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International Workshop

BEYOND COMPENSATION: DEALING WITH ACCIDENTS IN THE 21ST CENTURY

Informal Proceedings

TABLE OF CONTENTS

International Workshop

BEYOND COMPENSATION: DEALING WITH ACCIDENTS IN THE 21ST CENTURY

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INDEX TO COMMENTS BY THE PARTICIPANTS

International Workshop

BEYOND COMPENSATION: DEALING WITH ACCIDENTS IN THE 21ST CENTURY

INTRODUCTION

Richard S. Miller and Yasutomo Morigiwa

This international workshop grew out of some early conversations between Professors Miller and Morigiwa, who were introduced by Professor Matsumoto, prior to and during the time Professor Morigiwa was visiting the University of Hawaii at Hilo. It was designed to take the discussion of accident compensation beyond the usual boundaries of such conferences.[1] First, however, the workshop would include some discussion of issues that have been much mooted in the law journals and especially in the American Law Institute's recent Reporter's study of the American tort system:[2] the evaluation of various features of the tort system and recommendations for change, largely focussing on common law jurisdictions, especially the United States. Second, it would have a strong comparative law component, with comparisons being drawn between the accident compensation or tort systems of the four nations represented at the Workshop: Canada, Japan, New Zealand,

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[1] It is also notable, perhaps, for the reason that, except for a few face-to-face meetings in Honolulu and Hilo, Hawaii, it was planned for the most part by electronic mail between Hilo and Honolulu, Hawaii; Honolulu and Japan; and, while Professor Morigiwa attended international philosophical conferences, between Honolulu and Europe. This is surely a tribute to the advanced state of international computer networks.

[2] PAUL C. WEILER, ET AL., AMERICAN LAW INSTITUTE REPORTERS' STUDY, ENTERPRISE RESPONSIBILITY FOR PERSONAL INJURY (1991) [hereinafter "ALI REPORTERS' STUDY"].

and the United States. Third, — and this is where the workshop began to move beyond more traditional discussions of compensation — questions of the socio-political function of accident compensation and tort law would be examined from the perspectives of both public policy and jurisprudence. Indeed, three of the Japanese participants, Professors Tanaka, Morigiwa, and Shimazu, were legal philosophers who had taken interest in this aspect in the face of the sedentary socio-political environment of Japan with its dearth of positive public participation in the political process. And finally, the participants were to give some consideration to the possible global implications of the various domestic law approaches to accident compensation or tort, thus putting the issue of how to deal with accidents in the larger context of national economic policy and international competition and cooperation systems. For example, to what extent and in what manner might the various national regimes have to be adjusted in order to better compete with each other in light of developing international economic considerations?

As the reader will note, the proceedings — the presentations as well as the comments — are relatively informal and usually conversational in tone; they do not contain the relentless dotting of "i"s or crossing of "t"s that is common to law review scholarship, nor is there a citation to the literature for every assertion of fact or law. This informality was deliberate: we were seeking an open discussion in which the participants could speak their mind freely without being burdened with the discipline of law review-style prose; we also wanted the discussion to be as accessible as possible to those participants and readers to whom English is a second language as well as to non-lawyers who may have occasion to consult these proceedings for ideas useful to their work.

The Workshop was held in Honolulu, Hawaii at the East-West Center on the campus of the University of Hawaii at Manoa from March 22-24, 1992. We wish to thank our sponsors, The Sumitomo Life Insurance Company, The Yasuda Fire and Marine Insurance Company, The Non-Life Insurance Research Institute, The Egusa Foundation, and The William S. Richardson School of Law and its dean, Jeremy T. Harrison. Appreciation and thanks also go to the East-West Center and its president, Michel Oksenberg, and very helpful staff; to University of Hawaii law students Geoff Komeya, Kikuyo Matsumoto-Power, Michael Ragsdale, and John Thomas who gave freely of their time to provide essential logistical assistance; and to our good friend, Kazuhiro Miyasho, U.S. Manager of the Koa Fire and Marine Insurance Co., Ltd., for support and encouragement.

The A.L.I. Reporters' Study

Gary T. Schwartz
University of California at Los Angeles

I'm Gary Schwartz from the Law School at U.C.L.A. I've not written on Plato or divorce. Torts is my principal field of scholarship. At U.C.L.A., I also teach a course in administrative law. I began offering that course several years ago, when I realized that many major administrative law decisions dealt with safety issues of the sort I was already considering in my role as a torts professor. These include a major Supreme Court decision as to whether the federal Department of Transportation could rescind a regulation, promulgated several years earlier, requiring that air bags or automatic seat belts be installed in automobiles.[3] Another leading case concerns the standards that the federal job safety program should rely on in issuing regulations that might be effective in producing on-the-job safety.[4]

In addition to torts and administrative law, I've also taught a course in workers' injuries. This course deals with the federal OSHA program of job-safety regulation, and also with programs of workers' compensation. In its American form, workers' compensation is a very interesting example of a strong rule of strict liability — a rule with very few ifs, ands, and buts. At the same time, workers' compensation is a program that aims to afford compensation to large numbers of accident victims. As such, studying workers' compensation permits one to think about appropriate ways in which compensation programs should be structured.

I've been invited to talk about one recent American Law Institute project, and another forthcoming project. I was a minor player in the

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[3] Motor Vehicle Manufacturers Ass'n v. State Farm Mutual Automobile Ins. Co., 463 U.S. 29 (1983).

[4] Industrial Union Department, AFL-CIO v. American Petroleum Institute, 448 U.S. 607 (1980).

earlier project — enough of a player to permit me to discuss the project as an insider, but minor enough so that I can talk about it in a somewhat detached way.

I'm not sure how many of you know what the American Law Institute is — and I'm not sure that I myself can accurately describe the ALI. I have heard it called the establishment of the American legal profession. "Establishment" is a word that came into the American political vocabulary in the late 1960s. To say that the ALI is the legal profession's establishment is to suggest that it is a collection of the profession's most influential members. But even if the ALI, in fact, was once the legal profession's establishment, it's not entirely clear that it continues to serve this role.

In any event, the ALI typically publishes two kinds of studies. One is restatements — like the Restatement of Torts — which largely attempt to clearly codify the law in its contemporary form. Of course, in drafting a restatement, the ALI's reporters frequently appreciate that the law is somewhat confused. In these circumstances, the reporters do not merely count jurisdictions and then set forth the majority view. Rather, the reporters try to figure out what is the better rule. The restatements, then, are primarily descriptive efforts designed to exposit the law in its present form. But at least at the margins, a restatement is also a normative effort to resolve disagreements in light of what seems to be the wisest results.

In explaining the problem that restatement reporters face, I can add a point here that some of you may be unaware of. American tort law is plagued by the problem of federalism. There are 50 different jurisdictions — 51, including the District of Columbia — and each of these jurisdictions can express its own view as to what the law is or should be. The Hawaii Supreme Court, for example, can issue a ruling that authoritatively settles all questions about Hawaii law. But that ruling merely resolves the legal uncertainties in Hawaii. It leaves open the question of what the law is in 49 other American states. I'm unaware of any major nation in the world today whose tort law is as dominantly federalistic as it is the United States. The American tort scholar constantly needs to worry about variations in the law from one state to another.

But back now to the ALI. The ALI publishes restatements. But it also publishes documents like the Model Penal Code. The latter are primarily normative. Granted, they are designed to take advantage of existing legal traditions in the United States and perhaps England. Still, their basic goal is to come up with what a team of scholars

regards as the best rules — the right rules. And those rules can be identified without all that much regard for exactly what the law currently is in the majority of American jurisdictions.

In any event, the ALI project on Enterprise Responsibility for Personal Injury — as it was finally titled — began in the mid-1980s in the midst of, and partially as a result of, what was then being experienced as a "torts crisis." This crisis took the immediate form of the skyrocketing cost and reduced availability of liability insurance. But the crisis had deeper causes. As tort reformers began surveying the scene in the mid-1980s, they could appreciate that the level of tort claims in the United States was sharply higher than the level of claims in America 30 years previous. Also, by the 1980s the number of tort claims in America was evidently much greater than the number of such claims in other countries. The seemingly exceptional quality of the contemporary American tort system thus provided part of the background for the ALI's decision to launch a major study of enterprise responsibility.

This Study was quite consciously not a restatement. That is, it was not merely an effort to clarify the law and to resolve the limited number of disagreements that the law might contain. But the project wasn't quite a model-penal-code-type effort either. There was no notion of coming up with a document that would elaborately set forth the best legal rules, one by one. Rather, the Enterprise Responsibility project was a unique ALI effort to think through the general problem of tort liability in the United States — and to do so against the background of the ongoing tort crisis, and the related fact that many state legislatures were adopting reform statutes that were restricting tort claims in a variety of ways. The ALI project was based on the premise that these statutes might not be based on an adequate analysis. The ALI's goal was to develop a basic analysis of American tort problems — and in doing so, to come up with at least a limited set of recommendations. These were, however, recommendations that could be set forth in rather general language. At the very least, the general recommendations would need to receive the approval of the full ALI membership before any effort would be made to sit down and draft actual statutory language.

A team of scholars was formed in 1986 to work on this project. The choice of the chair for this team was rather interesting. It was Richard Stewart, then on the law faculty at Harvard (and now on the faculty at New York University). Stewart is a scholar who had written widely and astutely on problems of administrative law and safety regulation.

Yet at the time of his appointment, Stewart — though a leading figure in administrative law studies — was not known as a teacher of torts, and had not contributed to torts scholarship.

A team of associate reporters was selected to assist Stewart. The original team included Ken Abraham from the University of Virginia. Abraham is the leading expert on insurance law among the current generation of American legal scholars. David Rosenberg, from Harvard, was also placed on the team. Rosenberg has written widely on procedural reforms that might be appropriate for the tort system. The combined appointments of Stewart, Abraham, and Rosenberg were designed to provide the ALI team with sophistication in those issues of regulation, insurance, and procedure that might be related to issues of tort reform as such.

For products liability, the ALI choices were Alan Schwartz and Kip Viscusi. For obvious reasons, I'll refer to Schwartz here as "Alan." Alan was then teaching at the University of Southern California — though during the term of the project he moved from U.S.C. to Yale. Alan had taught products liability, and had written excellently on products liability. But Alan hadn't been all that involved in the larger field of torts. Rather, Alan came to products liability with the perspective of a scholar who had previously focused on problems of commercial law. Viscusi is in the business school at Duke. His training is primarily as an economist. Still, he has written widely in the general field of law-and-economics — and the subfield of tort law and economics.

The final choice for the associate reporters team was Paul Weiler, from Harvard. Weiler's primary field has been labor law. As a labor lawyer, Weiler is an expert on workers' compensation. (American workers' compensation, as I noted earlier, is an interesting combination of ambitious strict liability and an ambitious compensation plan). In addition, Weiler, on account of various projects at Harvard, was becoming increasingly involved in problems of medical malpractice. Weiler turned out to be the person on the ALI team who was responsible for assessing both workers' injuries and medical injuries.

To supplement the original team of associate reporters, there was an additional set of advisers — 25 or so — that included George Priest. But my sense is that these advisors played a rather small role in the preparation of the project's various reports. In 1988, Bob Rabin, from Stanford, served as a visiting professor at Harvard. Bob was then working on a variety of topics, including the class-action aspects of mass tort litigation. During his visit at Harvard, Bob was added to the project as an associate reporter.

A year later, Dick Stewart left Harvard to become an Assistant Attorney General for Lands at the Department of Justice. Dick's acceptance of this executive-branch post required him to step down as the ALI's Reporter. He was replaced by Paul Weiler. Paul then brought in a limited number of new consultants, including Tom Rowe of Duke and Michael Trebilcock from the University of Toronto. During the project's last year, Weiler also invited both myself and Jeffrey O'Connell, from the University of Virginia, to serve as so-called "special advisors."

The project finally published its two-volume Study last year. These two volumes contain large numbers of individual chapters. In my view, the volumes are quite valuable as a collection of analyses of tort problems. The volumes themselves are published not by a major publishing house, but rather by the American Law Institute itself. By now, law libraries in the United States certainly have their own copies. But it may well be that the ALI has not been able to adequately distribute the Study outside of the United States. If any of you lack access to these ALI volumes, please let me know during our program here, and I'll make efforts to get you copies.

The two volumes do contain various proposals or recommendations. These are the recommendations that are denounced in Professor Jerry Phillips' memorandum, which you all have received; and the composition of the ALI study team has itself been denounced in a letter from John Vargo, a copy of which has been handed out. (Vargo is a products liability lawyer in Indiana). In any event, the ALI Reporters' Study was presented to the annual meeting of the ALI membership in San Francisco early last summer. Steve Sugarman — who was not involved in the project itself — attended the ALI session. That session itself was somewhat raucous. Many speakers strongly opposed the Study's recommendations. Those who did speak, however, consisted of only a minority of those in attendance. Still, the lack of harmony in the ALI discussion obviously raised a problem in terms of how the ALI should proceed. A further problem was raised by the form of the Study itself. After all, Volume One of the Study consisted only of background reports on particular matters. It would be difficult for the full ALI membership to "take action" on general reports of this sort. While Volume Two contained a number of recommendations, that volume also left open many other issues for further consideration. This circumstance made it all the more difficult for the ALI to figure out how it should respond to the report.

In any event, after the annual meeting, the ALI leadership pondered what to do next. Finally, in late 1991, that leadership decided to

proceed no further with the formal Enterprise Responsibility Study. Rather, the ALI decided to convene — as a successor to that Study — a project for a Restatement of Products Liability. This proposed Restatement would replace the limited products liability sections in the Second Restatement of Torts. These sections themselves had been drafted and published in the mid-1960s. At the end of April, there will be a meeting in Philadelphia in which a limited number of us will discuss the boundaries — and the feasibility — of a Restatement that is limited to products liability. This latter Restatement is expected to draw on the analysis provided in the Enterprise Responsibility Report. Other than that, however, the Enterprise Responsibility Study now seems effectively dead. You should appreciate, then, that the two-volume Reporters' Study does not now have any ongoing official status. Granted, state legislatures thinking of adopting tort reform are free to turn to the Study as a source of evaluation and possible insight. Likewise, judges, in deciding individual cases, are in a position to take the Study into account.

Whatever its ongoing practical significance, the Study is interesting at least insofar as it consists of the efforts of a number of scholars to come to grips with the basic issues in the American tort system in the late 1980s. An introductory chapter, written primarily by Reporter Weiler, sets forth the outlook of the report in terms of what the goals are of the American tort system.[5]

One goal identified in this chapter is deterrence.[6] The report points out that this rationale has been discussed by a large number of contemporary tort scholars. For that matter, a deterrence rationale for tort liability has always been around in the scholarly literature. In the past, however, that rationale had typically been deemphasized. It has been the economics-oriented writers — beginning with Calabresi in 1961, or at least with Calabresi and Posner in the early 1970s — who began focusing more attention on deterrence as a torts concern.[7]

Now I can say here that I agree with the previous statements of several seminarians that the economic analysis of tort law has now become excessively complex. Even so, the basic economic argument in favor of tort liability is quite easy to understand. Society does not want

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[5] 2 ALI REPORTERS' STUDY, *supra* note 2 at 3.

[6] *Id.* at 30-33.

[7] *See* GUIDO CALABRESI, THE COSTS OF ACCIDENTS (1970); Guido Calabresi, *Some Thoughts on Risk Distribution and the Law of Torts*, 70 YALE L.J. 499 (1961); Richard A. Posner, *A Theory of Negligence*, 1 J. LEGAL STUD. 29 (1972).

an excess of harm-causing behavior. By imposing liability for the negligent infliction of harm, tort law can induce people who are thinking of behaving negligently to reconsider their behavior. This is the simple economic argument on behalf of tort liability. And this is an argument that has frequently been voiced by scholars since the early 1970s. Still, from the early years of this literature, there have been other scholars less enamored of economics who have doubted the reality of the claims for deterrence that are advanced by the law-and-economics writers. These critics are certainly aware of the economic model on behalf of deterrence. Yet they find flaws in that model as it is applied to the ordinary injury-producing behavior of individuals or institutions. In these critics' view, those flaws suggest that tort law achieves much less by way of deterrence than the economic models themselves suggest.

I am one of three scholars from the mainland who are attending this conference. Let me look at the other two scholars, in order to give you an indication of the range of views on the efficacy of tort law's deterrence. As I read George Priest, his view is that properly drafted rules of tort liability can be very effective in preventing negligent conduct that would otherwise occur. George thinks that tort rules give incentives to parties that affect their behavior in major ways. At the other extreme is Steve Sugarman. The position Steve seems to take is that tort law achieves almost nothing by way of deterrence. In this regard, Steve emphasizes the deterrence that is already provided by other incentives that parties face — including the desire to save your own neck (if you're a motorist), and the desire to avoid a bad public image (if you're a manufacturer).

What the ALI Reporters' Study seems to say[8] is that tort law provides something significant by way of deterrence — not as much deterrence as law-and-economics writers like George assume, but still considerably more deterrence than a skeptic like Steve suggests. In coming up with this evaluation, the Study discusses alternative techniques for achieving safety — including the market and safety regulation.[9] As for the market, to what extent will manufacturers, for market reasons, seek to avoid producing unsafe or defective products? To what extent will employers, seeking to get better workers at lower wages, be induced to provide

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[8] It may well be that I am interpreting the Study here in a way that accords with my own views as to how the deterrence efficacy of the tort system should be appraised. *See* Gary T. Schwartz, *Variety and Reality in the Economic Analysis of Tort Law* (forthcoming).

[9] 2 ALI REPORTERS' STUDY, *supra* note 2 at 38-42, 45-47.

safer workplaces? As far as safety regulation is concerned, how effective are the programs administered by the Consumer Product Safety Commission and the Occupational Safety and Health Administration? What the Study's introductory chapter concludes is that both the market and regulation are of some assistance in achieving appropriate deterrence. Still, there are imperfections in the market that render the market no more than partially effective. Similarly, the record of American regulatory programs since 1960 discourages hopes that those programs can fully satisfy society's interest in deterrence.

On balance, then, the Reporters' Study suggests that tort law does have a meaningful role to play by way of contributing to the achievement of deterrence in society.

