982); *The Report of the Committee of Inquiry into Allegations Concerning the Treatment of Cervical Cancer at the National Women's Hospital and into Other Related Matters* (1988) (also known as the *Cartwright Report*).

48. *See supra* note 45 and accompanying text (discussing accident compensation system). An area in the New Zealand accident compensation system most adversely effected by problems of access is that of iatrogenic injuries. *See generally* Miller, *supra* note 7, at 1084-86 (reviewing new compensation scheme as requiring proof of medical negligence).

One way in which New Zealand has sought to counter the sense of powerlessness produced by the accident compensation system—applicable only to the context of medical injuries—is to strengthen the process whereby patients may invoke proceedings seeking disciplinary sanctions against medical professionals. Power in this context may be used to achieve rectitude—an official recognition that a wrong has been done—and perhaps to improve psychic well-being, but unfortunately not to improve physical well-being or to replace lost wealth.

B. Tort Law's Effects on Power with Respect to Each of the Decisional Functions

While recognizing that access to power for accident victims may be heavily dependent on access to legal representation, we may nevertheless find it useful to examine the extent to which tort law succeeds or fails to enhance victims' access to decisional power affecting their interests, legal representation aside.

1. The Prescribing Function

In the United States, it seems clear that tort law provides a vehicle for access by accident victims and those who represent them to proceedings in the most important arenas, legislatures and appellate courts, where tort law and policy are made. Until recent years, the primary arena for development of tort law was the appellate court, and it is clear beyond doubt that the tort law revolution, which undermined traditional limitations on recovery and developed new and sometimes controversial new bases of recovery, took place in the appellate courts.[49] To a significant extent, Congress and the state legislatures have become the new arenas for considering decisions relating to tort law.[50] But here, too, access for tort law victims through their representatives has been widely available. Arguably, the legislative halls have concentrated more heavily on terminating existing tort law and policy than on prescribing,[51] but wide access is nevertheless available to representatives of tort victims.

In New Zealand, by contrast, the accident compensation system has, subject to some recent interesting developments,[52] removed personal inju-

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49. *See* MacPherson v. Buick Motor Co., 217 N.Y. 382, 111 N.E. 1050, 1053 (1916) (providing basis for manufacturer liability); Greenman v. Yuba Power Prods., Inc., 59 Cal. 2d 377, 377 P.2d 897, 27 Cal. Rptr. 697 (1962) (same).

50. *See* WEILER ET AL., *supra* note 36, at 6-10 (discussing legislative responses to malpractice issues).

51. *See generally* WEILER ET AL., *supra* note 36.

52. *See* WEILER ET AL., *supra* note 36, at 29 (noting certain conceptual and pragmatic difficulties resolved through jurisprudence).

ry tort law and policy from the courts. While appellate courts do indeed interpret specific provisions of the Accident Rehabilitation, Compensation and Insurance Act (ARCIA)[53] and thus prescribe law and policy with respect to accident compensation, their involvement as prescribers of policy has generally been much more attenuated than in the American system. In Japan,[54] notwithstanding an active and liberal bar association, the prescribing function in regard to accidents and injuries, including toxic torts, seems to have been left to the vagaries of the Diet, the legislative branch. The Diet, with a few exceptions relating to highly publicized cases of toxic disasters, has until recently done little by way of prescribing beyond the traditional German-style civil code. Whether adoption of a new strict products liability law to conform with that of the European Community will actually open access to claims by accident victims remains to be seen.

2. *The Intelligence Function*

Access by accident victims in the U.S. to the performance of the intelligence function at the level of appellate courts, where they are engaging in prescribing law and policy, seems ample. Counsel are usually able, by Brandeis briefs or otherwise, to bring to the appellate panel information and data that is relevant to issues involving the making of law and policy. Perhaps a serious exception to this free access is being produced by measures taken or that may be taken, particularly in some federal circuits, to deal with an unmanageably heavy caseload of appellate cases.[55] If the size or content of briefs is limited by the court or if oral argument is barred, then the effectiveness of the intelligence (as well as the promotion) function may be called into question. *A fortiori*, the performance of the intelligence function in aid of prescribing law and policy is totally curtailed if non-frivolous appeals are denied to clean clogged dockets.

The recent reform of the federal discovery rules also seems to be curtailing the ability of accident victims to bring relevant information about a particular accident and its causes to courts engaged in applying existing

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53. These developments relate to situations of accidental harm that have been deleted from coverage by the accident compensation system and that, by virtue of the rule that injuries not covered by the Act are not withdrawn from the tort system, may show up as attempted lawsuits in the courts. They include, *inter alia*, actions to recover damages for emotional distress unrelated to sexual abuse or to physical injuries. *See generally* Rodney Harrison, *Matters of Life and Death—The Accident Rehabilitation and Compensation Insurance Act 1992 and Common Law Claims for Personal Injury*, LEGAL RES. FOUND. PUB. No. 25 (1993).

54. *See* Akio Morishima, *The Japan Scene and the Present Product Liability Proposal, in Beyond Compensation*, *supra* note 3, at 717-27 (tracing development of tort law in Japan and proposal for products liability legislation).

55. *See generally* Ruggero J. Aldisert, Luncheon Address, in THE AMERICAN LAW INSTITUTE, REMARKS AND ADDRESSES AT THE 71ST ANNUAL MEETING 16 (May 18, 1994).

law and policy.[56] The new rules could limit the ability of plaintiffs' counsel to uncover facts that are necessary to support a plaintiff's case.

In products liability design cases, similar effects may be achieved by rules of law that place the burden of proof on the accident victim to establish that there is a "reasonable alternative design" to the product that produced the harm.[57] Such proof often involves highly technical information readily available to the designer and manufacturer, who presumably took such matters into account when designing the product, but not necessarily to the accident victim. Placing the burden of such proof on the victim, instead of requiring the defendant to prove that there is no reasonable alternative design, may weaken the plaintiff's ability to have existing substantive law applied to the facts of her case.

Another barrier to the invoking of unpopular or novel, but deserving, claims may be the overzealous enforcement of Federal Rule of Civil Procedure 11.[58]

Generally speaking, liberal pre-trial discovery is not available in the courts of Japan, New Zealand, or England. Accident victims thus may not have the ability, on their own, to gather hard-to-find facts and data relevant to the application of law at any hearing applying law to facts. Indeed in automobile accident cases in Japan, the principal source of facts in the "mediation" or "arbitration" proceedings, conducted at the insurance company-financed Traffic Accident Dispute Settlement Centers, is a detailed police report.

Difficulties in securing discovery from other nations pose another possible problem of intelligence gathering for United States accident victims.[59] A plaintiff charging a Japanese automobile company with liability for product defects in a U.S. court, for example, may find that the company can thwart discovery of documents located in Japan.

Performance of the intelligence function at the prescribing or terminating level in the legislative arena is a subject probably worthy of an entire book. While it is clear that the plaintiff's trial bar has had wide access and general success in presenting relevant information to decisionmakers in the U.S. House of Representatives and Senate and in many state legislatures, the effectiveness of such information may be overcome or weakened by

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56. *See* Paul R. Sugarman and Marc G. Perlin, *Proposed Changes to Discovery Rules in Aid of "Tort Reform": Has the Case Been Made?*, 42 AM. U. L. REV. 1465, 1497-1500 (1993) (discussing difficulties injured consumer will experience in obtaining information under narrow discovery rules).

57. *See* A.L.I., RESTATEMENT OF THE LAW OF TORTS: PRODUCTS LIABILITY, § 2, at 30 (Council Draft No. 2, Sept. 2, 1994) (placing burden of proof on accident victim).

58. *See* Eric K. Yamamoto, *Efficiency's Threat to the Value of Accessible Courts for Minorities*, 25 HARV. C.R.-C.L. L. REV. 341, 361-71 (1990) (discussing amendment to Rule 11). *See also generally* Carl Tobias, *The 1993 Revision of Federal Rule 11*, 70 IND. L.J. 171 (1994).

59. *See generally* Kurt Riechenberg, *The Recognition of Foreign Privileges in United States Discovery Proceedings*, 9 J. INTL. L. BUS. 80 (1988).

media blitzes, often directed at voters and at principal decisionmakers, and by large campaign contributions financed by enormous campaign chests of powerful organizations opposed to the tort revolution.[60] Of course, the plaintiffs' bar has also been accused of winning votes against tort reform with well-placed campaign contributions.

3. The Promotion (Recommending) Function

The U.S. legal system, as stated earlier, offers wide opportunities for representatives of accident victims engaged in litigation to press for favorable changes to law and policy at the appellate level. U.S. courts are, in general, notoriously open to policy arguments, and appeals are usually funded by law firms, subject to a contingent fee, rather than impecunious accident victims. Not every tort plaintiff in every appeal, however, is represented by a lawyer who is up to the task. Because appellate decisions speak to the future, the right to recommend law and policy, for both plaintiffs and defendants, would be enhanced by permitting, perhaps even soliciting, amicus briefs from all groups with a legitimate interest in the issues in question.

Promotion of pro-victim reforms and counterarguments to pro-defendant reforms are common in legislative arenas in the United States, by virtue of the existence of a relatively wealthy and well-organized plaintiffs' trial bar. The opportunity to engage in promotion of law and policy, however, should not be confused with achieving success in such promotion. The legislative and judicial trend to limit the rights of accident victims has not necessarily curtailed the right of accident victims to promote favorable law and policy.[61]

By contrast, the right of accident victims individually or as a group to

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60. While the recent health reform debate did not directly relate to accident law reform, campaign spending and the electronic media blitz by the medical insurance industry clearly illustrates the ability of powerful special interests to undermine rational decision-making based upon excellent intelligence. *Cf. Outrage of the Month: Health Care Reform: Biggest Lobbying Campaign Ever*, 10 HEALTH LETTER 12 (Dr. Sydney M. Wolfe ed., Nov. 1994). Plaintiffs' tort lawyers may have effectively used similar strategies.