Having discussed deterrence, the introductory chapter of the Reporters' Study turns to the goal of affording appropriate compensation to the victims of serious injuries.[10] Here, too, the Study emphasizes how tort law is an imperfect tool for achieving what might be society's social policy in favor of providing compensation for accident victims. Tort law affords compensation to only a small number of victims — those injured by negligent or tortious conduct that is committed by solvent defendants. Tort law is unable to reach those who suffer serious injuries in circumstances that involve no tortious conduct or in which the tort is committed by an insolvent defendant. When tort law does provide compensation, it provides it at levels that seem higher than the compensation levels that would be justified by sound compensation policies, standing on their own. Moreover, tort law is regressive in the way in which it finances its compensation function. In buying Chevrolets, all of us pay the same mark-up in order to cover General Motors' products liability costs. But if one consumer with a million-dollar salary is injured by a defective Chevrolet, he receives a very large tort award. Yet if another victim earns only $20,000 a year, the tort award this consumer receives is quite small. Still, the products liability mark-up that the two consumers originally pay is exactly the same — since manufacturers do not find it feasible to adjust the price of their products to take into account the income of individual consumers. While all consumers thus pay the same price for the insurance policy that accompanies the product, some consumers benefit from that policy far more than other consumers do. This is the sense in which tort law is regressive in affording compensation to accident victims. I

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[10] *See id.* at 28-30, 42-45.

can add that this is a line of analysis that has been most effectively articulated by George Priest.[11]

Furthermore, tort law delivers compensation in a way that entails very high administrative costs. For every dollar that comes into the system, perhaps only 40 or 50 cents winds up in the pockets of injured victims. The overhead, then, is 50 percent or more. Now if tort law is regarded as a device for achieving either deterrence or fairness, that 50 percent overhead may not be all that troubling. Tort law may be succeeding in preventing large numbers of terrible accidents; or, tort law might be keenly valuable as a way of achieving fairness. But when tort law is considered from the perspective of efficiently compensating accident victims, its very high overhead becomes quite hard to justify.

In summary, the ALI Reporters' Study notes a variety of points — most of them by now quite familiar in the literature — as to why tort law functions awkwardly as a device for delivering compensation to accident victims. The Study then goes on to consider alternative sources of compensation for accident victims. The first volume of the Study contains solid chapters on those alternative sources. One chapter reviews health insurance in the United States — how extensive its coverage is, and isn't.[12] The Study also contains a solid chapter written primarily by Ken Abraham on the market for disability insurance.[13] This is a form of insurance that people do need, but tend not to have. There's not much written on disability insurance. An ongoing American debate about *health* insurance leads to new articles almost every week in various journals; yet problems of *disability* insurance are only rarely dealt with. The Reporters' Study chapter thus fills a real need by discussing disability insurance from a range of perspectives, and by explaining how economic factors inhibit the marketing of this insurance. That chapter reaches rather pessimistic conclusions about society's ability to encourage the purchase of disability insurance through a variety of possible reforms.

The introductory chapter to the Reporters' Study thus appreciates that tort law is an imperfect mechanism for delivering compensation; but it also concludes that alternative mechanisms are imperfect as well. It therefore reasons that the compensation rationale for tort law —

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[11] *See* George L. Priest, *The Current Insurance Crisis and Modern Tort Law*, 96 YALE L.J. 1521 (1987).

[12] 1 ALI REPORTERS' STUDY, *supra* note 2 at 129. The principal author of this chapter was Troyen A. Brennan.

[13] 1 ALI REPORTERS' STUDY, *supra* note 2 at 157.

though far from ideal — is not worthless either. It hence recommends that compensation considerations, along with deterrence considerations, continue to play a major role in our evaluation of tort liability and possible tort reforms.

An additional goal for tort law might be fairness, or justice as between the parties. Fairness arguments in favor of tort liability are easy enough to understand. The defendant, having harmed the plaintiff through its negligent or tortious conduct, should bear the responsibility of compensating the plaintiff for his losses. This is an idea that courts express by using such language as "victims of negligence should receive compensation." Note that while this statement employs the language of compensation, what it expresses is a fairness point — that those victims who are injured by the negligence of others should receive compensation from the negligent harm-causers. This fairness point is unrelated to what might be a broader societal concern for providing compensation to all victims of serious accidents.

Without doubt, the fairness ideas I have referred to above have played an important part of the tradition of tort, as that tradition has developed over several centuries. Likewise, fairness is certainly an important part of the way in which the public generally (and also many lawyers) understand what the current tort system is all about. Nevertheless, a growing number of scholars and analysts have concluded that fairness reasoning is no longer useful or adequate in explaining and justifying tort liability. One point often made is that many defendants have liability insurance, and therefore don't actually bear the burden of tort judgments. Another and related point is that tort liability is imposed on institutions that don't themselves end up paying for tort liability. Rather, they pass on the cost of liability by way of increasing the price of products that are purchased by the same set of consumers who themselves might be bringing tort actions against those corporations.

For a variety of reasons, then, many believe that fairness or justice no longer has a significant role to play in justifying or understanding current tort practices. This is, indeed, essentially the belief expressed in Weiler's introductory chapter to the Reporters' Study.[14] This chapter, moreover, accurately anticipates the analysis that is found in many of the Study's later chapters.

That Study hence decides to ignore, or at least to downplay, fairness or justice as tort rationales. Let me postpone for a minute the question

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[14] *Id.* at 24-27.

whether this is analytically proper. At the very least, it is politically problematic — since, again, there is a large segment of the public (and the personal injury bar) which clearly does appreciate tort law in terms of fairness or justice, and which hence is able to employ the rhetoric of justice in order to justify the tort system in its current form. These tort supporters are able to put advocates of tort reform on the defensive by suggesting that these advocates are insufficiently sensitive to the demands of justice.

Having noted this political point, let me now more fully consider the reasoning of the Reporters' Study in largely rejecting a fairness rationale for tort law. In considering tort law's deterrence and compensation rationales, the Study acknowledges a number of basic problems with tort law — yet still concludes that tort law can play a significant role in furthering society's interest in deterrence and compensation. To this extent, the Study considers the deterrence and compensation rationales in a very sympathetic way. This, however, is a sympathy that is lacking in the Study's treatment of tort law's efforts to achieve fairness. Having concluded that there are certain problems in tort law's fairness efforts, the Study essentially dismisses the fairness rationale. In doing so, it does not consider whether tort law might be at least somewhat helpful in achieving just results; and it does not consider the adequacy or availability of alternative institutions that might be capable of achieving the kinds of fairness that ordinarily is associated with tort liability.

Let me now identify and briefly discuss a number of the particular recommendations for reform that are found in the second volume of the Reporters' Study. The recommendations for products liability are rather mild.[15] As far as the law of defective design is concerned, the Study primarily recommends that the consumer expectations standard for design liability be rejected. This is a recommendation that both George Priest and I would concur in. The Study also recommends that the so-called "risk-benefit test" for design liability be rendered more rigorous. Again, both George and I would agree. The Study additionally proposes — in a chapter originally drafted by Dick Stewart — that a defense of regulatory compliance be recognized that would allow certain manufacturers to be relieved of liability when their designs or warnings comply with the orders of a regulatory agency.[16] Stewart's

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[15] 2 ALI REPORTERS' STUDY, *supra* note 2 at 33.

[16] *Id.* at 83.

background in regulatory policy helps explain his own interest in this recommendation. The regulatory compliance defense is one that has not been previously recognized by American law. Moreover, from what I can tell, it is not accepted by European or Japanese legal systems, either. Even so, as regulatory programs become increasingly ambitious — more nearly cradle-to-grave processes — the argument for attaching more weight to regulatory standards becomes stronger. Granted, there is a problem of regulatory lag — of regulators being too slow in updating their regulations. Acknowledging this problem, the Reporters' Study proposes that the regulatory compliance defense be conditioned on the manufacturer's showing that it has passed on to the regulatory agency whatever new information the company has received as to the dangers of its product or the inadequacies of its design or warnings. This shrewd condition incorporated into the Study's recommendation is designed to minimize the problem of regulatory lag.

I can add that given this condition, the regulatory compliance defense, even if adopted, would be of little assistance to Owens-Corning — the primary American breast-implant manufacturer — with respect to its own defense against current products liability claims. For there are widespread allegations — apparently accurate — that this company (and other companies as well) had considerable information on the hazards of breast implants that they failed to pass on to the federal Food and Drug Administration, the agency with regulatory authority over medical devices like breast implants.

In its chapter on medical malpractice drafted by Paul Weiler,[17] the Reporters' Study innovates by recommending that tort liability be largely shifted from individual doctors to the hospitals themselves — at least for those instances of malpractice that occur in the hospital setting. Here, the Study relies partly on economies of scale that might be achievable if insurance is purchased by the institution itself, rather than by individual doctors. Also, the Study suggests that the deterrence potential of tort liability could be more fully realized if liability were concentrated on the institution of the hospital. For one thing, current malpractice insurance, as it is purchased by doctors, is written in ways that takes account of the doctor's specialty, but which makes *no* effort to engage in experience rating — to attach weight to the doctor's record of malpractice in calculating the doctor's premium. Given the absence of experience rating, it may be difficult to see how malpractice

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[17] *Id.* at 111.

liability — so supplemented by liability insurance — can achieve all that much by way of deterring doctors from engaging in malpractice. If, however, the hospital were the entity that bears liability, the hospital would choose either to self-insure—that is, to do without insurance — or to buy a liability insurance policy that would include a significant element of experience rating. Facing the real cost of its malpractice record, the hospital might well be induced to develop effective methods of loss control.

Admittedly, to affirm the legal liability of the hospital would seem to acknowledge that the hospital should be able to instruct the doctor as to how he should perform when he is providing services within the confines of the hospital. The Study's recommendation would thus entail some loss of doctor autonomy. This loss might or might not be a bad thing. Certainly, however, it would lead at least some doctors to oppose the recommendation.

At the end of the second volume, the Study identifies, at least as an option for states to consider, a program of elective no-fault medical liability.[18] Under this program, hospitals, doctors, and patients could opt out of the tort system in order to rely on no-fault compensation for all medical accidents — or at least those accidents that exceed a significant degree of severity. The no-fault scheme is rather complex, and I won't make a full effort to describe it here. But I can mention here that the chapter was drafted by Paul Weiler. Weiler's interest in medical no-fault almost certainly grew out of his knowledge of workers' compensation. (Recall that he came into the ALI project as an expert on workers' compensation). Workers' compensation is, as noted, a compensation program, backed up by strict liability, that has produced generally acceptable results.

Volume Two goes on to consider a number of the damages issues that have preoccupied American legislatures during the mid-1980s tort reform process. In considering joint-and-several liability,[19] the Study suggests that the traditional rule should remain intact in those cases in which potential defendants are in an ongoing bargaining relationship with each other. Preserving the rule in these cases would encourage the parties to allocate liability among themselves by way of before-the-fact contracts. But the Study also focuses on the joint-and-several liability problem in cases lacking this potential for ex ante bargaining.

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[18] *Id.* at 487.

[19] *Id.* at 127.

For these cases, the Study makes a limited proposal, which is in line with the law of some number of jurisdictions. The Study recommends that the joint-and-several rule be retained, along with a broad practice of contribution by one tortfeasor against the other. The problem then arises, however, as to what to do when one tortfeasor is insolvent and is therefore unable to reimburse the other tortfeasor for its share of liability. What the Study here recommends is that when this happens, the effective burden of the tortfeasor's insolvency should be shared by all other parties (including the plaintiff), in accordance with their relevant degrees of fault.

In discussing the accommodation of tort liability and workers' compensation,[20] the Reporters' Study comes up with a recommendation that Richard Epstein (a noted torts scholar) has been advocating since the late 1970s.[21] That recommendation would reverse the current relationship between workers' compensation and products liability. Right now, an employee injured on-the-job because of a defective product can recover immediately from his employer in workers' compensation, but can then sue the tortfeasor for full tort damages. When these tort damages are paid, the employer can then secure full reimbursement for the outlays it originally made on account of workers' compensation. In this sense, under current arrangements tort is "primary" and workers' compensation "secondary."

This relationship between tort and workers' compensation may make sense in some contexts. But it makes a lot less sense in the products context — where the employer is frequently negligent in its own management of the workplace product, and where the employer at the very least has plenty of control over the danger level associated with that product in the work environment. The Reporters' Study's recommendation is that the relationship between workers' compensation and products liability be reversed. Under this reversal, the worker would recover workers' compensation in all cases; the worker would then recover from the product manufacturer only for that differential between his workers' compensation recovery and the larger recovery afforded by tort practices. Under this recommendation, workers' compensation would become "primary" while products liability would become "secondary."

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[20] *Id.* at 183.

[21] *See, e.g.*, Richard A. Epstein, *Coordination of Workers' Compensation Benefits with Tort Damage Awards*, 13 FORUM 464 (1978).

I'll now briefly describe the Study's chapter on pain and suffering.[22] That chapter vigorously rejects the pain-and-suffering caps that have been adopted by many state legislatures during the last several years. The view of the Study is that these caps are excessively harsh in their application to those victims who have suffered the most serious injuries. Consider, for example, the pain-and-suffering cap of $500,000. Those victims with moderate injuries — where the pain and suffering is less than $500,000 — can recover for their own pain and suffering in full. The burden of the cap thus falls precisely on those victims who have suffered the most by way of pain and suffering. This discrimination among victims in the administration of a pain-and-suffering cap seems quite hard to justify. Yet while opposing caps, the Study remains quite concerned with the erratic quality of pain-and-suffering awards as provided by American juries. The ALI team was no doubt aware of the tort practice in countries such as England and Japan. In those countries, the process of trial-by-judge means that any one judge is in a good position to know the amount of verdicts that he has awarded in previous cases, and likewise the verdicts that his fellow judges have given in recent cases. In England and Japan, then, a kind of implicit schedule is in effect that governs the award of damages.[23] What the Study accordingly recommends is that in lieu of caps there be a schedule for pain-and-suffering damages. Such a schedule would be effective in preventing the excessive costs of litigation — of requiring each jury to rediscover the wheel as to what a particular injury is worth. The schedule is likewise designed to achieve a greater standardization in the amount of tort awards. Moreover, consider the possibility that a legislature, in adopting a schedule, also wants to reduce the overall cost of defendant liability for pain and suffering. If so, the legislature can take this goal into account in fixing the basic level of its schedule. Choosing this way of economizing on pain-and-suffering awards would allocate the burden of these economies proportionately among all tort victims, rather than concentrating that burden on a limited number of victims with the most serious injuries. This is, to repeat, the result achieved by more conventional tort caps.

My time is up. I've been able to discuss several of the specific recommendations in the ALI Reporters' Study. I may have a chance to refer to other recommendations later on in our discussions.

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[22] 2 ALI REPORTERS' STUDY, *supra* note 2 at 199.

[23] *See* Gary T. Schwartz, *Product Liability and Medical Malpractice in Comparative Context*, in THE LIABILITY MAZE: THE IMPACT OF LIABILITY LAW ON SAFETY AND INNOVATION 28, 73 (Peter Huber & Robert Litan eds. 1991).

Economic Problems of Accidents and Compensation

George L. Priest, Yale Law School

Over the past 30 years there have been enormous changes in the understanding of the economic effects of accident law. I believe that over the next decade there will be equally increased attention to the economic dimensions of the design of compensation systems.

All are aware of the strict liability revolution and the substantial expansion of liability that has occurred in the United States led by changes in the products field with the expansion of substantive liability and the reduction of defenses available against alleged tortfeasors. This change in approach toward the law, however, has extended far beyond products liability and has affected many other areas. It has affected insurance law and insurance interpretation. It has affected the interpretation of statutes of limitation. It has affected the way courts deal with expert testimony and with damages issues. It is a movement that is far more extensive than simply products liability alone, though, I believe that it was led by developments in products liability.

Within the products liability field, the movement was encouraged by the economic idea that greater liability would lead to salutary effects, both in terms of deterrence and in terms of providing compensation. Over the last 30 years, however, there has been a substantial re-analysis of those conclusions in the academic literature in the United States. The academic literature today is substantially different than what it was 30 years ago.

Thirty years ago there was a debate, a very serious and far ranging debate, over the relevance of economics in any form for the analysis of the tort system. We all are familiar with the debate between Calabresi and Blum and Kalven, the very substantial challenge that George Fletcher gave to the economic approach to the legal system in his corrective justice article and, of course, Richard Posner's extensive work claiming that tort law is, will be, and should be efficient in all of its forms.

Again, that was a debate as between deterrence and compensation and, indeed, many still view these two approaches toward the legal system as alternatives in some way. I think it is characteristic of that time that the efficiency/compensation question was regarded as a debate or as alternative goals of the legal system that were inconsistent in some way.

A newer economic analysis — and perhaps I should say a softer economic analysis to distinguish it from Richard Posner's work — is reflected in the ALI report and in its conclusions that Gary presented just a moment ago. It is also reflected, perhaps, in a slightly more aggressive form, but I think an important form politically, in the recommendations of Vice President Quayle's Council on Competitiveness which has recently recommended and sent to Congress some broad-ranging changes, not so much in substantive law but in procedure and in the award of attorney's fees, that are meant to deal with perceived problems in the expansion of the law.

We also see a new thinking and a new approach to this area of the law in the adoption of the product liability directive by the European commission and by a number of countries in Europe. And, of course, the Japanese are very interested in the European directive and in developments in the United States as to how to change their law.

These new approaches to tort law and to accident law and compensation systems are not entirely the result of new academic learning. The academic learning has trailed behind broader trends that have pressed in these directions.

Indeed, I think the most important force for the re-analysis of accident law and compensation systems is the great increase in international trade and the increased concern about international competitiveness. I think that these concerns are important for understanding the movement in Europe and also important for understanding Japan's desire to choose a system of product or, more broadly, accident law, that corresponds to that of western countries.

Most important for understanding the future of accident law and the future of compensation law is to try to understand what the effects will be of the greater harmonization of law across different jurisdictions. The academic literature in the United States has operated for at least the last 30 years and probably 200 years as if the United States were an island alone and could ignore the law prevalent in other countries. There has always been some comparative work, but the work of comparativists, I think, has had less influence in the United States than in any other country. I believe that that will change very substantially in the future.

The compulsion to harmonize accident law and the design of compensation systems across countries will necessarily lead to a greater focus on the economic effects of accident law and what I will call the economic definition of compensation systems.

For this analysis, I wish to put aside the economic efficiency school of Richard Posner and the Chicagoans. The focus on economic efficiency is useful to an economist because one can frame the issue in a mathematical model, and then play with the model. But the economic efficiency approach is not very useful in thinking about a legal system, and it is not very useful in trying to either describe to judges or to juries how to think about the law. The ALI report has avoided the economic efficiency approach almost entirely, though I think there is a very important economic thrust to the ALI report.

When I use the term "economics" or "economic effects," I mean a generalized cost-benefit approach toward the design of accident law or the design of compensation systems: that is, weighing to the best ability that one can what the costs are of a particular rule or of a particular design of a compensation system against some definition of the benefits of the law or system.

My point today is that there are two principal reasons that greater international trade and the greater desire for harmonization of law across countries will lead toward the expanded influence of the economic approach to the design of accident law and of compensation systems. The first reason is that the desire to harmonize law across jurisdictions necessarily challenges the individual idiosyncratic moral or non-economic, non-functional features, of any country's legal system. Indeed, that is what harmonization means. It means putting the idiosyncratic aside and trying to reach a definition of law or a definition of a set of standards that operates roughly equivalently across different jurisdictions.

Necessarily that means a shifting to a functional approach of thinking about the law. That is, it simply is no longer possible for a country in the European commission to presume to be perfecting some nationally idiosyncratic corrective justice view of some principle of law if the other countries in the European community are taking a functional approach to the law. Thus, the nationally idiosyncratic will be harmonized out of each country's legal system.

In addition, it follows that if the moral or distinctively national approach to legal principles is abandoned, what is left will be a functional approach to law. It also follows, therefore, that a shift toward a functional approach means a shift toward taking the economic effects of the legal system and of the system of law into account.

The second reason that I believe that there will be an increased influence of economic analysis of the effects of the legal systems derives from the increased competitiveness of trade across jurisdictions.

There is no question that, with the success assumed to be achieved of the 1992 movement in Europe, with the tremendous success that the Japanese have achieved in entering foreign trade, that there will be pressure toward efficiency, pressure toward having a legal system that controls the manufacture of products or the provision of services in international commerce that does not put excessive burdens on one particular country versus another.

There are very few studies in the United States today about the effects of modern tort law or products liability law on international competitiveness. The reason for that is that we have not yet had a harmonization of litigation.

The American trial bar has not yet exploited and uncovered the reservoir of victims that have purchased American products and been injured by them in foreign countries. When the American trial bar develops that market for litigation, then there will quickly be greater attention given to the effects of U.S. product liability law on the international competitiveness of United States' manufacture. That attention will create pressure toward a more economically rational form of law.

I will not at this point even try to define what "economically rational" means. But I think that the increased pressures of international trade will necessarily force each country to examine whether its system of law and the extension of its system of law to its manufacturers and providers of services benefits or harms them competitively.

Of course, the foreign trade in any country is a relatively small portion of the total gross national product. But it is not insignificant. And with increased competition and increased international trade, there will necessarily be increased attention toward the economic effects of the legal system.

What will increased attention to economic effects mean about the direction of a legal system? What does it imply about substantive changes in the law? How should we think about the traditional economic debate between deterrence and compensation?

There is close to a consensus among those writing about the economic effects of law that, from an economic standpoint, an economically sufficient accident law or tort law — whether product liability, auto, or workers' compensation — can be defined in very simple terms. If the tortfeasor were able to prevent the accident in some practicable

way but did not do so, then the tortfeasor ought to be held liable; otherwise, not. That is a very simple economic definition of "optimal or efficient" accident law. I believe that it represents a consensus definition.

Regrettably, though there are many admirable achievements of Richard Posner, he has captured the words "efficient and optimal" and put his own definition upon them which is not a definition that is always helpful.

Posner aside, however, an economically sufficient accident law or tort law could be defined simply as I have defined it above. Most importantly, the forces of harmonization and increased competitiveness of international trade will press the legal system of each jurisdiction's legal system in the direction of that economic definition of accident law.

For example, the reform movement in the United States is pressing in that direction. Similarly, the European Products Liability Directive, though it adopts the term "strict liability," really seems to be designed to be interpreted according to this economic definition, rather than in the manner that the term "strict liability" is interpreted in the United States.

Furthermore, I think that these trends in the legal systems of Europe and the U.S. will successfully lead toward a unified approach toward tort law, where the principal ambition of tort law will be to make liable those tortfeasors who could have prevented an accident but failed to do so.

What about compensation systems? Parallel to the expansion of tort law in the United States, there has been expanded concern about providing compensation to the injured. I have argued in my work, though it has not been totally accepted, that the principal source of the expansion of liability in the United States beyond the point of minimal economic sufficiency, has been a desire to compensate. Whether that is true or not, there is no question that there has been a substantial increase in concerns about compensation.

In my view, there will be greater international competition in the future in terms of the design of compensation systems. Every country has a compensation system of some form. These compensation systems will be subjected to increased competition. The reason derives from issues of international finance.

The first arena of battle in all international financial competition is the level of taxation of any country. The taxation level of a country is heavily influenced by the form of compensation system that the country

provides. We have seen extraordinary competition over the last decade in terms of tax levels, which has had a substantial effect on the design of compensation systems.

Everyone is aware that every country in the world has experienced substantial reduction in taxes over the last ten years. While there have been internal political pressures to reduce taxes, there have also been international trade reasons to reduce them because countries compete as sources of manufacture and as sources of employment. We have also seen over the past decade that the reduction in taxes has not been matched by reductions in government expenditures in any country in the world. Almost every country in the world has suffered increasingly severe budget deficits. These deficit problems have affected, and necessarily will in the future affect, compensation systems and the design of compensation systems within any country. Indeed, if we look around the world, there has not been any health or accident compensation system anywhere that has not been subjected to severe financial pressures as a consequence of the reduction in taxes and the consequent deficits.

Though it operates through a different mechanism, I believe that these increased financial pressures on compensation systems will also increase the attention to and the relevance of economic analysis and the economic approach toward the law. The process is very simple. The desire of every compensation system is to provide the most extensive compensation possible given the resources available, and to provide that compensation most effectively to those that are injured or that suffer loss.

These are essentially economic goals. Essentially all that economics is about is the allocation of resources in the presence of scarcity. There is no question that all compensation systems of the world suffer problems of the scarcity of compensation resources. Moreover, the policymakers of every country in the world would like to provide more extensive compensation than is currently being provided.

The resolution of these concerns, ultimately, will be reflected in greater harmonization of compensation systems across countries, both from the desire for harmonization, but also from concerns about competitiveness.

The pressures to reduce taxes are serious. Pressures at the same time to remain competitive in foreign trade are serious to the extent that overall taxes in an economy can be lowered by adjustments in a country's compensation system. Put differently, to the extent that compensation can be provided equally extensively at less cost to the

productive elements of an economy, the more competitive the country becomes.

Now, of course, the central problem in dealing with compensation systems, and I think the most important problem in the United States, is how to deal with the poor. In this regard, the U.S. has experienced, if anything, a free ride in terms of competitiveness in international trade because it provides a relatively low level of support for the poor, which as a consequence gives the United States and United States' manufacturers what might be regarded as an unfair competitive advantage. The United States has a compensation system for the poor. It differs in extensiveness in different states, heavily funded by the federal government, and with additional public assistance provided by state jurisdictions. Nevertheless, the overall level of support is low. Still there is a limit to the extent to which even the U.S. will disregard the poor.

There is little chance whatsoever that greater concerns about international competitiveness will lead us to abandon that low level of support for the poor. Indeed, I think that the greater pressures toward harmonization across countries will lead in the opposite direction.

Yet there are limits to the extent to which any country can provide compensation to those injured or suffering. I believe over the next years that we will see severe challenges to the comprehensiveness of national compensation systems, such as the New Zealand system or to systems proposed by my friend, Professor Sugarman, or others. These challenges will stem from the precarious economic positions of many countries.

I think that the effort to provide uniform compensation without regard to tort law or accident law in the New Zealand manner will not be successful in the future. Indeed, I believe that there are strong pressures to move back toward reliance on accident law.

Accident law is a very effective way to reduce the costs of a compensation system. Accident law shifts losses to tortfeasors and, more precisely, shifts losses to tortfeasors where the tortfeasor is able to prevent the loss.

In the debate between compensation and deterrence, some have argued that, since every humane person wants compensation to be provided to injured persons, and since we do not know definitively whether the legal system has a deterrent effect, we should forget about deterrence and adopt a compensation rationale in order to provide compensation most broadly.

I believe that this approach addresses the problem backwards. If we view a compensation system as my Dean and friend Guido Calabresi

has taught us — as a form of tax system — and if a country faces a need to lower the general tax burden — whether a political desire or a desire that has been put to the country by greater international competition — and if that country is considering reducing the level of compensation it provides to injured persons, then why not first shift compensation costs where they might have some deterrent effect? That is, whether there is definitive evidence of a deterrent effect is not an argument to ignore deterrence, especially where compensation systems face severe financial pressures.

I think, however, that there is evidence, scattered though it is, that there is some substantial deterrent effect of accident law, not only in the products field, but also in the auto field and in workers' compensation. There is enough evidence that tort law has some form of deterrent effect to employ tort law as a means of making a country's compensation system more generous. That is, take away from a compensation system those sets of injuries caused in contexts in which the tortfeasor could have prevented the injury. Make the tortfeasor pay for those directly. If you view a compensation system as a tax system, apply the tax first to tortfeasors in contexts that free resources to allow broader compensation elsewhere.

Indeed, over the next decade in the United States, we will see even a retreat from the workers' compensation that Gary referred to as a system that works pretty well. I think that everybody believes that it works fairly well. But there are increased pressures in the United States to reduce the costs of workers' compensation. There are very few state legislatures in the United States that do not consider some form of workers' compensation reform package every year, addressing the increasing costs of insurance or of workers' compensation judgments.

An obvious reform in that context — an obvious and compelling way to reduce the general costs of workers' compensation — is to eliminate the limit on suing the employer where the employer could have prevented the accident. Take those costs out of the insurance system, place them on the employer. It may have a deterrent effect.

There is substantial evidence, in fact, that, to the extent insurers can increase premiums to employers who have substantial claims, premium increases lead to changes in employers' activities and reduce the accident rate. Such reductions will increase the ability of any system to provide compensation more broadly to those workers who are injured in contexts in which the accident was unpreventable. Thus, I believe that the trend for the future will not be toward the greater application of workers' compensation concepts barring suit against tortfeasors, but

the reverse: the re-introduction of tort law into the workers' compensation area.

Finally, I believe that these various trends — the desire for greater harmonization of the law across countries, the increased competitiveness as a result of increased foreign trade and, again, the financial pressures on compensation systems resulting from lower levels of taxes and increased budget deficits — all of these developments will lead to a greater attention to economics — to the economic effects of accident law and to the design of the economically optimal compensation systems.

Again, the essence of economics is how to obtain the greatest return from a limited set of resources. The increased competitiveness of foreign trade and the budget deficits of every country certainly show us that resources are limited. The question that remains is how then to define an accident law system and a compensation system to take best advantage of those limited resources.

On Harmonizing Laws and Evaluating Claims Processes

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I.

I am pleased that Professor Priest addressed the role of tort law in international competitiveness because this is an area of mutual concern to the participants in this conference. But what is the real story? One version is that American enterprise, losing out in world competition, is desperately looking for something to blame that loss on, and the tort system looks like a good excuse. Chief executive officers thus go around giving speeches railing against tort liability to cover up deeper failings. Another version is that tort liability really does importantly contribute to the decline in world competitiveness of American companies. Which is right?

My view is that the question is too narrowly phrased. Enterprises in all countries are concerned, not just about tort law overhead, but also about the full range of accident and illness costs suffered by their employees, their customers, and others who might be affected by their activities. These are costs they may be required to bear through tort liability, through compensation systems like workers' compensation, through employment-based social insurance and health insurance schemes, and so on. And all those costs can potentially have some effect upon an enterprise's international competitiveness.

That is why I think it is too narrow to focus only on tort liability costs when addressing the issue of international competitiveness. For example, under my reform proposals, American tort liability for enterprises would be largely eliminated,[24] and that might help make

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[24] STEPHEN D. SUGARMAN, DOING AWAY WITH PERSONAL INJURY LAW (1989) [hereinafter SUGARMAN].

American companies more competitive. But, of course, I admit that my plan would impose on them new costs through expansion of the social insurance and employee benefit system. And, while the net effect is meant to lead to a cost reduction, the additions certainly should not be ignored.

Professor Priest spoke about the movement towards uniformity in tort liability among industrialized nations. I want to explore a distinction I see between uniformity brought about through competition and uniformity attained through harmonization.

Suppose, for example, we think about trying to harmonize the provision and funding of unemployment compensation and workers' compensation among industrially developed nations. If harmonization implies a movement towards the norm, then the financing of these schemes would not rely upon experience rating at the individual firm level. Firms would pay differing rates for workers' compensation based upon their industry-wide experience. Unemployment compensation would be funded through a uniform national payroll tax, or its equivalent.

Notice that the harmonization solution would not be the current American solution, which, to a substantial extent, bases an individual firm's costs on the unemployment and workers' compensation benefits paid out to its employees.

Several economists in the U.S. have argued, however, that experience rating is "efficient" because it causes employers to take socially desirable preventative actions to reduce work accidents and to reduce uneven employment levels. Suppose for the moment that this is the correct analysis (a matter of some dispute).

Now we see a potential conflict between competitive advantage and the harmonization of national legal regimes around common solutions.

This, in turn, suggests that if international competition is its goal, a country may not be interested in harmonization of legal regimes. Indeed, it suggests that an "efficient" legal system, even if adopted in but a few places, has the potential to undermine an otherwise common regime and force a kind of "invisible hand" harmonization around it. Put differently, each country faces pressures to adopt a least cost, lowest-common-denominator, solution, even if it means most countries changing their rules.

Yet, there are also pressures the other way. Legal regimes that help a country's firms internationally can have very undesirable result on that nation's domestic population. To put it simply, one good way to

be internationally competitive is to drive down your wages. But that is obviously undesirable in other respects.

A better strategy, then, is to see if you can get something for nothing. That is, try to find some feature you can take out of your legal system which is both causing trouble for your enterprises and not really much benefiting your people. The issue, of course, is whether there really are features in your legal systems that people can agree both do damage and little good and hence should be changed.

For me, two features of the American tort system that have this quality are first the very high transactions costs that accompany the operation of U.S. tort law, and second, the enormous sums paid out for intangible losses. To be sure, it's a fair question as to whether we would sacrifice something important by sharply reducing these costs. Unlike me, others feel we would; they value both the individualized administrative process (where claimants are represented by high priced lawyers) and the award of large, individualized sums for pain and suffering. The upshot is that until more people with political power think as I do, American tort law is not likely to be substantially changed even if it has negative effects on our firms' ability to compete abroad.

Just how great a burden is American tort law anyway? My understanding is that, for the overwhelming proportion of American enterprises, the direct cost of tort liability is well under one percent of sales. This seems rather small. Indeed, for most firms surely it must be true that differences in tax costs, social insurance costs, labor costs and the like are far greater from one country to another than whatever differences there are in tort liability burdens (no matter how slight the tort law burden elsewhere). And besides, firms from abroad that compete in the U.S. face U.S. tort law burdens too.

On the other hand, this does not mean that the tort burden is simply unimportant. For one thing, in some sectors of the economy the direct cost is substantially greater than one percent of revenues. I understand that in the hospital sector, for example, it may amount to three percent.

Furthermore, a few individual firms and firms providing a few products have been subjected to enormously burdensome liability. Maybe these burdens are deserved, and maybe they are not. For executives looking from the outside at these few high visibility defendants, their concern is that they too might be drawn into that turmoil despite their best efforts to avoid that fate.

If the response to this fear were simply to redouble safety efforts, this would probably be a good thing, even though putting too much

money into safety can at some point be wasteful. But the bigger concern is that this fear discourages innovation. In short, how much does the possibility of embroiling the enterprise in potentially ruinous litigation make firms excessively cautious and unwilling to bring out what would be socially desirable new products?

The very interesting new book sponsored by the Brookings Institution called *The Liability Maze*[25] contains several very interesting and quite insightful, although, ultimately, I think, not dispositive, chapters on innovation effects in various industries. That clearly is an area that needs more research.

This is very difficult work to carry out, like identifying the dog that did not bark, because you have to focus on desirable products that are not introduced but would have been but for the fear of liability. But it is possible that the most important negative consequence of American tort law on U.S. international competition is its chilling of innovation.

II.

Berkeley Professor Tom Tyler, a social psychologist, has been looking at how satisfied people are with different types of dispute resolution mechanisms. He finds that people decidedly care about the process as well as the outcome. Furthermore, he finds that people are more satisfied with trial-type processes than they are with arbitration, and they are more satisfied with arbitration than they are with litigation that leads to settlement.

Some people who have seen this work claim that it demonstrates the importance of maintaining the traditional personal injury law system. But I read the evidence in the opposite way. I say that because I believe it is wholly implausible to think that we could ever operate a system in which all accident disputes are resolved through trials. Therefore, we are necessarily stuck, under tort law as we now know it, with an overwhelming proportion of claims being resolved through litigated settlements which Professor Tyler shows are not so satisfying to people.

If we are going to be concerned with how claimants feel about the process they encounter, the key comparison, I think, is between tort settlements and claims filed under compensation schemes or first party

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[25] THE LIABILITY MAZE: THE IMPACT OF LIABILITY LAW ON SAFETY AND INNOVATION (Peter Huber and Robert Litan, eds. 1991).

insurance arrangements. Perhaps Professor Tyler will next examine this comparison.

Another interesting researcher whose work is relevant to us is Andrew Tobias, a freelance writer who lives in Florida. He wrote a book called *The Invisible Bankers* about the insurance industry. Tobias has made a very creative proposal that would both provide us with good information about people's satisfaction with their insurance carriers and, he hopes, prompt better customer service.

Under the Tobias plan every time you have a transaction concerning an insurance claim, you would be given a performance evaluation form to complete and send to the appropriate public agency, such as the state insurance commissioner. Tobias then links the ratings insurers obtain from claimants with new business they are able to write. There are many ways to link the two that I will not take the time to explore here.

What I want to emphasize instead is that this technique could be employed in other settings as well. For example, how about patient evaluations of hospitals that might be linked to the hospital's reimbursement rate under from health insurers?