61. It must be recognized that, to the extent that representatives of either victims or accident causers use their power effectively to promote or provide intelligence to mislead with regard to the problems and effects of tort, accident, and insurance law, the power of their opponents to promote rational decisional outcomes is diminished. The author believes that, while there are serious excesses built into the tort system and much hyperbole on the victims' side, the proponents of "tort reform" have succeeded in *grossly* misleading the public and its decisionmakers about the nature and dimensions of the problems produced by tort law. One very important example is the view that medical malpractice actions significantly raise the cost of medical care, that there are too many such actions, and that there is, in consequence, an enormous amount of needless "defensive medicine." Much of this has been discredited by one of the most important studies of medical malpractice ever undertaken. *See generally* Michael J. Saks, *Medical Malpractice: Facing Real Problems and Finding Real Solutions*, 35 WM. & MARY L. REV. 693 (1994) (reviewing book by WEILER ET AL., *supra* note 36).

recommend law and policy to decisionmakers in courts or in the parliament in nations such as New Zealand, Great Britain, and, especially, Japan, seems much more limited. As with other decisional functions, the reasons relate to various barriers to legal representation or to the initiation of tort lawsuits. The appellate courts in New Zealand and England, as contrasted with those in the United States, seem to be more heavily precedent-oriented, given to changing law only in "rare" situations.[62] Furthermore, barristers in the English and New Zealand systems and *bengoshi* in the Japanese system do not usually specialize in the representation of victims (or defendants), but generally hold themselves out to represent either side in an accident suit. They do not therefore have the single-minded ardent (pro-plaintiff or pro-defendant) bias and zeal that often characterize personal injury lawyers in the United States.

Nevertheless, a very unusual phenomenon has developed in Japan, where victims of toxic torts, unable to bring class actions and generally frustrated from seeking damages against industrial tortfeasors in the courts, band together to sue the government for *its failures* in permitting toxic conditions to occur. Their purpose in these suits is solely to promote government policy-making designed to prevent further injuries and perhaps to create a mechanism for compensation when such injuries do occur.[63]

In New Zealand, new opportunities seem to have arisen in the courts for promotion of law and policy favorable to accident victims, largely by reason of judges' negative reaction to the 1992 amendments to the accident compensation scheme that have significantly reduced accident compensation, compared with both the prior Act and with common-law rights.[64]

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62. *Cf.* PATRICK DEVLIN, THE JUDGE 201 (1979) (evaluating utility of precedent). Devlin states:

> I have never felt the tyranny of precedent. It is a tie, certainly, but so is the rope that mountaineers use so that each gives strength and support to the others. The proper handling of precedent is part of judicial craftsmanship; the judge must learn how to use it and in particular how to identify *the rare occasions when it is necessary to say that what judges have put together they can also put asunder.*

Id. (emphasis added).

63. *See generally* Robert B. Leflar, *Personal Injury Compensation Systems in Japan: Values Advanced and Values Undermined*, *in Beyond Compensation*, *supra* note 3, at 744-51; Tsuneo Matsumoto, *Brief Country Report: Japan*, *in Beyond Compensation*, *supra* note 3, at 577-582; Shigeaki Tanaka, *Justice, Accidents, and Compensation*, *in Beyond Compensation*, *supra* note 3, at 736-42. According to Leflar, [t]he phenomenon . . . whereby public-interest lawsuits are brought that make no financial sense, in which the costs of litigation could not possibly be recouped through the likely damage award, constitutes an important means for citizens to be heard." Leflar, *supra* note 3, at 744.

64. A much-mooted Master's decision in the High Court of Wellington adopted the view that "[r]educed availability and quantum of accident compensation may parallel the situation which occurred early this century when Courts began to extend the concept of negligence to permit common law damages to be awarded because it became notorious that the statutory compensation available under the Worker's Compensation Act was clearly inadequate." Akavi v. Taylor Preston Ltd., 1

4. The Invoking Function

The ability to invoke, or to set in motion, the common-law claim for tort damages is, as has already been suggested, heavily dependent upon the availability of counsel. Thus, the contingent fee and the absence of the threat of having to pay winner's legal fees are critical to the ability to invoke a claim except, perhaps, for the very wealthy and those who might qualify for free legal services. Because injury by the fault of another and inability to process a claim may cause serious injustice and frustration, the U.S. practice of allowing contingent fee contracts, coupled perhaps with recent ethics rules permitting law firms to waive the payment of costs by their losing clients, provides the broadest rights to invoke claims for tort victims.