Professor Jerry Mashaw has written about management evaluation techniques that can be used to improve the service delivery by a bureaucracy, with a focus on welfare and social security benefits. One such strategy is quality control in which, for example, a sample of cases is retrospectively audited and the agency is fined or receives a bonus based upon the results of the performance evaluation.

Yet another technique for controlling bureaucracies is through whistle-blowing awards. The American Law Institute's recent Reporters' Study of personal injury law has recommended that, if companies disclose dangers they know about, this will help them make out a "regulatory compliance defense" in a tort suit.[26] That is an interesting idea, but it should not be the only way to prompt firms to disclose product dangers. I propose that if a company does not disclose a danger before a citizen comes forward and points that danger out, the enterprise would be subject to a fine. And out of the fine, a substantial share (perhaps half) would be paid to the whistle-blower who brought the danger to the public's attention. The hope, of course, is that the threat of the fine and public disclosure would prompt the firm to come forward earlier on its own.

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[26] 2 ALI REPORTERS' STUDY, *supra* note 2 at 83-110.

The more general point here is that those of us interested in public policy toward accidents should direct our imaginations towards evaluation techniques of two sorts: (1) those which promise to induce claims handling bureaucracies to provide service that claimants find satisfying, and (2) those which will prod risk creators to take socially desired safety precautions. The development of effective evaluation systems can make alternatives to tort law all the more appealing.

Comments by the Participants

PROFESSOR MILLER: With regard to the view that accident victims are more satisfied with a hearing and a decision than with a settlement without a hearing, you may be interested to know that Hawaii has a comprehensive mandatory court-annexed arbitration program for personal injury claims where probable damages are $150,000 or less.[27] The working of the program has been carefully studied and evaluated since its inception by my colleague, John Barkai, and Gene Kassebaum of the University of Hawaii Sociology Department. Their findings have been published.[28]

PROFESSOR PALMER: I was most interested in Professor Priest's suggestion that the New Zealand type of scheme may be an inhibition to international competitiveness. I want him to consider the fact that the opposite is the case.

If you compare the accident costs to New Zealand employers compared with their counterparts in Australia, a country where New Zealand does a great deal of trade, there are some interesting results.

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[27] Haw. Rev. Stat. § 601-20 (1986).

[28] John Barkai & Gene Kassebaum, Hawaii's Court-Annexed Arbitration Program: The Final Report, 1992, University of Hawaii, Program on Conflict Resolution Working Paper Series: 1992-2; *Pushing the Limits on Court-Annexed Arbitration: The Hawaii Experience*, 14 JUST. SYS. J. 133 (1991) (An earlier draft was published in the Program on Conflict Resolution Working Paper Series: 1990-2); *Using Court-Annexed Arbitration to Reduce Litigant Costs and to Increase the Pace of Litigation*, 16 PEPP. L. REV. 43 (1989) (An earlier version was published as Program on Conflict Resolution Working Paper Series: 1989-2); and *The Impact of Discovery Limitations on Pace, Cost and Satisfaction in Court Annexed Arbitration*, 11 U. HAW. L. REV. 81 (1989) (Also published in Japan at 13 HIROSHIMA L. J. 132 (1989). An earlier version was published as Court-Annexed Arbitration in Hawaii: An Evaluation of Cost, Satisfaction, and Pace, Program on Conflict Resolution Working Paper Series: 1988-3).

The following are either translations or shorter summaries of the above: *Court-Annexed Arbitration in Hawaii: Is it Worth it?*, HIROSHIMA B.J., Japan, September, 1992 (in Japanese); *Hawaii's Court Annexed Arbitration Program Interim Evaluation Report: March 1991*, in T. KOJIMA, AMERICA'S CIVIL JUSTICE SYSTEM 261 (1992) (in Japanese); and *Hawaii Court-Annexed Arbitration Evaluation is the First to Show Cost Reduction to Litigants*, 3 BNA's ALTERNATIVE DISPUTE RESOLUTION REPORT 140 (1989).

One finds that in the Australian systems, all of them which retain negligence to a large extent and the extensive common law trial system, the New Zealand comprehensive scheme is substantially cheaper for employers than the schemes in Australia. The Law Commission in 1988 in New Zealand found that New Zealand employers enjoyed a commercial advantage in terms of the costs compared with their Australian counterparts.[29] One can make a sound argument on the basis of nearly 20 years experience, that had the common law been retained in New Zealand, the employers would have been in a far worse competitive position.

The changes that are currently being legislated in New Zealand are going to advantage the employers even more. But that should not be permitted to obscure the point that there are in fact, significant savings due to what Professor Sugarman calls the "transaction costs of the existing tort system." If the money is, in fact, funnelled to accident victims and not to lawyers, not to insurance adjusters, not to insurance companies, that there are very substantial savings on a "cost benefit" basis, to use Professor Priest's term, compared with the existing systems.

One has to acknowledge that the American systems have been extraordinarily, stubbornly resistant to change. The reasons for that are almost entirely political, in my view. Having taught torts in the United States at a very early stage in my career and having taught Advanced Torts at the University of Iowa in 1991 and rereading all the literature again after some years away from it, I was staggered at really how boring it is. How little progress has been made in reforming it over the years and what a social wasteland it is. But, however, that is not something which I suppose, from my little corner of the Pacific, I should worry about.

PROFESSOR PRIEST: If I could just respond briefly, I did not mean to suggest that the New Zealand Plan was an inhibition to international competitiveness or that New Zealand trade will sink into the Pacific because of the Plan, not at all.

But I do think that outside New Zealand, the New Zealand Plan is viewed as something of a miracle. That is, the New Zealand Plan is, I think, inconceivable in the United States, given the experience there

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[29] Law Commission, Report No. 4, *Personal Injury Prevention and Recovery-Report on the Accident Compensation Scheme* para.248 (Wellington, 1988).

with very limited forms of compensation through Medicare and Medicaid. It is inconceivable because those systems have ballooned into systems of enormous cost.

There has been a similar experience with the Black Lung program, which was essentially a no-fault program, and the same experience though not quite as adverse — but still subject to persistently aggressive upward pressure — in the context of workers' compensation in the individual states.

It is simply inconceivable that one could imagine that total costs would be reduced and compensation extended more broadly if the U.S. were to abandon tort law entirely. I don't know of anyone — well, perhaps Steve Sugarman — but there are very few others besides Steve Sugarman in the United States that would be willing to take those risks.

The New Zealand system and its success are not sufficiently understood in the U.S. It is unfortunate that economists have not given it more attention.

We simply don't know why it has been so successful in New Zealand. And, without knowing the reasons for that differential experience, and given the adverse experience with other types of compensation systems in the U.S., there is no thought of overturning U.S. tort law.

PROFESSOR KLAR: I have a comment and a question for Professor Priest. First, my comment concerns the New Zealand Accident Compensation scheme. I, for one, do not think that it has been the miraculous success which Professor Priest assumes it has been. The New Zealand scheme has been in effect for approximately 20 years. It has been the target of serious reform proposals throughout all of that period. Once again we see substantial reform of the scheme being undertaken in New Zealand. One wonders why, if it has been so successful, such dramatic reform seems to be constantly taking place. We will be discussing the New Zealand scheme more tomorrow, when I shall comment further.

I have a question for Professor Priest, in order to gain a better understanding of his position. Professor Priest's position seems to be that the United States will be returning to more tort, not less tort, in the future. He basically relies on the economic rationale that the tortfeasor who could have avoided the accident but did not, should pay for its costs.

Am I correct in understanding that Professor Priest relies on the normal negligence standard in this context? Or is it a strict liability standard which he espouses? What is Professor Priest's view of the "tortfeasor"?

PROFESSOR PRIEST: One could call the regime to which the U.S. is moving "negligence," but it is dangerous to do so. The term "negligence" in the United States, has been perverted beyond hope of repair. The negligence system that was in effect through, say, the late 1950s and 1960s, in the U.S., was a very crude system of law, and did not correspond to the simple economic standard that I have talked about. It doesn't correspond with a law that anyone would accept today.

It is shocking to go back, as I have, and read cases from the 1950s and see what courts were doing in those days. It is amazing how low the level of liability was. So I certainly do not endorse a return to pre-1950s negligence.

The term "negligence" has been perverted in the U.S. in another way by its appropriation by Richard Posner, Steve Shavell and Mitch Polinsky — the efficiency of the law school — that has interpreted negligence to mean a very precise calculation of costs and benefits, reaching some point of efficiency which can be represented by a mathematical model. I believe that it is not a very helpful way of thinking about the legal system. So the only reason I do not use the word "negligence" is because it is freighted with an unsavory history and equally unappealing baggage from economics. There is too much weight attending the term "negligence" to try to resurrect it at this point.

On the other hand, the concept that I refer to as the basic or simple economic standard of liability is very much similar to the type of weighing of benefits and burdens of alternatives to prevent the accident — alternatives to tortfeasors or to manufacturers or to consumers or other victims — that we associate with the more interesting cases of negligence law.

This basic economic concept is a concept of deciding: Was the accident preventable or not? If the accident were not preventable, then let's see if we can establish an incentive to prevent it. Attach liability; maybe it will prevent it, maybe it won't, but let's try it. If it was not preventable, then we have to think "What is the most effective way of providing compensation for that accident?" It is really no more difficult than that.

PROFESSOR MORIGIWA: First of all, I'd like to express my happiness for having Professor Priest give the talk which has set the scene for this workshop. As Dick Miller would know, evaluating regimes of law in the context of international trade competition was one of the main reasons that I had in mind for getting this workshop together at this time.

As Gary Schwartz has pointed out in his article, the issue of compensation has become somewhat old hat with the rise and development of the law and economic analysis and then the rights theory analysis of tort. So, why talk about compensation now? What is beyond the issue of compensation? My answer to that was policy analysis of different schemes for dealing with accidents, in the context of international relations of nation states. When we talk of policy analysis, as George Priest has pointed out, we will be dealing with the issue of tax regime, insurance systems and accident law on the same plane. George has chosen to speak about it in terms of economic effects of each of these systems. I think Professor Sugarman's comments to George are quite well taken and an ensuing discussion with George would be extremely important for finding out the implications of their ways of looking at the problems. Let me first give you a part of my view in a nutshell.

The economic effect, of course, is one important way of looking at things. But, then as Gary Schwartz has pointed out, there are also the fairness or justice rationales, among others, that we must consider if we are to evaluate these systems comprehensively.

One point that I want to bring out is about what brings about uniformity, or the competition and harmony dichotomy. I agree with Stephen that although there may be political pressures for harmonization, the basic reason for uniformity, if it happens at all, among the vast economies of the world would be pressure from competition to get the most efficient system going in each of these countries. But, as Professor Matsumoto's talk should bring out, law plays different roles in different societies. I think that had a lot to do with what, to George Priest, would seem as a miracle in New Zealand. If you're in New Zealand, you know that it's not a miracle. It's perceived as something that could well happen if you are in that particular society. In Japan, at least the courts do not play the role that they do in America. To an extent, one might say that law is not necessary to achieve the economic effects that George Priest had in mind.

And so, if we are going to do rigorous policy analyses of these several social systems for attaining economic efficiencies as well as fairness and deterrence, we would have to regard not only the pressure for efficiency, which brings about uniformity of these systems, but also the cultural diversity which would make it very difficult for each of these different nations, for different reasons, to come up with the same system for addressing each of these problems. I believe the time is ripe for studying compensation systems anew in this light.

PROFESSOR LEFLAR: Professor Priest, if I understand him correctly, has made the prediction, and perhaps it's a normative recommendation, that tort law should sweep away all of its competitors, and that administrative compensation schemes and the like are to be consigned to the dustbin of history. I'm wondering if he is making that recommendation with regard to every segment of tort law, and in particular to medical malpractice law.

The work of Danzon[30] in the United States, and most recently, the Harvard medical practice study have fairly definitively established that, first of all, there is a great deal of actual medical malpractice in society; second, that only a minuscule proportion of that medical malpractice is ever subject to court action; and third, that compensation within the court system of medical malpractice is — perhaps it's uncharitable to call it a random event, but certainly an event that is not very closely related to actual desert.

The result of those studies seems to be that with regard to incentive structures that the malpractice system creates for individual physicians, the incentives are fairly weak and, as Professor Sugarman has pointed out in some of his writing, in fact, perverse in terms of leading to defensive medicine and similar practices.

I'm wondering if, perhaps, Professor Priest might carve out an exception to the general thrust of his recommendations for medical malpractice, as reformers in, for example, New York state seem to be doing in recommending a switch to an administrative compensation scheme for malpractice.

PROFESSOR PRIEST: Well, I did not mean to suggest that tort law would sweep away all of its competitors. I think, though, that there will be a consistent role for tort law and, indeed, an increasing role for tort law even in those areas which, in the U.S. at least, are now dominated by compensation systems.

My vision of the future is not an all-encompassing tort law, but a tort law restricted in terms of substantive standards in comparison to the tort law we see today in products liability and in some other areas.

Now, I surely agree with your reading of the literature that medical malpractice is a particularly difficult area in which tort law does not

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[30] *See, e.g.*, Patricia Danzon, *The "Crisis" in Medical Malpractice: A Comparison of Trends in the United States, Canada, the United Kingdom and Australia*, 18 LAW, MEDICINE & HEALTH CARE 48, 50 (1990); Patricia Danzon, *The Frequency and Severity of Medical Malpractice Claims: New Evidence*, 49 LAW & CONTEMP. PROBS. 57 (1986).

seem to be operating very effectively. Why is not entirely clear. And even the various reports — the Harvard study, the ALI recommendations — do not convincingly indicate why it is that the tort law operates so ineffectively in the medical malpractice field.

The ALI study, as Gary has reported, has recommended focussing more on hospitals and then allowing the hospitals to monitor the doctors practicing within them. Perhaps that would help. I am not sure.

I tend to suspect that medical malpractice is an area in which the jury system may not operate very effectively. Of course, in the U.S., it is a sacrilege to even question the jury system. But, I think we know very little about the extent to which lay citizens, chosen in particular because they know nothing and have never known anything about a case on which they are sitting, are able to coherently make liability and damages decisions. Reports have been quite critical about the damage recoveries that juries award and about settlements in response to the expectation of jury awards. That may be a source of the problem.

My recommendations are that tort law should be retained, but that a system of compensation should be expanded to provide compensation for all accidental losses either provided through a person's own first party health or accident policy or through some type of social welfare net for those that don't have the resources for first-party insurance.

That is not a system of no compensation, but a system of universal compensation in some form, private for most, with public support for the poor, that provides for all that do not recover under the tort system.

We have a compensation system in this country that relies heavily upon private first-party insurance, secondarily upon federal and, to some extent, state insurance for those that do not have resources for first-party insurance.

The real question is whether a separate compensation system for medical malpractice victims is a useful grafting upon that system of combined private and public insurance?

I think that, in the context of specialized compensation system programs, such as the Black Lung program, we have learned that such programs do not work very well. Such programs shift an enormous amount of dollars. But the dollars are hard to control. Such systems do not work very well in comparison to the other compensation available in this country.

My colleague Jerry Mashaw's work on Social Security disability has shown the same things, again, heavy transaction costs, though purely a compensation system.

But the issue has to be harmonizing those forms of compensation within our country. I think that it is not clear at all that we ought to do away with tort law for medical malpractice.

But it is strong evidence of the ineffectiveness of our current system that there is little discrimination by insurers among doctors who have had claims filed against them. The malpractice insurance system does not seem to work very well. The licensing system does not seem to do very well. It is not clear that hospitals under the current form are doing well enough. Maybe they will under the ALI proposals.

PROFESSOR MATSUMOTO: Professor Schwartz commented on three rationales for the tort system discussed in the ALI report: fairness/justice, deterrence, and compensation. On the other hand, Professor Sugarman showed us a very interesting survey of his colleague, a social psychologist, that suggests that victims care about the process of dispute resolution and that they are more satisfied with a trial-type outcome than they are with arbitration.

I think the satisfaction of victims is quite important in dispute resolution. However, the term "satisfaction" is tricky. In Japan, for example, the victims of the *Minamata* disease suffered serious nervous system damage from eating fish polluted with mercury contained in the wastewater discharged from a chemical plant on the coast. The injured insisted that they did not want money damages. Rather, they demanded the president of the defendant chemical company apologize to them in public and drink the wastewater just discharged from his factory. (Actually, they wanted both sufficient compensation and an official apology, but the point is that they had not been satisfied just with the negotiation process before filing the suit and the out-of-court settlement negotiations during the litigation process).

Professor Sugarman, what do you think about this? Do you think the satisfaction of victims is an independent, fourth rationale of the tort system? Or is it just an element of justice or a part of compensation?

PROFESSOR SUGARMAN: I think it's an important social function in all societies to provide, through the culture or through the legal system, ways for people who feel aggrieved to be listened to so that they will believe that attention is paid to their being wronged.

You can probably increase social trust if people don't feel alienated. One way to become alienated is if you have a grievance and there's no way to be heard.

The question is whether or not private lawsuits for money damages, which almost always result in private settlements, particularly with the worst offenders, work very well to provide an avenue for this satisfaction

that people need. I doubt it, and that's why I think it's important for us to think about other remedies, which people can turn to, particularly in the most serious cases, in order to obtain some sort of redress.

People have tried in recent times to allow victims to be able to play a greater role in the criminal law process. Many times the victims of crimes feel they're the victims of the criminal process what with all the attention given to the criminal and the rights of the criminal.

In this same vein, I have proposed more public participation in administrative and regulatory processes.

Brief Country Reports: New Zealand

Margaret Vennell, University of Auckland

In 1974, New Zealand adopted our first Accident Compensation Act and it provided a comprehensive scheme for those who suffered personal injury by accident. At the time, it was said that New Zealand was leading the world in a far reaching piece of social legislation. And the scheme has stayed in more or less the same form ever since 1974. So, we've had 18 years of experience.

Now, the act abolished the right of an injured person or the dependents of a deceased injured person to bring an action for damages at common law where the injuries or death were the result of personal injury by accident.[31] It provided in its place a system of state compensation under which no question of fault or liability arises — if the claimant can establish both that the right flows from a personal injury by accident, and that the claimant has suffered loss. The scheme concentrates on compensation for the injured, not on causes.