However, another factor that, as a practical matter, greatly inhibits the ability of seriously injured accident victims to invoke claims—or more accurately, seriously limits the utility of invocation—is the solvency of the defendant or, in the case of public entities, the partial or total immunity of the entity from suit. This problem is particularly acute in the case of automobile accidents. Only Alaska requires as much as $50,000 per person of liability insurance.[65] Often individual drivers and owners are judgment proof and uninsured, even in compulsory insurance states, or significantly underinsured in serious accident cases. Further, even in a no-fault state, invoking the process of claim in a serious accident case is often ineffective to produce a decision for adequate compensation. Thus, only those relatively few seriously injured victims who are fortunate enough to have significant self-protection—such as large amounts of un- and underinsured motorist insurance or accident and disability insurance—or who are injured by the fault of a solvent or well-insured defendant, can hope to gain adequate compensation for themselves through the tort or no-fault process. Here, interestingly, victims' invoking power against wealthy and powerful defendants is great but is poor against poor or middle-class defendants, especially where only small amounts of liability insurance are available.

Conversely, in automobile accident cases in Japan, victims who invoke the non-judicial process of accident compensation mentioned above routinely have access to high liability insurance limits: About $230,000 of

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N.Z.L.R. 33, 34-35 (1995). Similarly, the author has been informed that courts imposing penalties for violations of the Health and Safety in Employment Act of 1992, which provides fines of up to NZ $100,000, have, in view of the inadequacy of accident compensation, awarded part of the fines to victims who have suffered injury by virtue of the violation even though no provision of the Act so provides.

65. Chart, "Automobile Financial Responsibility/Compulsory Limits," Auto Insurance Database Report (Hawaii) (Dec. 1993).

liability insurance is required of all drivers and most carry unlimited liability insurance.[66] While the insurer-controlled process tends to produce much lower judgments than in the United States, recovery of a significant amount of the award is almost always assured.[67] It should also be noted here that in most cases of serious injury, the invocation process is likely to produce a favorable outcome because, for all practical purposes, there is strict liability in Japan for automobile accidents.[68] An interesting side effect, however, is that the auto insurance system pays for all automobile accidents, even those caused by product defects, and the auto insurers, at least until the recent adoption of strict products liability, have not sought contribution or indemnity from automobile manufacturers.[69] As bringing a separate suit is too expensive for most injured victims, courts have not held auto manufacturers accountable for injuries caused by their defective products.[70]

On the other hand, personal injury victims of other forms of accidents in Japan, such as toxic torts, medical malpractice, or products liability injuries, may find themselves unable to invoke the tort process either because of lack of access to legal representation, as noted above, or, in the toxic tort situation (except where special legislation has created a right to administrative compensation for particular environmental hazards) because of the lack of any remedy.[71]

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66. *See* Morishima, *in Beyond Compensation*, *supra* note 55, at 719 (setting forth Japanese liability insurance requirements).

67. Morishima, *in Beyond Compensation*, *supra* note 55, at 719. "When a car is . . . not covered by compulsory insurance or a car which injured the victim cannot be identified, a government fund pays compensation up to a certain amount." See Morishima, *in Beyond Compensation*, *supra* note 55, at 719.

68. *See* Matsumoto, *in Beyond Compensation*, *supra* note 64, at 579 (explaining Article III of Automobile Compensation Security Act).

69. *See* Matsumoto, *in Beyond Compensation*, *supra* note 64, at 579 (discussing "quasi no-fault liability" in products liability scheme).

70. The up-front attorney's fee in a $1,000,000 action is $45,000. Plaintiffs who succeed must pay a contingency fee in the same proportion. In addition, filing fees are very high and depend on the amount of the claim. The filing fee for a $1,000,000 action is $5,000. Matsumoto, *in Beyond Compensation*, *supra* note 64, at 578.

71. *See* Matsumoto, *in Beyond Compensation*, *supra* note 64, at 577-81 (discussing various tort actions). With regard to products liability, Professor Matsumoto has related an interesting comparison. Showa, a manufacturer of a nutritional substance containing an amino acid, L-Tryptophan, exported the substance to the United States and also sold it in Japan. Evidently, its L-Tryptophan was contaminated. Showa had paid $66,000,000 to settle more than 1000 law suits brought in the United States, as well as $100,000,000 in litigation and settlement costs, with much more to come. Matsumoto, *in Beyond Compensation*, *supra* note 64, at 580. The number of victims in Japan is not clear, but no cases have been reported other than that of one woman who was planning to bring an action, but had not done so at the time Professor Matsumoto wrote his comment. Matsumoto, *in Beyond Compensation*, *supra* note 64, at 580; *see also* Leflar, *in Beyond Compensation*, *supra* note 64, at 744-51 (discussing medical malpractice); Yutaka Tejima, *Tort and Compensation in Japan: Medical Malpractice and Adverse Effects from Pharmaceuticals*, *in Beyond Compensation*, *supra* note 3, at 728-33 (discussing

The serious problem, in New Zealand, of invoking a process of claim against powerful injurers has been discussed.[72] The victim may view this situation as a serious injustice.[73]

5. *The Applying Function*

Because it is normally a court, an arbitrator, an administrative agency, or a private organization that performs the function of applying law and policy to a particular claim of injury, the above discussion of the intelligence, promotion, and invoking functions are more relevant to the question of whether accident victims are empowered in relation to their claims for compensation or justice.

One feature of the application system in the United States—the availability of an independent judge, jury, or arbitrator—deserves special recognition.[74] Compared with systems such as New Zealand's, where accident compensation decisions may be made by nonexpert and sometimes nonfriendly examiners,[75] or Japan's, where the applying function in automobile accident cases is usually performed by lawyers and former judges *paid by liability insurers in a forum provided by the insurers*,[76] the ability easily to invoke a bench or jury trial in the United States constitutes a much more formidable and potentially effective kind of power for victims of alleged tortious misconduct.

6. *The Appraising Function*

The function of examining law and policy and its operation to determine whether and to what extent preferred policy goals are being achieved is more open to victims of tort in systems such as the United States, where there is a large, wealthy bar specialized in advocating the rights of such victims. Such an organized bar may conduct its own appraisals and publish relevant findings in its own organs, which have wide circulation to

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medical malpractice involving use and side-effects of drugs).

72. *See supra* notes 45-49 and accompanying text (discussing shortcomings of New Zealand tort system).

73. David Sargeant, CEO of the Insurance Council of New Zealand, Inc., related the following story to the author. After Sargeant first arrived from Australia to take up a position in New Zealand, he and his wife were carrying a newly purchased bed into their home. His wife stepped on a metal grill in the street that collapsed under her, causing her to fall several feet and suffer very serious injuries. He then learned, with some horror, that while his wife was entitled to limited compensation from the Accident Compensation Corporation, the municipality, which controlled the grill and the road, had no legal responsibility whatsoever to his wife or to him for her injuries.

74. There is no right to a jury trial in personal injury actions in England. Judges and arbitrators may be independent, but except for those who are rich or who qualify for legal aid, the other cost hurdles to bringing an action are formidable.

75. *See generally* Trapski, *supra* note 45.

76. *See* Miller, *supra* note 24, at 211-12 (explaining procedures for accident disputes in Japan).

their membership. It may recommend particular outcomes of appraisal during appellate review or at legislative hearings. Similarly, but often in opposition to the plaintiffs' bar, organizations favorably disposed to defendants, such as the Defense Research Institute, also actively pursue the appraisal function. An organization made up of lawyers and scholars drawn from a less specialized, but nevertheless elite, segment of the bar, the American Law Institute, also engages in appraisal and recommendation in order to temper, and sometimes thwart, appraisal and recommendation efforts of the plaintiffs' and defendants' bars. Because of the prestige in which the organization is held by appellate judges, the A.L.I.'s recommendations, set forth in its Restatements of the Law, may succeed in constraining the effectiveness of the more partisan groups. The A.L.I.'s appraisal function in major tort law issues, such as products liability, seems to emphasize precedent more now than it has in the past, when the Institute led the development of new rights to recovery.[77]

Appraisal may be performed effectively in other nations by first-rate law commissions, as in New Zealand[78] and England,[79] or by interested scholars in law journals, as is the case in England, Japan, New Zealand, and the United States. Perhaps missing in nations with no strong, partisan plaintiffs' tort bar is a strong adversarial view of appraisal widely available for presentation in appellate proceedings or legislative hearings. On the other hand, what is missing in the United States, perhaps, is the appraisal of powerful interests representing tort victims, on the one hand, and insurers, on the other, which widens the policy choices to include non-tort alternatives such as no-fault schemes. Lawyers for both sides tend to be wedded to the tort system. The broader view in the United States thus seems to be taken mostly by legal scholars.[80] Alternatively, in New Zealand, although employers[81] and trade union representatives[82] engage

77. *Compare* RESTATEMENT (SECOND) OF TORTS § 402A (1965) *with* RESTATEMENT OF TORTS: PRODUCTS LIABILITY (Council Draft No. 2, 1994).

78. *See* REPORT OF THE ROYAL COMMISSION OF INQUIRY, COMPENSATION FOR PERSONAL INJURY IN NEW ZEALAND (1967) (original report, known as "Woodhouse Report," giving rise to adoption of no-fault accident compensation scheme); LAW COMMISSION, REPORT NO. 4, PERSONAL INJURY: PREVENTION AND RECOVERY—REPORT ON THE ACCIDENT COMPENSATION SYSTEM (1988) [hereinafter REPORT NO. 4] (functioning as "follow-up" to Woodhouse Report).