There have been since at least 1985 a number of proposals for change to the scheme. These proposals for change, up until comparatively recently, were to actually widen the scheme, to bring in compensation for disabilities arising out of events other than accidents.[32] It was seen that the New Zealand scheme was unfair in that it picked out the victims of accidents and gave them advantageous treatment over those disabled, particularly through sickness.

In the last 12 months since we have had a change of government, the proposals for change have taken an entirely different form.[33] They have been employer-driven, in the sense that the employers have carried out extensive lobbying of Government. One must remember that the

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[31] Accident Compensation Act 1972, § 5; Accident Compensation Act 1982, § 27.

[32] Law Commission Report, No. 4, Personal Injury: Prevention and Recovery (1988).

[33] Accident Compensation: A Fairer Scheme, (Government Green Paper, July 1991).

New Zealand scheme began really as a workers' compensation scheme. But compensation for the victims of other accidents was brought in and injuries to all persons were compensated in a similar way to the way workers were compensated. The employer-driven demands for change have been largely cost-driven.

The employers in New Zealand, as a body, have objected to paying for the non-work accidents of their employees — because the New Zealand scheme has traditionally been funded from three sources: from a levy on employers whereby 24-hour cover has been provided for accidents to employees, wherever they occur; there has been a motor vehicle fund whereby the owners of motor vehicles have paid a levy annually when they relicense their motor vehicle; and the supplementary fund to cover non-earners has been budgeted for from general taxation, and set aside for that purpose.

The employer lobby has complained that it has had to cover the 24-hour compensation of employees for non-work injuries. These have been minor injuries principally — with a considerable number of sports related injuries, which have resulted in high costs for minor medical treatment.

These arguments have driven the change.

The New Zealand scheme has actually been a highly cost-effective scheme. It has been extraordinarily efficient, I think. Until very recently I have been a member of the Board of Directors administering the scheme; although I don't personally take credit for it, I have been able to take pride in its efficiency.

Ninety-four cents of every levied dollar has been returned in compensation. The scheme has cost six percent of levy funds to administer. And that, in comparison with North American and Australian workers' compensation schemes, is extraordinarily cost efficient.

The levies have not been high. The levies have been very much lower than the levies, as Geoffrey has mentioned earlier, paid under the Australian workers' compensation schemes, and very much cheaper than, I think, most, if not all, North American schemes.

But, the employers, as I have said, have complained. So the present government saw that as a mandate to put forward proposals for reform. A working task force was set up last year which had very few meetings, but which made recommendations which were released in the form of a green paper in July last year at the time the government issued its financial budget. The green paper was entitled "A Fairer Scheme."[34]

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[34] *Id.*

Now, there's many in New Zealand who query whether the proposals were likely to produce a fairer scheme. One important point is that the government has rejected any return to tort law, but it did take on board the employers' complaint about funding non-work accidents. Thus one of the principal proposals has been that there be a levy paid by all earners on their earnings. So there are now to be, in fact, five different ways of funding the scheme.[35]

The Accident Rehabilitation and Compensation Insurance Bill[36], which will replace the accident compensation scheme with an insurance-based scheme, was introduced into Parliament towards the end of November last year and it was referred to a parliamentary select committee for consideration.

The Select Committee received just under 600 submissions, most of which I understand were critical of many aspects of the bill. The bill was reported back into Parliament for its second reading on Thursday of this last week, the 19th of March 1992.

On Wednesday I received a copy (which obligingly fell off a truck) of the bill which was to be reported back. I find, sitting next to Geoffrey, that he has one that he managed to get on Thursday and his is slightly different from mine. So what happened on Friday is anyone's guess.

But, you know, there are some reasonably substantial changes as far as I can see by just glancing at Geoffrey's. So this makes it very difficult to give you a complete update of what is actually happening in New Zealand. New Zealand may have exploded today for all we know.

Parliament was taking urgency on it, and I think it's Monday today in New Zealand. I don't know whether they were having Monday off. They didn't have Friday off as they normally do, though some of them did leave Parliament, I understand, to play a game called cricket which became more important than the bill. But perhaps they wanted to get their injuries over before they had to pay something towards them themselves.

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[35] Accident Rehabilitation and Compensation Insurance Act 1992, §§ 101, 110, 114, 120 and 123, which provide for employers, employees, motor-vehicle and medical misadventure premiums to be payable. Non-earners injuries are funded by parliamentary appropriation.

[36] Enacted as the Accident Rehabilitation and Compensation Insurance Act 1992 (effective July 1, 1992).

But, as I say, the reasons for change have largely been driven by this belief by the employers that the scheme was costly when, in fact, that is far from the truth.

Now, I think, problems have arisen in New Zealand, and this may have been a reason why the scheme has been criticized. A problem is that a comprehensive compensation scheme that concentrates on compensation rather than causes may not necessarily provide incentives for the prevention of accidents. Whether or not tort law provides an effective deterrent element is arguable. I accept that there are arguments in favor of the view that tort can act as a deterrent — but there are other ways of getting deterrence. These have not really been explored in New Zealand. And I think some of the tensions have arisen, not only because of the fear of cost blowouts, but also because people fear that there is a lack of any deterrent element.

People have also feared the lack of any notion of accountability, and that has also created tension, particularly I think in relation to medical accidents.

There has never been, or there has been very little account taken of regulatory controls in New Zealand which do provide one way of preventing accidents. There is limited power in our fair trading legislation for regulatory standards and controls to be promulgated.[37] But, in fact, very few to date have actually been introduced.[38]

Some of the tensions of the proposed new scheme, which may by now have been enacted, relate to definitional problems.

The New Zealand scheme, up until now, has provided comprehensive cover for personal injury by accident however caused.[39]

The new scheme rewrites the definitions[40] which have already been interpreted in a considerable number of cases in our courts. The new definitions, particularly those of "accident,"[41] "personal injury"[42] and "medical misadventure"[43] take very little account of the judicial developments in the law and, in particular, the interpretation the courts

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[37] Fair Trading Act (1986).

[38] Examples of product safety standards which have been introduced are those for children's night clothes, and for toys.

[39] Accident Compensation Act § 26 (1982).

[40] Accident Rehabilitation and Compensation Insurance Act § 3 (1992).

[41] *Id.* at § 3.

[42] *Id.* at § 4.

[43] *Id.* at § 5.

have given of "medical misadventure,"[44] because our scheme, being comprehensive, also covers medical accidents. There have been an extensive number of cases coming before the courts where the courts have interpreted what is a medical misadventure.[45]

There is now a completely new definition[46] — and Geoffrey's copy of the bill is different in this respect from mine[47] — so it's again going to have to go back to the courts for interpretation.

Under the new bill there are now two types of medical misadventure: medical error and medical mishap. Medical error will equate with medical negligence.[48] Whereas medical mishap is an adverse consequence of treatment by a registered health professional properly given if the likelihood of the adverse consequence of the treatment occurring is rare[49] and the adverse consequences of the treatment is severe.[50]

So apart from medical error to fall within medical mishap there has to be both an adverse consequence, which is rare, and severity. Rarity is defined as being something where there's a probability basis of one percent. And the threshold for severity is that you have to be in hospital

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[44] Accident Compensation Act § 2 (1982).

[45] *See, e.g.,* Accident Compensation Commission v. Auckland Hospital Board and M., 2 N.Z.L.R. 748 (1980); MacDonald v. Accident Compensation Corporation, 5 N.Z.A.R. 276 (1985); Viggars v. Accident Compensation Corporation, 6 N.Z.A.R. 236 (1986).

[46] Accident Compensation Act § 5 (1992).

[47] The Bill as finally enacted corresponded with Sir Geoffrey Palmer's copy of the Second Reading Draft. The definition of "medical misadventure" was further amended by the Accident Rehabilitation and Compensation Insurance Amendment Act 1993 which came into force retrospectively on 1 July 1992.

[48] Accident Compensation Act § 5(1) (1992).

[49] *Id.* at § 5(1). Section 5(2) provides: "For the purposes of the definition of the term 'medical mishap,' the likelihood that treatment of the kind that occurred would have the adverse consequence shall be rare only if the probability is that the adverse consequence would not occur in more than 1 percent of cases where that treatment is given."

[50] Section 5(4) provides:

> For the purposes of the definition of the term "medical mishap", the adverse consequences of treatment are severe only if they result in death or —
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> (a) Hospitalization as an inpatient for more than 14 days; or
>
> (b) Significant disability lasting for more than 28 days in total; or
>
> (c) The person qualifying for an independence allowance under section 54 of this Act.

(The independence allowance under section 54 is a maximum of $40.00 per week, with a 10 percent disability threshold).

for at least 14 days as a result of the mishap or disabled for at least 28 days.

And there's a further restriction that if as a result of treatment you suffer a mishap, it will not be compensated as a medical mishap unless the original treatment was itself a medical misadventure. So, if a person presents for medical treatment for another cause and suffers an adverse consequence, that will not amount to a medical mishap.[51] So, there's also a causal link that has to be established.

Now, at the select committee stage before the bill was reported back there had been no provision for funding for medical misadventure in the scheme. This was introduced rather surprisingly in the bill as reported back. There had been no real and widespread consultation when the bill was in committee on any new proposal for funding medical accidents. Compensation for medical accidents under the 1982 Act was paid for basically out of the earner's fund, as part of the twenty-four hour cover, if the person injured was an earner; out of the motor-vehicle fund for those which might have followed on from a motor-vehicle accident; or out of the supplementary fund if the person injured was a non-earner.

Under the new scheme as originally presented to Parliament for first reading, medical accidents would have been paid for out of the employer's fund, the earner's fund, and from the non-earning fund from general taxation, depending on the status of the injured person. A few might have been funded from the motor-vehicle fund.

As reported back on Thursday, and ultimately as enacted, the bill now contains a fourth funding — premium funding basis, and that is that a premium will be charged on health professionals.[52] Registered health professionals will have to pay a premium to cover medical misadventure as a result of their treatment of patients.

As I left New Zealand on Saturday evening[53] there was already an outcry. The President of the New Zealand Medical Association was on the radio for most of Saturday morning, and no doubt he was on T.V. too, but I missed the T.V. news bulletins. And he was saying, "This is grossly unfair. We'll have to pay $1,000 each a year premium and, obviously, we will have to raise our charges." And he said — he was complaining that they already paid $600 as an annual premium to their defense societies.

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[51] Accident Compensation Act § 5(5) (1992).

[52] *Id.* at § 123.

[53] March 21, 1992.

Now, since the scheme came in, the New Zealand medical profession has, indeed, been paying premiums to its defense societies. Until comparatively recently, the premiums paid were US$60. The New Zealand medical profession belongs to branches of the two main United Kingdom based medical defense societies, which also operate in New Zealand. Here the medical profession was paying $60 whereas their counterparts, belonging to the same societies in the United Kingdom were paying 1,500 pounds. It's gone up to $600 within about the last 18 months largely because, I believe, there was a lack of accountability in the scheme. And there have been many more complaints to the appropriate disciplinary bodies,[54] which have had to be funded by the health professions.

Someone this morning I think did mention that people — victims of accidents — like their day in court. The New Zealand victims of accidents, at least medical accidents, have got around this by complaining under the medical disciplinary process and getting their day in court through the disciplinary process.

And the defense unions have been paying for legal counsel to represent the medical profession when they have had to appear before their disciplinary body. So that's what medical practitioners have been paying their membership fees to those bodies for.

And those have had to increase from $60 per annum to about $600, really, because there has been such an increase in complaints. Medicine is undoubtedly becoming more technological and scientific. Maybe the standards of the medical profession have been slipping, although it would be hard to prove this. The public is certainly more likely to complain. So even if health professionals have to pay $1,600 per annum, I suggest it will be cheap in comparison with what is being paid in other countries.

Now, there has been another problem, or at least a perceived problem, which the government accepted. And that was the government alleged that there was going to be a tremendous blow-out in the number of medical misadventure claims. It was difficult to see on what grounds the government could justify this belief because in the 1991 Annual Report of the Accident Compensation Corporation it was said

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[54] In 1990 there were 218 complaints to the Medical Practitioners' Disciplinary Committee, the body which is the principal complaint hearing tribunal. Complaints also lie to the Medical Council or to Divisional Disciplinary Committees. (There were 9,643 registered medical practitioners in 1990.)

that the costs of medical misadventure claims to the scheme were five million out of a total budget of compensation paid of $1.2 billion.[55]

But it was argued by the government in the preparatory papers which were prepared for the select committee that medical misadventure claims were likely to increase in costs in the coming financial year — or in the present year — to a 100 million, from five million to 100 million in one year and that was the reason why it was said that medical misadventure had to be more narrowly defined to prevent this $95 million worth of claims coming along.[56]

Now, I myself, never found any evidence to suggest that there was going to be a 95 million dollar escalation in medical misadventure claims. The new scheme, as I have said, has restricted medical misadventure and indirectly, contrary to the government's rejection of a return to tort law, opened up the way to sue in certain cases.[57]

For instance, pharmaceutical trials and clinical trials where the person is a volunteer, provided that the subject has agreed in writing to participate in the trial, are now outside the scheme.[58] So that is an area where there will be a way opened for tort claims. There are other areas where tort claims clearly are likely to arise.[59]

The scheme also has changed the system and gone from an administrative system — or it's proposed that it will go from an administrative system into a much more insurance-based system. The new Act is premised on this approach. It seems likely that the way is now open for private insurers to bid for a share of the premium dollar. So, too, the way is open for the Corporation[60] to be privatized, or to be reconstituted as a state-owned enterprise.

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[55] By Colin Beyer, Chairman of the Board, at 13.

[56] Statements by the Hon. Bill Birch, 1991.

[57] See Rodney Harrison, "Matters of Life and Death: The Accident Rehabilitation and Compensation Insurance Act 1992 and Common Law Claims for Personal Injury," Legal Research Foundation, Auckland Monograph (No 35) 1993.

[58] Accident Compensation Act § 5(8) (1992). This provision has been amended in 1993, so that clinical trials only now are covered by the scheme provided the trial has been approved by a properly constituted ethics committee, which is required to certify that the trial is not being conducted principally for the benefit of the manufacturer or distributor of the medicine. For the trial to be covered under the scheme there is a further requirement that the subject has not agreed in writing to participate in the trial.

[59] For example, where the misadventure occurred after the original treatment. *See* Accident Compensation Act § 5(5) (1992).

[60] Accident Rehabilitation and Compensation Insurance Corporation.

One way this has been done has been to create a class of employers who will not have to pay any premiums to the Accident Rehabilitation and Compensation Insurance Corporation and who will become exempt employers and will be allowed to cover the scheme, either directly or through private insurance, in relation to their own employers for their work related injuries.[61]

There are, I think, a lot of constitutional problems in introducing that system.

But, basically, the scheme is still to be a 24-hour no-fault scheme. And the principal changes are in the funding system, the movement to an insurance-based scheme, and the opening of the way for some tort claims.

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[61] Accident Compensation Act § 105 (1992).

Japan

Tsuneo Matsumoto, Hitotsubashi University, Tokyo

What I would like to say at the beginning of my remarks is that in Japan we do not have such a tort or insurance crisis as seen in the United States. The number of cases filed at district courts has decreased gradually from 220,000 in 1980 to 190,000 in 1990.

The insurance companies are not losing money through affording liability insurance. For example, in Japan the automobile liability insurance consists of two parts: one is compulsory liability insurance, the other is add-on voluntary liability insurance. By law, compulsory liability insurance must be reinsured by the Ministry of Transportation. In practice, the Ministry is making a profit through reinsuring.

U.S.- and European-based insurance companies are of course permitted to sell automobile liability insurance policies in Japan, and it is beyond doubt that they profit by doing so. And now they are demanding that the Japanese government let them enter the reinsurance market as well.

In the fiscal year of 1991 that ends this month, almost all insurance companies made it public that their annual profit was reduced, not because of an insurance crisis but because of the securities market falling last year. And that reminds me of my experience here in Hawaii in 1986, when I happened to be visiting the University of Hawaii School of Law. At that time, responding to the cry for tort reform, consumer lawyers insisted that it was not the tort law, but the insurance companies' cash flow underwriting that raised the insurance crisis.

Why do we not suffer from a litigation explosion and tort crisis in Japan? In the past, the theories of Professor Kawashima of Tokyo University dominated. He said that the rights consciousness of the Japanese people was still underdeveloped and that the pre-modern society still existing in Japan made us less litigious.

Now quite a different theory attracts supporters. The advocates of this new theory assert that the level of litigiousness of the Japanese people has nothing to do with an underdeveloped rights consciousness;

rather, there should be another type of dispute resolution other than litigation. Litigation is neither the only nor the best method.

Not only Asian people — including the Japanese — but also some European people are less litigious and more alternative dispute settlement-oriented. Last year, I visited the Netherlands in order to survey their consumer law. A professor at Utrecht University said they have had only two supreme court decisions relating to personal injuries caused by defective products. Most of the cases are settled outside the courts. And he further noted that recent legislation of product liability under the European Community's Council Directive will further promote fair settlement.

Here I would like to emphasize institutional factors rather than Japanese personalities.

The first factor I would like to point out is that in Japan, bringing a suit before the court is relatively difficult. A plaintiff must pay a considerable amount of money before bringing suit. As a rule, a client is required to pay a lump sum amount of attorneys' fees in advance at the time he/she contracts with the attorney to handle the suit. The standard fee table is authorized by the Japan Federation of Bar Associations — this is actually a kind of cartel, but most of the attorneys are willing to discount the rate.

On the fee table, the amount of fees is proportionate to the amount of damages the plaintiff demands in the suit. For instance, if the amount of damages demanded is $1,000,000, attorneys' fees amount to $45,000. And if the plaintiff is fortunate enough to win the case, he/she is required to pay a contingent part of the judgment in the same proportion.

Moreover, in addition to attorneys' fees, the plaintiff has to pay a filing fee to the court. The amount of the filing fee is also proportionate to the amount of damages demanded. To take the same example, if the amount of damages demanded is $1,000,000, the filing fee is $5,000.

So in other words you need $50,000 in advance to bring a suit demanding the payment of damages totalling $1,000,000. Thus it is virtually impossible for the less wealthy injured to prepare such an amount of money. In Japan, a pure contingent fee arrangement is considered to be against public policy and unenforceable.