79. 1 ROYAL COMMISSION ON CIVIL LIABILITY AND COMPENSATION FOR PERSONAL INJURY, REPORT (1978).

80. Two such commentators are Jeffrey O'Connell, the foremost proponent of no-fault substitutes for or complements to the tort system, and Stephen D. Sugarman, who advocates doing away with the tort system and replacing it with other compensation and regulatory mechanisms.

81. *See* REPORT NO. 4, *supra* note 78, at 212-37 (providing extensive list of persons and organizations contributing to New Zealand's accident compensation scheme).

82. *See* Hazel Armstrong, Union Viewpoint on ACC: Rescuing the Woodhouse Vision and Reclaiming Our Compensation Rights, Speech to the COAC Conference (Aug. 24, 1994) (copy in author's possession).

in extensive and adversarial discourse involving appraisal of developments in the field of no-fault accident compensation, there are few lawyers or others who have advocated a return to the tort liability system.

7. *The Termination Function*

With regard to the arenas in which actual decisions to terminate existing law and policy are made, victims of tortious personal injury in the United States have considerable access and ability, largely through their legal representatives, to provide information favoring their cause and to recommend adoption or rejection of particular proposals. There is little difference here between the prescribing and terminating functions.

Using California as an example, however, it is also clear that the public may possess considerable countervailing power through initiative, the power to elect judges, and the general right to vote for its representatives. From the point of view of preferred goals, there is every reason to be pleased that the power of the ordinary citizen may also run to issues involving the development and termination of tort law policies. The public, after all, is comprised of those who have already or someday may become victims of tortious accidents, and to have power is not the same as winning all decisions. If there exists a problem that undermines the goal of extending power to accident victims, then it is again in the ability of powerful private interests to defeat the intelligence process and sound decision-making by using modern media strategies that permit wide distortion, oversimplification, and appeals to emotion. The complexity of tort and related insurance law thereby seems to defeat wise exercise of decisional power by the public at large.

V. APPRAISAL

The authors of the A.L.I.'s Reporters' Study, *Enterprise Responsibility for Personal Injury*, have downgraded the importance of decisional power of accident victims.[83] First, they recognize that "large corporate enterprises are the real defendants in most high-stakes tort litigation," and that "[j]uries and judges see large organizations abusing their power through systematic endangerment of large segments of the population."[84] Furthermore, they admit that "skepticism proliferates about the willingness of the executive branches of government to control abuses of corporate power, in part because of a perceived symbiotic relationship between the private and public bureaucracies."[85] They also admit that "there is something satisfy-

83. ENTERPRISE RESPONSIBILITY, *supra* note 3, at 26-27.
84. ENTERPRISE RESPONSIBILITY, *supra* note 3, at 26.
85. ENTERPRISE RESPONSIBILITY, *supra* note 3, at 26.

ing about a process that allows ordinary people to put 'authority in the dock'[86] and hold it to account for such human tragedies as asbestos exposure, DES, or the fallout from nuclear testing."[87]

Nevertheless, the authors denigrate the goal of empowering the private citizen *vis á vis* powerful corporations and government.[88] They argue that the individuals in the powerful entities that caused the injuries are usually long gone by the time the injuries occur and the corporate or governmental entity is called to account.[89] They assert, therefore, that damages are not imposed on those who originally created the excessive risk but on present-day shareholders, employees, and customers of the firm, most of whom are not responsible for the original misconduct.[90]

The problem with their argument, however, is that in much products liability litigation there is not necessarily such a "great distance between those whose actions trigger the suit and those who must eventually pay the bill."[91] While the time lag may be enormous in asbestos litigation, and where serious illness does not appear until many years after initial exposure, such as in some matters involving drugs, such as DES,[92] there are many cases involving unsafe products in which the imposition of liability follows reasonably quickly after the accident.[93] Delays in those cases are often a product of the defendant's litigation tactics.

Whether or not there is a long delay in establishing accountability, however, it hardly lies in the mouths of corporate shareholders, who are insulated from personal responsibility by the corporate veil, to complain that accountability has remained with the corporate entity. Officers and employees are, in almost all cases, similarly protected from personal civil liability by the corporation itself. Additionally, it is not necessarily true, as the Reporters' Study suggests, that customers end up paying a good part of the bill. Instead, the forces of competition will in most cases provide an

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86. ENTERPRISE RESPONSIBILITY, *supra* note 3, at 26 (citing Geoffrey C. Hazard, Jr., *Authority in the Dock*, 69 B.U. L. REV. 469 (1989)).

87. ENTERPRISE RESPONSIBILITY, *supra* note 3, at 26.

88. ENTERPRISE RESPONSIBILITY, *supra* note 3, at 26.

89. ENTERPRISE RESPONSIBILITY, *supra* note 3, at 26.

90. ENTERPRISE RESPONSIBILITY, *supra* note 3, at 26.

91. ENTERPRISE RESPONSIBILITY, *supra* note 3, at 26.

92. *See generally* Mink v. University of Chicago, 460 F. Supp. 713 (N.D. Ill. 1978) (involving medical experiment with DES).

93. These tend to be accident cases where defects in recently manufactured products cause accidents involving serious injury. *See* Grimshaw v. Ford Motor Co., 119 Cal. App. 3d 757, 174 Cal. Rptr. 348 (1981) (May 28, 1972 accident involving 1972 Ford Pinto purchased in November 1971). Final appeal of the *Grimshaw* case was decided less than 10 years from the date of purchase. *See generally id.* In *Stewart v. Budget Rent-A-Car Corp.*, a 1966 Isuzu rental car ran off the road and injured plaintiff on Feb. 20, 1966. Stewart v. Budget Rent-A-Car Corp., 52 Haw. 71, 71, 470 P.2d 240, 241 (1970). The Hawaii Supreme Court affirmed judgment in favor of plaintiff on May 26, 1970. *Id.* at 79, 470 P.2d at 245. The *Stewart* case is Hawaii's leading case on products liability.

advantage in the marketplace to the firms and actors who did not engage in misconduct. Customers can vote with their feet to patronize safer producers. Furthermore, intelligent investors will surely inquire into the history of companies in which they invest to determine whether unwise or outrageous safety decisions in the past might result in lawsuits that could produce adverse economic effects for the firm and reduce the value of their investments. Assuming the rationality of decision-making in the corporate sphere, the accountability that liability produces is likely to lead to more safety-conscious decisions in the future. For all of these reasons, it is inappropriate to suggest, as do the authors of the Reporters' Study, that the costs of litigation will not "prove to be a socially worthwhile investment . . . for ameliorating the personal injury problem."[94]

Furnishing decisional power to accident victims does not merely permit them to counter corporate abuses of power but gives them a voice in decisions that affect their values, with regard to both accidental injuries already sustained and future accidents that may be deterred. This voice is important irrespective of the existence of adversaries who are in a strong power position. On the whole our current system appears to provide such a voice.

By contrast, victims of accidents in nations such as New Zealand, Japan, and England, where legal representation in tort forums is not assured, are virtually powerless with respect to their ability to hold accident causers accountable in any significant decisional arena. This powerlessness necessarily translates into adverse effects, such as inadequate compensation for injuries; feelings of helplessness, frustration, depression, anger and cynicism; weak deterrence and excessive numbers and severity of accidents; and, in general, development of accident law and policy that does not adequately reflect the interests of accident victims.

Unfortunately, the United States system, while furnishing considerable power to many victims, also leaves many gaps in liability that may translate into similar adverse effects. These gaps are largely a result of idiosyncracies caused by the economics and realities of law practice that result in a failure or inadequacy of representation for various important groups. These groups include victims of accidents with no provable tort claim or whose tort claim has been rejected;[95] victims of accidents involving tort claims where defendant's resources—assets or insurance—fall far short of plaintiff's damages; victims of medical malpractice and other torts, whose damages, though considerable, fall below a high profitability threshold for

94. ENTERPRISE RESPONSIBILITY, *supra* note 3, at 27.

95. This category would include victims of serious injuries whose injuries were caused by an immune or partly immune public entity. It would also include an important category of cases involving pollution and toxic torts, where problems of proving causation tend to undermine a tort law solution.

contingent-fee attorneys; poor accident victims who, by virtue of their poverty, are unaware of their legal rights or reluctant to assert them; victims whose poor financial situation, coupled with court delays, coerces them to accept inadequate compensation; and victims of torts committed by actors, such as cigarette companies, who are wealthy and powerful enough to make representation of plaintiffs under a contingent fee unprofitable.[96]

These situations represent cases where the victim is left without compensation through the tort system and possibly any other system. In many of these cases, the absence of adequate health care systems and adequate systems for replacing economic losses caused by disability represents a larger societal problem in the United States. New avenues to power on behalf of these victims are clearly needed. Arguably, the personal injury bar should take up their cause for at least two reasons. First, adequate basic compensation by way of medical care and disability income replacement will enable otherwise impecunious victims to pursue their tort claims even in the face of court delay. Second, it will counter a major criticism of the tort system, that it overlooks and diverts attention from a much more serious societal problem.[97]

Only the last two situations described above, however, are those in which the excessive wealth and power of an injury causer leave the victim remediless or without an adequate remedy. Even in those situations, however, the plaintiffs' bar remains available, and should no doubt be very willing and eager, to exercise its considerable power to promote suitable remedies by way of compensation and deterrence to prescribing and terminating authorities.