The second institutional factor is that even if the plaintiff manages to file suit, it is difficult to win the case. The plaintiff usually has difficulty collecting evidence to build a case, since Japanese law does not provide for full and extensive discovery procedures like those in

the United States. I believe this is the principal reason why we have so small a number of product liability decisions.

Further, in civil cases in Japan, the plaintiff bears a higher burden of proof, much higher than the preponderance of the evidence standard employed in America. Also, juries in the United States tend to be sympathetic to the injured, but we do not have a jury system in Japan at present.

The third institutional factor is that the amount of damages awarded in judgments does not tend to be excessive. There is also a standard table of awarded amounts of damages for personal injury, which has been compiled jointly by judges, attorneys and insurance companies based on long experience in motor vehicle accident cases.

Before the Motor Vehicle Accident Compensation Act was enacted in 1955, a number of lawsuits had been filed in the courts and quite a few court decisions had been reported. At that time, automobile accidents were one of the major sources of practicing attorneys' incomes. After the legislation, most of the motor vehicle accidents came to be handled by insurance companies without the intervention of attorneys.

The fourth factor may be that it is rare for attorneys to make big money on a lawsuit because as I said before, we do not have pure contingent fee arrangements for plaintiffs' lawyers, nor do we have a time charge system for defense lawyers.

I must add one more factor. Our relatively well-functioning automobile accident compensation system also covers a portion of accidents caused by product defects. Article III of the Automobile Compensation Security Act provides that the holder of the motor vehicle which injured another party is exempted from liability only when he proves all of the three following facts: First, he/she was not negligent; second, the injured or a third party was negligent; and third, there was no structural defect or functional disorder in his/her automobile.

The third requirement means in practice that the holder of the vehicle assumes a form of substitute liability for the manufacturer of the defective vehicles. Of course, the insurance company will pay the damages on behalf of the holder. However, the insurance companies rarely make indemnity claims against the auto manufacturers. As a result, the holder of the automobile essentially bears the risk of damages caused by the defective product through the premium paid the insurance company.

As a result, Article III has been interpreted as establishing quasi no-fault liability. The nationwide compulsory liability insurance scheme

combined with the quasi no-fault liability principle therefore serves to make the area of product liability even smaller.

Thus in a country like Japan, in light of all the factors I've mentioned, who of the members of the Association of Trial Lawyers of America would file a suit? I will give you a recent example of a product liability case: Showa Electric Industries' L-Tryptophan case.

Showa, a Japanese manufacturer of chemical products, exported L-Tryptophan to the United States. L-Tryptophan, an essential amino acid, was made as a component of a kind of nutritional supplement. In the manufacturing process, Showa's L-Tryptophan was contaminated with some impurities injurious to health. Currently, 1,500 victims have been reported in the United States, and more than 1,000 lawsuits have been filed so far.

During the account year of 1991, Showa paid $66,000,000 in settlement with the injured in the United States, though Showa did not make public the number of cases they settled. And Showa also paid $100,000,000 as litigation and settlement costs. I believe that the attorneys' fees comprise most of that cost. Analysts expect that Showa's losses in the next account year will be much greater.

On the opposite side of the Pacific, in Japan, however, the number of victims of L-Tryptophan is still unclear. Early this year, a newspaper reported that a 52-year-old housewife was going to bring an action. She has not brought an action so far. Her attorney related to me that she lacked proper evidence which could be admitted in a Japanese court.

What could explain such a difference between the United States and Japan? In the United States, you have strict product liability while we do not. But I do not think that is the correct answer.

Even if we could introduce strict product liability into our legal system, I believe we would not follow the way the U.S. has gone. I would say that it is the differences in the system of civil procedure implementing the tort claims that makes the difference, and not the substantive tort doctrine itself.

So "tort crisis" does not seem to me to be an adequate term. The "civil procedure cost crisis" or the "civil justice crisis" is more appropriate. The Japanese companies are facing adversity not only with product liability litigation in the United States, but also intellectual property infringement claims raised by U.S. companies such as Texas Instruments, Wang Laboratories and Honeywell.

The Japanese companies are compelled to accept out-of-court settlements in order to avoid litigation costs. This issue is recognized in the

United States as well. Last summer at the American Bar Association's annual meeting, Vice President Quayle proposed 50 measures to save litigation costs as recommendations from an "Agenda For Civil Justice Reform in America."

Do we in Japan have any problems in tort law and litigation? Yes, I think we do, but they are quite different from those of the United States.

I would like to point out three problems I believe we have in Japan. The first is that the victims are not properly compensated except in the case of automobile accidents. The principle of corporate liability has not been well established. As I said before, maintaining tort litigation is not an easy task. We have several government-supported compensation systems, including the Drug Side-Effects Compensation Fund system, and the "SG" or "Safety Goods" marking system. But these alternative compensation schemes cover only a limited part of the total injuries.

I think, contrary to the movement in the U.S., we should continue to encourage tort litigation by reforming civil procedure laws and rules. By chance, the Ministry of Justice of Japan just recently started work overhauling our now 66-year-old code of civil procedure. I hope their reform effort will successfully expand access to the courts.

On the other hand, we also have a professor who enthusiastically advocates a comprehensive compensation system modeled on the New Zealand experience. But in light of the current budget deficit and the reduction of social welfare benefits, I am afraid that a New Zealand-modeled plan might not work in Japan. In Japan, privatization of social security benefits is seeing progress, and tort law is beyond doubt one vehicle for that privatization.

The second problem is that Japanese plaintiffs and their attorneys are fond of bringing lawsuits against the national government or a local government entity in addition to — or instead of — private entities in various types of cases, such as product liability, pollution, flood, landslide, school accidents, stray dog bite cases, and so on.

There seem to be several reasons. One is, of course, the governments have deep pockets. Another reason might be a form of reverse paternalism. The third reason is that there is no other way to demand the government implement some policy the plaintiff believes favorable to them, such as certain environmental policies. We do not have initiatives as are utilized effectively in California, and tort claims against the government function as policymaking litigation. So we should add policymaking as another feature of tort law. In other words, it is a way for a citizen to participate in implementing the law.

The third problem — which I fear is very serious — is the widening of individual liability. In a case with which Professor Morishima is very familiar, a mother let her son play with his friends at his friends' home. They all lived in the same neighborhood. While playing in a pond near their houses, her son drowned and died. She and her husband filed a suit against the parents of their son's friend alleging that the mother of their son's friend was negligent in taking care of their son. The district courts rendered judgment in favor of the parents while the local government's negligence in failing to properly maintain the safety of the pond was denied by the judge.

In the old days, this type of dispute was settled in the communities. So I think it's one example of privatization of compensation. If the judge had recognized the local government's negligence, then this case would have been settled more satisfactorily. Thank you.

Canada

Lewis N. Klar, University of Alberta

Frankly, the reform of accident compensation in Canada has not been a highly controversial issue. As in the United States, accident compensation in Canada is a matter for the individual states or provinces. There are ten provincial jurisdictions, each with its own compensation scheme. What might be a controversial issue in one province, is not necessarily an issue in another. As Professor Matsumoto was stating in reference to Japan, there are important differences between American tort law and Canadian tort law, as well as between the two societies. This makes the accident compensation debate in Canada very different than the accident compensation debate in the United States.

Canadians generally define themselves as "not being American." One of the symbols of Canadian pride is the existence of several programs which are in place in Canada which are not in place in the United States. This serves as an example of how "progressive" we Canadians believe we are.

The fault/no-fault debate in Canada basically is focused solely on automobile accidents. All Canadian provinces have had workers' compensation programs for decades. The Canadian workers' compensation models are based on no-fault, which eliminate the workers' right to sue. It might be noted, in fact, that if there is any public concern in Canada over reform of accident compensation, it is more frequently directed at workers' compensation. Much of the heat is directed at the adequacy of the workers' compensation schemes. In contrast, there is very little public controversy over the operation of automobile accident compensation or the tort law process.

The issue of the adequacy of tort law comes up as in issue in relation to automobile accidents only because of increasing automobile insurance premiums. There is otherwise no ideological ground swell in Canadian society for no-fault compensation.

The difficult political issue for governments is the cost of automobile insurance. Automobile insurance in all Canadian provinces is compul-

sory. People must have insurance in order to drive, and people must drive. It becomes a very difficult issue for Canadian governments to deal with, therefore, when the public complains about the burden of automobile insurance premium increases. I am in fact convinced that if the public was not concerned about the increase in automobile insurance premiums, the government would not be dealing with the issue of no-fault. In view of the fact that automobile insurance premium increases seem to be the exclusive concern, one might wonder whether there are not less drastic solutions to dealing with this problem than the introduction of no-fault.

The province of Quebec has not only its unique automobile accident compensation scheme, but as well a legal system which differs from that in the other Canadian provinces. Quebec is a civil law jurisdiction, whose law is based upon the Napoleonic Civil Code. The law in the remainder of Canada is based upon English Common Law. Quebec is the only province in Canada that has adopted a pure no-fault scheme in relation to automobile accident compensation. There is no right under the Quebec automobile accident scheme for any automobile accident victim to sue for damages.

Whether the Quebec scheme is working or not is difficult to assess. As always, it depends upon one's view of "success." As with the New Zealand scheme, one is told that the scheme seems to be working. This is perhaps so; it is trite to observe, however, that whether a scheme is working or not depends upon what goals it is designed to achieve.

In Quebec, I assume that what has been achieved is stability in the pricing of automobile insurance premiums. There have, on the other hand, been studies in Quebec which have indicated that since the introduction of the Quebec automobile accident scheme, the injury, death and accident rate in Quebec has gone up annually.[62] Thus, despite its possible success on other grounds, this seems to be one of the clearer after-effects of the Quebec automobile insurance scheme.

The next major province which has experimented with no-fault is the largest province in Canada, Ontario. The Ontario experience, in

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[62] *See, e.g.*, Marc Gaudry, *The Effects of Road Safety of the Compulsory Insurance, Flat Premium Rating and No-Fault Features of the 1978 Quebec Automobile Act* in 2 REPORT OF INQUIRY INTO MOTOR VEHICLE ACCIDENT COMPENSATION IN ONTARIO 1-28 (1988); Rose-Anne Devlin, *Liability Versus No-Fault Automobile Insurance Regimes: An Analysis of the Experience in Quebec, 1988*, noted by Trebilcock, *The Future of Tort*, 15 CAN. BUS. LAW. J. 471 at 476 (1989).

one way, parallels that of New Zealand. Once a no-fault scheme is introduced, there seems to be constant pressures to change it.

Ontario's no-fault scheme was brought in by the Liberal government following the campaign promise of Premier David Peterson that his government would do something about rising automobile insurance premiums. This was the sole political motive for bringing in the scheme. Premier Peterson established a very impressive commission under the Chairmanship of Mr. Justice Osborne which spent considerable time and money, had an experienced staff, visited other jurisdictions, interviewed experts and so on, before coming down with its two-volume Report. The Report recommended the retention of the tort system with some significant modifications. The Report specifically recommended *against* bringing in a pure or threshold no-fault system. Despite this, the Ontario government, several months later, introduced a threshold no-fault program, which, for the vast percentage of automobile accident victims, eliminated their tort law rights. One can find no better illustration of the fact that if the political will is there and the political heat is high enough, governments will decide on the no-fault issue, without regard to their own commissioned studies. Threshold no-fault under the Ontario system was similar to threshold schemes existing in the United States, the Michigan system, for example. A victim's injuries must satisfy a certain verbal threshold before that victim can sue in court for damages. The threshold was set at death, permanent serious disfigurement, or permanent serious impairment of important bodily functions caused by continuing injury that is physical in nature. It was estimated that about 90 percent of tort law claims would be eliminated because of that threshold. A victim, whose injuries satisfied the threshold, could sue for general damages as well as for economic losses.

This scheme, in any event, is now history due to the election of a new government in Ontario. The New Democratic party, which is the socialist or left-wing party in Canadian politics, campaigned on the promise of returning the right to sue to automobile accident victims. It won the election and brought in proposed legislation which would have totally altered the existing no-fault scheme. The proposal was quite remarkable, and would clearly have introduced a unique accident compensation scheme into Ontario.

The concept of this proposal was as follows. All automobile accident victims would retain their right to sue. This sounds good in so far as tort law rights are concerned. However, victims would only be able to sue for their general damages; that is, pain and suffering, and other

non-pecuniary losses. *As well, this right to sue for general damages would be subject to a $15,000 deductible.* In addition, no victim would have a right to sue for their economic losses — not the seriously injured, not the permanently injured, nor the estates of deceased. The $15,000 deductible for general damages would in effect really translate into something more like a $25,000 deductible, since no actions would be brought unless there is a cushion above the deductible which will cover the costs of litigation.

This proposal did not meet with favor from any camp, neither those in favor of no-fault nor the tort right advocates. The process of attacking it started. Thus Ontario's situation is now in a state of limbo, and new proposals have been put forward.

Other than for Quebec and Ontario, all of the other provinces maintain basic tort rights for automobile accident victims. Every province has, as a part of its compulsory automobile insurance, provisions dealing with "no-fault benefits." That is, when an owner of a car purchases an automobile insurance policy, certain minimum, no-fault benefits are provided. These are called "Section B benefits" because they fall under Section B of the standard form automobile insurance policy. These Section B benefits give everyone a certain minimum coverage on a first-party basis. Victims maintain their right to sue for whatever is not covered in these no-fault benefits. It is possible that no-fault benefits of this nature tend to promote litigation because they can provide some initial "seed money" with which further litigation can be pursued. They are, in general, not taken very seriously. They are too minimal to really be important.

Three provinces — British Columbia, Manitoba and Saskatchewan — have public auto insurance. It is frequently erroneously believed that these three provinces have no-fault insurance schemes. This, of course, is not true. What British Columbia, Manitoba and Saskatchewan have is the same thing that the other Canadian provinces, other than Quebec and Ontario, have; that is, tort law rights supplemented with minimal no-fault. The only difference is that in those three Western provinces, a public insurance corporation sells the insurance, rather than private insurers.

Aside from the automobile accident field, there is little demand for no-fault in other areas. Occasionally, no-fault compensation is looked at in other areas; medical malpractice for example. Generally speaking, however, there is no great movement for no-fault.

I must stress the importance of having regard for jurisdictional differences when discussing accident compensation. This is a comment

which Professor Matsumoto was making as well. There are many differences, both in societal institutions and values as well as in the substantive law of torts, between the Canadian system and the American system. Canada better resembles England than it does the United States in this respect. Even though we are neighbors, little has so far seeped across the border. There is, in Canadian tort law, a cap on non-pecuniary damages. This was introduced not by legislation, but, surprisingly enough, by judicial decisions in the Supreme Court of Canada.[63] In Canadian tort law the maximum a victim can receive in non-pecuniary damages or general damages is approximately $300,000.

Canadian tort trials rarely use the jury system. Although there is some variation between provinces, as a general rule Canadian lawyers and judges do not have the same comfort level with juries as do Americans and, as a result, juries are used less frequently. Although there is a right to use juries, judges can reject a request for a jury trial, on the basis that a case is not suitable for a jury. Canadian tort law does not, as a general rule, use the contingency fee, although again, this is subject to provincial variation.

Canadian tort law does not use punitive damages in the same heavy-handed way as does American tort law. Punitive damages are used in Canadian tort cases almost exclusively to punish wrongdoers, in very serious cases of outrageous or illegal conduct. This generally restricts their use to the intentional torts, not to negligence actions, although they have been used in a few negligence cases. Even when punitive damages are awarded, their quantum tends to be low. Nothing like the $120 million award in the Ford Pinto case could occur in Canadian tort law. A plaintiff who receives $50,000 or $75,000 for punitive damages, has done quite well. Another substantive difference is that product liability in Canadian tort law is generally based on negligence, and not on strict liability.

Overriding all of this, of course, is the natural conservative nature of Canadians. Canadians generally are a conservative and cautious group that shy away from flamboyance and theatrics. Thus attitudes are basically quite moderate with respect to our legal system, as with other matters.

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[63] *See, e.g.*, Andrews v. Grand & Toy, 2 S.C.R. 229 (1978); Thornton v. Prince George Bd. of School Trustees, 2 S.C.R. 267 (1978); and Teno v. Arnold, 2 S.C.R. 287 (1978).

One of the findings of the Osborne Commission Report,[64] which examined automobile accident compensation in Ontario, was that, for the most part, Canadians are very well served by existing social insurance or social welfare programs, much more so, I would suggest, than Americans. For example, one of the debates now going on in the United States concerns whether or not United States should move to a Canadian style medical insurance program. George Bush and others have widely condemned it as being something that is a disaster. Canadians do not agree with this assessment at all. There's quite a lot of comfort in being able to go to a doctor of one's choice, or a hospital of one's choice, to get medical care without cost.

In terms of motor vehicle accident compensation, liability insurance in Canada is compulsory as it is in other jurisdictions. The minimum compulsory amount in all provinces, however, is $200,000. This compares very favorably with many American jurisdictions which have minimum amounts which are much lower. In Arizona, for example, the minimum amount is $15,000. This is virtually no insurance at all. Although the minimum compulsory amount in Ontario is $200,000, the Osborne Report found that, on average, the Ontario motorist carried $500,000 liability insurance. In some American states there is a high percentage of drivers on the road who are not insured at all. The Osborne Report found that in Ontario less than 2 percent of drivers are uninsured. Thus there is an excellent chance that a victim injured in a motor vehicle accident will in addition to receiving good medical care, be able to sue a solvent person who was responsible for the accident.

In short, I do not think that other than for the insurance premium issue, that it can be fairly argued that the tort system, in relation to automobile accidents, is not working. One would be moved to acceptance of the no-fault position, if one concluded that under the existing system, there were significant numbers of victims of motor vehicle accidents who were not being compensated, were not receiving proper medical care, were not receiving adequate disability coverage, and so on. As was suggested by Professor Priest, any humane person wants reasonable provision for everyone in society, whether they have been injured in a motor vehicle accident, whether they have been disabled due to disease or, one might even suggest, whether they are disadvantaged by environmental or social conditions.

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[64] REPORT OF INQUIRY INTO MOTOR VEHICLE ACCIDENT COMPENSATION IN ONTARIO (1988).