Potential problem areas include possible curtailment of discovery opportunities,[98] limitations on appeals designed to deal with crowded appellate dockets, inhibiting the presentment of novel claims or civil rights claims because of improper use of Rule 11-style sanctions, and, of course, adoption of "loser pays." These problems could in turn adversely affect participation by representatives of accident victims in important decision-making arenas. On the other hand, to the extent that rules such as these, except for "loser pays," make litigation more efficient and reduce its costs (especially

96. It is interesting to note that without exception, the basic, or minimal, compensation needs of each of these groups could be provided by a no-fault compensation system encompassing medical expenses and income replacement. Perhaps the personal injury bar should consider whether it is not in its interest, if not its professional responsibility, to advocate for basic compensation for these groups. The payers of such compensation, of course, could be reimbursed from any tort recoveries.

97. *See* Comments of Geoffrey Palmer, *in Comment: Sugarman's Proposals for Reform, in Beyond Compensation*, *supra* note 3, at 697-98 (questioning priorities in America).

98. *Cf.* Linda S. Mullenix, *Discovery in Disarray: The Pervasive Myth of Pervasive Discovery Abuse and the Consequences for Unfounded Rulemaking*, 46 STAN. L. REV. 1393 (1994) (describing abuse of discovery and shortcomings of civil justice reform in America).

in cases in which damage claims are not large) they might weaken the ability of wealthy defendants to bury victims' claims in heavy costs. As for "loser pays," once the ability to commence a lawsuit is lost, access to all the other functions of decisional power provided by the tort system will be curtailed.

On the basis of this preliminary survey, it does not appear that tort law places excessive power in the hands of tort victims. Notwithstanding the considerable power of the personal injury bar, policies and rules that have been argued to cause overdeterrence and to inhibit important and useful activities, such as strict design defect liability for pharmaceuticals, are being overturned in favor of less stringent rules, such as those based on proof of negligence.[99] Assuming that there has been overdeterrence, its cause was not only the power of the plaintiffs' bar, but also the persuasiveness *at the time* of the reasoning in favor of the allegedly overdeterring rules.

Finally, it does appear, notwithstanding the problems that have been identified, that the personal injury tort system in the United States does serve as an effective tool for optimizing the power of victims of tortious accidents against wealthy and powerful actors who cause such accidents. This is in sharp contrast with the situations in England, Japan, and New Zealand. There exist some deficiencies regarding power directed to securing compensation, the most serious of which is the lack of adequate resources to compensate seriously injured victims. At first glance, the stated goal of providing access to the arenas of law and policy-making is being achieved.

Whether and to what extent there are other instrumentalities, in nations such as England, Japan, and New Zealand, that are effective in balancing the power of wealthy actors in a position to cause injuries—such as product manufacturers, polluters, slumlords, health care providers, or their insurers—is beyond the scope of this essay. Whether there are such mechanisms, and whether they are effective, does not leap out of the literature.[100] There exist important regulatory bodies in the United States, such as OSHA and the Consumer Product Safety Commission, that supplement the tort system in encouraging safety-conscious decisions. The effectiveness of these bodies often depends on the enthusiasm of the administration in power, which is not encouraging from the perspective of coun-

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99. *See* Brown v. Superior Court, 44 Cal. 3d. 1049, 751 P.2d 470, 245 Cal. Rptr. 412 (1988) (limiting liability of manufacturers of prescription drugs). *See generally* Gary T. Schwartz, *The Beginning and the Possible End of the Rise of Modern American Tort Law*, 26 GA. L. REV. 601 (1992).

100. *But see Japan Drug-maker Punished After 15 Die*, HONOLULU STAR-BULLETIN, Sept. 1, 1994, at A10 (describing punitive measures of one government). In that situation, "[t]he government ordered a pharmaceutical company . . . to halt production for 3 1/2 months as punishment for withholding information about a medicine blamed for 15 deaths last fall." *Id.*

tervailing power. Thus, with regard to providing effective power to accident victims, the American system of tort liability appears, at first glance, to be the most effective source of countervailing power, not unsuitable in a nation that takes prides itself giving the individual citizen a voice in her or his destiny.[101] For this, Tom Lambert, to whom this issue is dedicated, surely deserves a lion's share of the credit.

101. *See generally* Robert Reno, *Juries Sometimes Err, Bless 'em*, HONOLULU ADVERTISER, Sept. 2, 1994, at A16. Reno noted: "Anyway Liebeck [the woman who was scalded between the legs by a 65 cent cup of McDonald's coffee] may or may not have suffered $2.9 million worth of damages and pain, but she is, for all of us, living, breathing and now rich reaffirmation that the legal system, maybe not always but occasionally, and with majestic eccentricity, comes down on the side of the unempowered." *Id.*