There has been a new alignment in the fault/no-fault debate. Whereas previously one saw insurers on one side of the argument and "progressive" academics on the other side, the insurance companies now have joined the no-fault side. The insurance companies in Canada want no-fault schemes which they can control. In this way, by controlling the costs of automobile accidents, profits for the insurers can be guaranteed. On the other side of the debate we not only find the plaintiff's bar, which fights hard for the maintenance of tort rights, but as well victims' rights advocates. These groups fight very hard for the retention of tort rights. One might suggest that they're wrong, or misguided. But one might also see in their position that their sense of justice, their need for appeasement, their demand for full compensation, and their commitment to the individual's dignity, run stronger than we are otherwise led to believe. Many of them have been through the tort system; for example, parents of children who have been killed in traffic accidents. At this point, tort law has very little to offer them. Despite this, they feel very strongly concerning the retention of tort rights. I think more work has to be done in trying to understand their feelings.

We have talked about the public's satisfaction with our existing systems. Are people satisfied with tort? Are they satisfied with workers' compensation? These are things which we can study. The Pearson Commission Report[65], for example, indicated that there was a fair degree of satisfaction with the tort process among claimants. This compared favorably with data indicating satisfaction with non-tort methods of compensation.

In conclusion, I would argue that unless a convincing case can be made for a move to no-fault, we should not do it. The Canadian situation still rests firmly on the side of tort law rights, although certainly encroachments have been made.

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[65] THE ROYAL COMMISSION ON CIVIL LIABILITY AND COMPENSATION FOR PERSONAL INJURY, March 1978, CMNO 7054-11.

Who to Suffer from Misfortune

Itaru Shimazu, Asia University

It seems that all of you attending here are specialists and better informed than I am in this field of tort and insurance. The only thing that I feel I can do here is to restate what I think is the problem and to raise several basic questions as a layman and try to find where to search for the answers to them. Before I begin, however, as a preface, I must express my concern that in Japan, the economic point of view is very poorly represented in discussion, while what economists teach us is quite relevant, I feel, to understanding peoples' behavior.

First, I'd like to talk about what peaked my initial interest in this field. It is a simple story which has been lingering in my mind for some five years. In Japan, there is an old leading case in tort law where an elementary school (i.e. the local government) was found liable for the injury of a child caused by a defective piece of playground equipment at the school. The accident occurred after school (as far as I remember; if not, let us suppose so for the purposes of theory). The decision of the court in this particular case might be considered fine, but that is not the point here. Besides, under Japanese law, once a house, or playground equipment in this case, is found defective, no-fault liability is applied to the owner to compensate the damages caused by the defect. So once the defect was found, the school's losing the case could not have been avoided.

But I wondered, what would happen after the amount of such cases grew to a point so as to give both school administrations and the pupil's parents common knowledge that in the case of after-school accidents in school playgrounds, schools are likely to be found responsible, just in general? Obviously, the schools would react by shutting their doors after school and telling the children to go home to play. Then many children would end up playing on the streets, and some of them would probably get hurt or even killed by cars. Such causal changes are easy to detect. In this case, therefore, the court decision admitting the school's liability could be said to have caused the injury and/or death of children in the streets. Such a chain of causation is, I

think, obvious enough that we can assume it without empirical proof.

This story is only an imaginary one and perhaps not even a very well-made example for my following argument, but it is obvious, at least to me, that playgrounds in schools are safer places for children to be, even after school, than the busy streets.

Then by making a long story short, let me jump from this simple story to a serious conclusion: that there must be a category of damages which can be said to be caused by human beings, but whose cost should be carried somehow by the victim, because trying to help the victim by the universalized rules of law will result in producing many more victims in other places. This is the problem of the intricacies of natural causation, the workings of which we can only guess at. And judges' decisions have been made and accumulated in such a world of uncertainty, aiming at minimizing human damages in general.

If things are such as roughly described above, and if it is agreed upon that there are some cases in which the damages should be carried by the victim rather than by someone else, those who are enduring the suffering of accidents in these cases and not trying to get compensation from somewhere by claiming it as his right, are contributing to the welfare of the public in general. They are in a sense equivalent to heroic soldiers sacrificing their life or health in a just and unavoidable war.

However, in the case of school accidents, the so-called "war" here is not one against some human enemy, but against nature or the network of natural causation in which we live and which works with total indifference to human values. If "social justice" is one ideal, no matter whether it is a "mirage" or not, as Dr. Hayak describes, in the comparison to "social justice," we might as well talk about "natural justice," i.e. the ideal or rules which require people to endure suffering in such cases as mentioned above. The latter might be severe and inhuman in the ordinary sense of the word, but that is the consequence of the nature of circumstances where we are living and surviving. It could be understood by another name as the principles of "fate" or "luck" which human beings have been discussing since the beginning of history. Of course, the jurisdiction, or application of such inhuman justice, must be limited as little as possible and only by being limited within such a minimal sphere may it still be recognized as just. But it seems that we first must admit the existence of such a sphere in general.

But as you can easily tell, my example with which to prove the necessity of admitting such a category of "natural justice" as the

opposite of "social justice" may not be a good one, especially if we consider the possibility of applying the device of liability insurance to cover the risk of this case. My example of the playground equipment in school might be considered, thanks to insurance, to fall within the case of social justice rather than natural justice, in which a human sense of sympathy for victims finds a suitable place to be applied to lead to a happy union of economic efficiency and moral satisfaction.

As a matter of fact, that is how I myself thought when I was trying to discern a clearer picture of the embryonic conception of "natural justice." The social cure given by the institution of liability insurance seemed to be final. But as I was reading for this workshop about the so-called "crisis of tort law" or the "insurance crisis" in America, it occurred to me that my old idea of natural justice might still be relevant.

I am afraid that you might find my argument for the concept of natural justice not very convincing. But it is obvious that some risk cannot but be borne by the party him- or herself. Then the question is whether there is any convincing justification for such risk allocation, and if there is, how far can we extend or minimize such allocation.

Let me use the following abbreviations:

A — the victim of an accident;

B — another party and a potential defendant;

N — "nature" or "luck";

D — damage;

Ac — the cases in which A caused D;

Af — the cases among Ac which are caused by A's fault;

nAf — the cases among Ac which are not caused by A's fault.

Thus:

$$Ac = Af + nAf \text{----------(1)}$$

Likewise,

$$Bc = Bf + nBf \text{----------(2)}$$

And if the logic behind this is that if D happens, it is caused either by A or B (or a combination thereof) or N and that it must either be A or B (or a combination thereof) or N's fault; we cannot apply the same relationship between Nc, Nf and nNf to get the formula Nc = Nf + nNf.----------(3).

First, nNf is somewhat awkward and nonsensical because nature seems to be responsible for all damages caused by her — a form of "strict liability" for nature — so nNf is empty.

And if we ignore the cases in which both A and B caused and are responsible for A's damage, then:

T (the total cases of A's damage) = Ac + Bc + Nc = Af + Bf + Nf----------(4); But because of (1) and (2),

Ac + Bc + Nc = (Af + nAf) + (Bf + nBf) + Nc;

And because of (4)

(Af + nAf) + (Bf + nBf) + Nc = Af + Bf + Nf.

Then, instead of (3), we get:

Nc + nAf + nBf = Nf.

But since neither nAf nor nBf is empty, we get an interesting theorem:

Nc < Nf

Normal social aids plans as a safety net for the competitive market are indifferent to the causes of suffering. And it could be understood as a precondition to get people to start playing the game of the market. In other words, it could be a term of original social contract that one is provided with certain plans of risk-avoidance in case of misfortune. But the inherent limitation of this device to mitigate human grief is that its level must be kept low enough not to attract too many recipients to destroy the scheme as a whole. And that is a logical consequence of including Af and Bf among the recipients of the system, because they are the cases in which damages could have been avoided by either A or B. This is the so-called "moral hazard" or the "deterrence" problem.

Conventional negligence systems deal only with the Bf type of damages by charging B for A's damage. That means nBf—part of Bc falls in the category of Nf, and D will be borne by A. The system comprised of these two (social aids and the compensation-by-negligence rule) is very simple and it is easy to see the theory behind it. That is, tort liability is applicable only in the exceptional case of Bf in which B has the clearest reason why he is to compensate A. That means there is nothing wrong in A's suffering from his or her own damage in other cases. And only if B is to blame for it, should B bear the cost of damages in A's stead. But if B cannot be identified, or even if identified, is not wealthy enough to pay his due, A cannot be compensated. A is unfortunate, of course, but it is only his or her hard luck that is to blame. And A will be aided by social provisions in exactly the same terms with those who are suffering from various other kinds of hard luck. Now such classical systems are facing various challenges in modern society, and several alternatives have been offered. One is the strict liability solution.

The strict liability school insists to substitute Bc for Bf in the formula described above because it cannot be justified from the viewpoint of

corrective justice to leave the category of nBf for A to bear the cost of. It seems the theory behind this is that nobody should be suffering from the damages caused by other human beings. Or that one's protected sphere should be kept intact from risk generated by others and if any damages is inflicted by someone, the one who caused that damage can and therefore must compensate for the loss. But this theory deals only with corrective justice, whose concern rests only on human relations, leaving the results of interactions between man and nature behind as one's own matter which it is none of law's business to interfere with. The reason for that might be that this interaction, i.e. "fate" or "luck" would consist of the very core of the protected sphere or freedom of each individual. Here life is understood to be something like a gamble played by each individual within his or her own protected sphere of rights. It is a matter of course that all gains or losses of the gamble go to the gambler. And it is B rather than A that gambled in the case of Bc, including the case of nBf. Thus B is required to compensate A for nBf and A's loss in nBf is categorized in the same case as B's loss of Nf, i.e. B's hard luck rather than A's. On the other hand, the rest of A's damage in Nf (with nBf excluded from it) is to fall in the same domain of life, as age, disease, and death which are unavoidably to be suffered by A.

Another alternative will be the system proposed by Professor Sugarman, or the New Zealand system. The question which will naturally be raised here is "why do those who suffer from the damage Nf other than nBc — for example, damages caused by lightning, earthquake or disease — should get less support from the society than those covered by such a system. (Professor Vennell just reported about the recent development in New Zealand and it seems that the New Zealand scheme will cover some of Nc).

A possible rationale for such treatment is that there is nobody to cover Nc. When it is caused by nature, there is nobody to cover the damage, to carry the burden, to pay the fund. Social aids can cover this category but that is something entirely different.

This is a very daring system. But we need more detailed information and investigation in order to evaluate the results and effects of such a system and to find out if we are living in such circumstances so as to allow us to have this kind of broad system of compensation or socialization of risks.

My viewpoint here has been located outside of the compensation system. The focus was on the question of how we can justify the system toward the people who are not covered by it. The answer to this

question must be sought in the interrelationship between ethics and economics. Whether such defenses as "we can't afford it" or "to try to cover such damages will disrupt the balance of the system," are valid or not will depend, in the last resort, on our long-term experience. So whether what was alleged to be the case was true or not, we must wait to see in the future. Thank you.

Discussion: Setting the Scene

PROFESSOR MCKENNA: I have a question for Professor Klar. I was just curious as to what the Canadian system is in terms of attorneys' fees. Does the prevailing party get attorneys' fees?

Second, what is your civil procedure system; do you have the type of discovery system that we have?

And, third, how do you obtain such a high percentage of compliance with the required insurance on the motor vehicles; how do you enforce that? Do you have a system where you check to see where people have insurance?

PROFESSOR KLAR: On the three questions, the prevailing party does not get attorneys' fees but will be awarded costs as designated by a schedule. This will, by no means, cover the fees that the person will have to pay to his or her own attorney.

We do have a system of discoveries, pre-trial examinations, and so on.

I am not certain as to why we have such a high percentage of compliance with required liability insurance. We use basically the same system that probably most American states use. A person cannot register a vehicle without having the required insurance.

There is nothing to prevent that insurance from subsequently being canceled or terminated. We do not have particular surveillance, such as check stops, to look for that.

Perhaps I should ask why American states have such low compliance rather than wonder why Canadians have such high compliance.

What is your perception of why in some states, for example, California, there is such a high percentage of uninsured drivers? What reasons would you attribute to that?

PROFESSOR MCKENNA: I don't know about California but I assume some similar factors must play in California as in Hawaii. I just bought a car and I don't think I was required to show any proof of insurance to buy that car, first of all, and this is in Hawaii.

Second, I think the cost of insurance is so high that people just choose not to renew their insurance, especially after you've had one ticket or a driving under the influence type of citation. Your insurance

costs just skyrocket and a lot of people just choose to drive without insurance.

PROFESSOR PALMER: I couldn't help thinking, when we heard from Professor Shimazu, that in a sense I'm not so sure what we're debating here is a philosophical question. It seems to me the underpinnings of accident law are actually political. It depends, in the end, on what sort of value system you have. It depends, in particular, what sort of collectivist value system you have, what sort of sense of community you have, whether you believe that the state has a series of responsibilities to look after people or whether you don't believe that. I don't think you can find in the annals of jurisprudence, at least, and perhaps even in philosophy any satisfactory answers to that.

You've got a competing series of political philosophies from which you can choose, but almost no issue that I know is better than accident law as a sort of battleground of political values. And a lot of what we're debating here, I think, comes down to those sorts of very heavily value-laden questions, not capable of empirical verification. Most of the arguments that are raised are make-weight arguments which are used to justify what is essentially a political position.

Now, I think this debate has been characterized by that for many years now. And while there were quite a few years when I didn't go to these sorts of meetings, when I used to go to them before, there seemed to be a greater spirit of progressiveness, to use your term or one of the other terms that we used, than there is now. This retreat to right wing ideology that has overtaken the Western world seems to be trying to embrace accident law within it and that would be a very sad and retrograde development to which I would be unalterably opposed. It just seems to me some of what is happening in accident law discussions is a political retreat from collectivist values in favor of a more individualistic set of values which traditional tort law actually reflects rather well.

PROFESSOR LEFLAR: I certainly agree with Professor Palmer to a large extent. But, perhaps there is a proposition on which we can all agree, and that is that accidents are worth preventing, and a system that works in preventing accidents is quite possibly worth trying.

Now, in that respect, there is a paucity of evidence, as has been remarked before, about what works. And I'm very glad that Professor Klar has mentioned the Quebec no-fault insurance in that regard because Quebec seems to be at least one possible controlled test of whether the abolition of a negligence system, in fact, leads to more injuries.

Now, it's my understanding that given the available data (on which Professor Klar took no position), Professor Priest and Professor Sugarman draw exactly opposite conclusions. Namely, Professor Priest contends that the abolition of negligence law, in fact, has directly led to large numbers of preventable injuries; while Professor Sugarman believes that, to the contrary, there are other ways of explaining the rise in accidents such as that more teenagers have been driving and, therefore, the number of accidents has increased. I'm interested in the conclusion to that debate because it could be very informative on a larger scale than just auto accident law.

I would like first to invite Professor Klar to give his thoughts about what's actually going on in Quebec, and then perhaps Professor Priest and Professor Sugarman might care to respond.

PROFESSOR KLAR: The study in Quebec indicates that since the introduction of the scheme there has been a dramatic increase in the rate of deaths, and injuries caused by motor vehicle accidents. The general explanation given for this is that Quebec, as New Zealand, does not use any method to differentiate between safe and unsafe drivers when it licenses drivers. There are not, therefore, huge insurance costs for unsafe drivers.

So the explanation might very well be that the Quebec system, in fact, invited unsafe drivers back onto the roads. Those who were high risk drivers and perhaps were not driving because of the unaffordability of insurance were brought back into the system. Quebec has made no effort at all with its no fault system to use any way of deterring accidents.

There is another side of it though, which is discussed in an interesting paper written by Professor White, from the Faculty of Health Sciences at McMaster University.[66] Professor White argues that tort law plays an important role in affecting behavior. The fault system illustrates a behavioral model which indicates that there are consequences for negligent conduct. It puts forth a role of safe driving.

The paper examined the cases of unsafe driving and ascribed one of the causes as driver attitude. Certain drivers are more reckless or more negligent than other drivers because they have a different attitude towards driving. One can help alter this attitude by the symbolism or legal theater represented in tort law.

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[66] Norman F. White, *The Function of Deterrence in Motor Vehicle Accident Compensation Schemes*, prepared for the INQUIRY INTO MOTOR VEHICLE ACCIDENT COMPENSATION IN ONTARIO, 1987.

This is something which I believe ought to be explored more carefully. I entirely reject the view expressed by some that motor vehicle accidents are largely caused by momentary inadvertence, brought on by "normal" human frailties, when, for example, the data indicates the tremendous percentage of serious motor vehicle accidents which are caused by drunk driving, something in the order of 40 percent.

I agree that there is a tremendous amount of momentary inadvertence on the road. It is suggested, for example, that the ordinary driver commits numerous driving errors every few minutes on the road. Whether it is these errors which produce the serious fatalities or deliberate misconduct in the form of recklessness, speeding and drunk driving, however, is another question.

PROFESSOR PRIEST: Well, I do not want to say too much in response to Professor Sugarman because we're saving tomorrow afternoon for a continuation of this discussion. But I will say something about the Quebec experience.

I have only seen the results of a study, I think, of the first year of the Quebec experience, after the adoption of the no-fault plan. But it was very detailed econometric study of changes in the composition of drivers and changes in the accident rate and death rate. The figures were really quite dramatic.

As I recall — and you can correct me — the accident rate increased 28 percent, something of that magnitude, and the death rate increased something between eight to twelve percent. So it was a very dramatic effect.

I agree very much with Professor Klar — the principal source of the effect came from a difference in the composition of drivers in the population.

It is not a perfect experiment, because along with the adoption of no-fault, Quebec eliminated age and sex as categories of discrimination in driving rates. So that meant that insurance rates for women drivers, typically safer and less accident-prone, went up substantially and many women dropped out of the driving pool. The insurance rates for young male drivers, ages 16 to 29 or 18 to 29, went down substantially, so that a large number of those individuals who had previously been priced out of the market entered the driving pool. The accident rate went up and, not surprisingly, went up very substantially.

I can give you the results of more personal study. I have a son, a young male, 16 to 25, who appears to be a very bad driver. Of course, his auto premium is subsidized by his parents. But if he were to forced to pay the premium that his driving proclivities require, he couldn't

afford it and he would probably, appropriately, be driven out of the population of drivers. As a consequence, the roads on which he now drives would be safer.

These issues are not captured totally by Professor Palmer's invocation of collectivist versus individualist values. Certainly these are political questions. No one would debate it.

But in a heterogeneous society like the United States and to some extent like Canada, there are very serious questions of effect that go beyond the affirmation of collectivist values.

I think that we can all aspire to a society in which we could adopt a uniform compensation system without seriously discriminating among those that have suffered ill effects in some way, whether by injury or by disease or illness. We would all like something like that, if it could be done, while at the same time maintaining a low level or the lowest possible level of accidents.

It is not clear, from my studies of this issue that that can be achieved in the U.S. with the adoption of a plan like the New Zealand Plan.

There is another serious issue, and it's one upon which I disagree with Professor Sugarman: It is very difficult to administer a compensation plan or let us call it an insurance plan on a no-fault basis that prices appropriately according to risks that are created. For example, young males 16 to 25 ought to pay higher insurance premiums. It is very hard to administer such a system and to derive appropriate pricing signals without something that resembles a fault system. The system need not involve person-on-person litigation. It may be achieved by insurance adjusting or by some other means.

But someone has to look at the facts of the case and has to make a decision: For example, my son's explanation of his most recent accident was that the car pulled right in front of him. Someone has to determine whether the car pulled right in front of him or, as is perhaps more likely, that my son was a little too heavy on the gas pedal. In fact, in this case, the other driver compensated my son, so at least he appears to have been convinced by my son's explanation. But someone has to make a decision of that nature in order to determine what the pricing signals ought to be.

One hypothesis about New Zealand is that it is sufficiently homogeneous a society in terms of the activities and the variance in activities that that form of discrimination may not be so important in terms of overall effect. Or perhaps New Zealand is simply so wealthy that it does not need discriminations of that nature.

In the U.S., it is a very hard problem because we have many drivers who, because of the magnitude of the premiums, would prefer to run the risk of putting all of their assets at danger rather than to pay an insurance premium; others that will drive even though they know they ought not to drive — the habitually drunk driving population; still others that have what Michael Trebilcock calls the "hormone effect" of the 16-to 25-year-old males, that have seemingly reduced proclivities for safe driving. But either a tort system or a fault system or an analog to a fault system is important for trying to price policies for those individuals.

I am not certain that the tort system has a specific deterrent effect as in: "I fear a tort judgment, therefore, I'm going to drive five miles an hour less than I would otherwise."

But it certainly has an effect by pricing people out of the market who find that driving is not worth the enhanced costs associated with their activities. For example, my son is a student in a university. He doesn't really need a car. Indeed, because of the severe problems that would come if he were to have another accident — perhaps only in terms of family drama — he rides his bicycle most of the time, and drives only occasionally on the weekends. That is a good thing. And it is really a pricing signal that has reduced his driving.

If his parents totally subsidized him and were indifferent to insurance rates and had not given him the threat, "one more accident and you lose the car" or "one more ticket and you lose the car," certainly his level of driving would increase.

But there has to be a mechanism for setting price in a system where you have drivers or for products liability, manufacturers, that generate different levels of risk. There has to be some analog to a fault system.

This is not a celebration of an individualism. I am not an Ayn Rand saying that we must have litigation to celebrate the human spirit. Rather, it is necessary to have something like a fault system to allocate costs appropriately. And I think the costs are very important in operating systems of this nature.

PROFESSOR SUGARMAN: If tomorrow I discover that cars would be exactly the same in all respects that they are now except they would cost one-half of what they currently cost, most people would say that would be wonderful, even though it's quite clear that we'd have more highway deaths as a result because, obviously, more people could afford and would be driving.

If competition among lawyers drove down the price of litigating auto cases to one-tenth of what it is now, auto insurance rates would be

driven down, and most people would say that would be great. Again there would be more highway deaths because there would be more people driving. But I think people would say, "we're sorry that we have more deaths. But we think it's better for society that automobiles cost everybody a lot less money." What does this imply about studies of auto no-fault and the accident rate?

My impression from the Marc Gaudry study,[67] is that he attributes most of the change in death rates and accident rates that he observes to activity-level pricing, that is, making driving cheaper. From my conversation with him, it's mostly bringing more 16- and 17- and 18-year-olds onto the road. They lowered the price of driving in Quebec for everybody, but for young men it was fabulously cheaper than it ever was before. It was down to something like $300-a-year premiums for everybody.

This happened at a time when 16 - 18 year-olds were a particularly large demographic group, and hence politically important. Gaudry told me to expect that as soon as this group gets older, they're going to impose tougher, higher rates on younger people.

Moreover, one should also ask about the Quebec situation: what are the criminal fine levels for bad driving and what is the enforcement rate? Perhaps they should be higher.

In other words, we must think about alternative behavior control mechanisms if we're going to wipe out pricing mechanisms. Maybe it turns out that those alternative mechanisms have their own problems. We need to know more about that as well.

PROFESSOR MORISHIMA: I think the deterrent effect of the tort system may be different field by field. Such a field as the automobile accident may be not greatly influenced by the pricing system because young people usually don't care how much their driving costs. And elderly people also do not care about the difference of the price of their driving.

But in the area of tort liability which may include the safety check and design process, in that case the industry is smart enough to calculate the cost and benefit, so in this field I think the pricing system may work.

Returning to the automobile, the automobile insurance system in Japan is different from the U.S., and maybe Canada. In Japan every

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[67] Marc Gaudry, *The Effects of Road Safety of the Compulsory Insurance, Flat Premium Rating and No-Fault Features of the 1978 Quebec Automobile Act*, *supra* note 62.

car has to be insured up to a certain amount (at present, 30 million yen) under the compulsory insurance system. Beyond the amount covered by the compulsory insurance, a car is insured by private or commercial insurance. Every two years the car should be inspected. If the car is not insured, then a license will not be issued. The insurance contract is made for the length of the two-year inspection period. So the compulsory insurance system is connected with the license issuing system.

So since the individual behavior problem of driving is not reflected in the pricing system, I cannot say otherwise, but in Japan the accident rate has not increased faster despite the rapid increase in the number of automobiles. In fact, the reason why the accident rate vis-a-vis the number of automobiles has decreased until very recently is that the government spent a lot of money for traffic signals and guard rails and safety facilities on the road.

And, also, as Professor Sugarman said, the criminal sanction has been strengthened, particularly for drunk drivers. So this combination of technology and safety devices and the construction of road and criminal sanctions has been much more effective than the price of insurance.

The New Zealand Experience

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You will recall that Dean Acheson, who was secretary of state at a very critical time in the development of American foreign policy, wrote a stunningly good book called *Present at the Creation*.[68] I often think about the title of that book when I think about the New Zealand accident compensation scheme. I was privileged and fortunate early in my career to be centrally involved in the creation of that scheme. Being present at the creation has given me a perspective on it which is different from the one I would otherwise have.

I want to just share with you some views that I have developed over the years about the scheme. Although I'm only 49, I sometimes feel that the creation was long ago and, really, everything has changed in the world since. It is a remarkable thing that the scheme is still there. Yet it does have an enduring quality to it.

The public opinion polls show in New Zealand that accident compensation is an accepted part of the social support system.[69] Therein lies the reason why the most recent changes have not really disturbed the most fundamental aspects of the scheme although some important changes have been made to the some of the details.

There is, strangely enough, an American aspect to the New Zealand accident compensation scheme. It is not often known the contribution that the American law school world made to the scheme. I thought I might outline it to you.

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[68] DEAN ACHESON, PRESENT AT THE CREATION — MY YEARS IN THE STATE DEPARTMENT (1969).

[69] LAW COMMISSION REPORT NO.4, PERSONAL INJURY: PREVENTION AND RECOVERY — REPORT ON THE ACCIDENT COMPENSATION SCHEME para. 78 (1988) [hereinafter LAW COMMISSION REPORT]. In a nationwide sample of 2500 people, 80 percent expressed support for the scheme.

When the New Zealand Royal Commission was set up in 1966, it was chaired by a New Zealand judge, Sir Owen Woodhouse. One of the things that Royal Commission did was to travel all around the world, talking to people who had written scholarly work on the issues and inspecting various styles of administration.

The Commissioners visited the University of Chicago because that lovely piece of Walter Blum and Harry Kalven had appeared in the relatively recent past analyzing automobile compensation plans in the United States.[70] The writing of Guido Calabresi was coming out at that time as well.[71] Then there was a celebrated debate between Calabresi and Blum and Kalven in the literature which was extraordinarily elegant.[72]

I was a student at the University of Chicago law school in 1966-1967 when the Royal Commission came through. Naturally enough, I met with the Royal Commissioners as, of course, did the members of the faculty. I went to a social function with members of the Royal Commission. In fact, I drove the chairman of the Royal Commission back to the Loop in my $50.00 Chevrolet, uninsured, because the Illinois laws at that time did not require insurance, and I could not afford it being a student. I discussed with the chairman of the Royal Commission the shape of the recommendations that might come out of that report and, indeed, the work that was being done at the University of Chicago in that area. It was a time when Chicago was actively involved in considering those policy issues.

When the Royal Commission report came out at the end of 1966,[73] it created quite an effect on the conservative National government in New Zealand which had commissioned it. It appeared to exceed its terms of reference. It had been established to examine workers' compensation and ended up recommending abolition of the tort system across the board. Thus, it was decided that in order to study this question more thoroughly that a government white paper should be written.

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[70] WALTER J. BLUM & HARRY KALVEN JR., PUBLIC LAW PERSPECTIVES ON A PRIVATE LAW PROBLEM — AUTO COMPENSATION PLANS (1965).

[71] Guido Calabresi, *The Decision for Accidents: An Approach to the Wrongful Allocation of Costs*, 78 HARV. L. REV. 713 (1965).

[72] Guido Calabresi, *Fault, Accidents and the Wonderful World of Blum and Kalven*, 75 YALE L. J. 216 (1965); Walter J. Blum & Harry Kalven Jr., *The Empty Cabinet of Dr. Calabresi — Auto Accidents and General Deterrence*, 34 U. CHI. L. REV. 239 (1967).

[73] ROYAL COMMISSION OF INQUIRY, COMPENSATION FOR PERSONAL INJURY IN NEW ZEALAND (1967).

I had, by this time, graduated from the University of Chicago and returned to New Zealand. The chairman of the Royal Commission decided that I was the sort of person who should write this white paper. I was insinuated into the government system as a consultant to do that, really, as a result of Sir Owen Woodhouse's influence.

An examination of that 1969 white paper shows that it cites Calabresi and Blum and Kalven.[74] The paper canvassed the emerging literature which was being published at that time. It suggested it might be worthwhile to try and get some deterrence into the system by way of general deterrence as opposed to specific deterrence.[75] Without developing the case in any detail the white paper suggested that there was scope for deterrence by means of adjusting the means by which funding contributions were made to the scheme. I must say that was a view that the chairman of the Royal Commission never agreed with. Nevertheless there was an attempt to get to grips with the literature as it existed at that time about the allocation of costs in the scheme.

Now, things developed in a very interesting fashion from there so far as I was concerned. One of my classmates at the University of Chicago had gone to teach at the University of Iowa. They had turned the law curriculum upside down at Iowa. They had started teaching torts as a compulsory second-year course. The Faculty appears to have taken that decision on the basis that torts did not have a rosy future and that, really, one should be teaching these important critiques of the tort system, something that could not easily be done when it was a first-year course. They needed someone to teach it.

So they hired me from New Zealand to go to Iowa to teach torts since I had been involved in the government white paper on accident compensation in New Zealand. The Iowa faculty thought this might be a person who knows something about what is wrong with the tort system. I kept in touch with the New Zealand developments and went back during the vacations and so on in order to keep up my research interest in it and publish about it.[76]

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[74] PERSONAL INJURY — A COMMENTARY ON THE REPORT OF THE ROYAL COMMISSION OF INQUIRY INTO COMPENSATION FOR PERSONAL INJURY IN NEW ZEALAND 46 (1969).

[75] *Id.* at 89.

[76] *See, e.g.,* Geoffrey Palmer, *Abolishing the Personal Injury Tort System: The New Zealand Experience*, 9 ALBERTA L. REV 169 (1971); Geoffrey Palmer & Edward Lemons, *Toward the Disappearance of Tort Laws*, 1972 U. ILL. L. FORUM 693; Geoffrey Palmer, *Compensation for Personal Injury: A Requiem for the Common Law in New Zealand*, 25 AM. J. COMP. L. 1 (1973); Geoffrey Palmer, *Accident Compensation in New Zealand: The First Two Years*, 25 AM. J. COMP. L. 1 (1977).

There was a lot of interest at that time in the United States concerning tort reform. I got to know Professor Jeffrey O'Connell well, who of course, has been an ardent critic of the tort system and probably the only scholar whose work I really have consistently agreed with until Professor Sugarman came on the scene.

I taught torts at the University of Iowa. Then I went and taught it at the University of Virginia. When I was teaching at the University of Virginia, Labor governments were elected in both Australia and New Zealand. This was in 1972. One of the things that Gough Whitlam, who was a lawyer and the Labor Prime Minister of Australia, was highly interested in was the tort system. He wanted to reform it. He had studied the New Zealand Royal Commission closely.

Whitlam obtained the permission of the New Zealand government to have the New Zealand judge who had chaired the New Zealand Royal Commission sent to Australia to conduct the Australian inquiry. Owen Woodhouse rang me up at the University of Virginia and said, "Palmer, come to Australia because we need help." So I went off to Australia to work on the report there.

It turned out that the fabric of the federal system, the structure of the legal profession, the importance of the insurance industry, and a number of other factors made the life of a reformer in Australia a great deal more difficult than it had been in New Zealand. While we had a wonderful time putting the Australia report together, it was not enacted.[77] A version of it may have been enacted had Sir John Kerr not dismissed the Australian government peremptorily, and many would say unconstitutionally, in 1975. When he did that, the scheme was still in front of the Parliament, and at that point it died.[78]

The experience was also put to use by the Commonwealth Secretariat who asked me to go to Sri Lanka and to Cyprus and to write reports on those countries' accident systems. The intriguing thing about those countries, of course, is that they have marvelously complex and intricate legal systems of great interest to comparative lawyers. In Sri Lanka the Roman Dutch law of delict really resembles that of Transvaal. I found it very interesting that the courts of highest authority as far as

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[77] REPORT OF THE NATIONAL COMMITTEE OF INQUIRY, COMPENSATION AND REHABILITATION IN AUSTRALIA (1974).

[78] *See* GEOFFREY PALMER, COMPENSATION FOR INCAPACITY — A STUDY OF LAW AND SOCIAL CHANGE IN NEW ZEALAND AND AUSTRALIA 173 (1979) [hereinafter COMPENSATION FOR INCAPACITY]. This book provides a detailed account of the policy and political developments relating to accident compensation in both New Zealand and Australia.

Sri Lanka was concerned with was the Supreme Court of Transvaal. In Cyprus we found the law of torts codified in 28 pages, administered by Greek-speaking lawyers trained at the University of Athens. I had never seen a common law tort system quite the same as that one: an extraordinary effort to codify the law of torts in the first place, and even more extraordinary to have people who were taught at the University of Athens administering it.

After a considerable time becoming experienced in advising governments on tort law reform, I came to the conclusion it would be better to be the minister than the minister's adviser. Then one may have a better chance to get it right. It might be possible to do the sort of reform one wanted to do rather than tell the minister what he should do and find out that in the privacy of the party room they agreed to some other solution. So I went into politics. An apprenticeship in reforming tort law is good preparation for politics — all the great issues are to be found there in microcosm.

I had some interesting experiences with the accident compensation scheme in Parliament. There was an attempt in New Zealand to pare the scheme back quite seriously in 1981-82. Being in Parliament at that time even in opposition, proved to be a good venue from which to resist those changes. I was a member of the select committee which considered the government's bill, and a great many of the more objectionable policy features introduced were thrown out by the Committee. The changes were successfully resisted mainly because even by that time, this scheme had taken hold in terms of New Zealand public opinion.[79] Many of them were also poorly thought through — the detailed policy issues in the field are full of traps for young players.

When I left politics in 1990 and returned to academic life, I decided to go back for a semester each year to the University of Iowa. I rang Jeffrey O'Connell at the University of Virginia and said, "Look, what do you teach these days? I haven't, you know, kept up with this literature in quite the way I should have, perhaps having had other things on my mind. What are you teaching?"

He told me about his advanced torts course and described it. And I said, "If you put the materials together, I'll teach from it." So he put them together and I taught an advanced torts course in 1991 at the University of Iowa to more than 50 students. So I was required

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[79] The results of this reconsideration of the policy were contained in the Accident Compensation Act of 1982, 3 N.Z. Stat. No. 181.

to reconsider the literature and the developments again more than twenty years after first having been exposed to them.

I began to wonder whether it was possible that these issues were ever going to go away. As far as I can see, the American tort system has been in crisis ever since I've had anything to do with it, and nothing much changes. Yet the crisis can't be all that serious because the system never seems to collapse.

I have had a great deal of difficulty trying to find coherent, intellectually honest arguments in favor of the tort system. Having spent a great part of my previous career in knocking the tort system over, I found it very difficult to try and take seriously arguments which could justify the continued retention of tort law in personal injury. Its retention in the United States appears to me to depend upon a combination of vested interests and inability to reach a consensus on the nature of the replacement.

That remains my position. It has been difficult for me to think that the case in favor of the tort system is anything other than intellectually inert. The thing that has always worried me about the American tort system is the fact that wholesale and comprehensive change seemed quite impossible. Often the intermediate changes that might be regarded as desirable are really in principle quite capable of being seriously criticized. Comprehensive and principled change is easier to defend.

I remember reviewing one of Jeffrey O'Connell's books in 1976 and I wrote this:

> Professor Jeffrey O'Connell has written seven books in eight years on no-fault insurance. The latest *Ending Insult to Injury*, proposes a system of no-fault insurance for products and services. This proposal is one of the most ambitious yet to come from the O'Connell stable, which has bred a number of winners. This article respectfully suggests that it is time O'Connell gave up horse-racing and took up flying.[80]

By that I meant that no-fault auto is such a provincial concern, and so also were the special plans that his book proposed for products. The problems should be considered comprehensively. Liability was not the issue. The issue was what was the community's responsibility for the human victims of misfortune.

The problems of dealing with the issues one item at a time — and I suspect that American tort law is now moving towards the idea that

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[80] Geoffrey Palmer, *Inspired Tinkering versus Holistic Social Engineering: Jeffrey O'Connell and the American Tort System*, 25 DRAKE L. REV. 893 (1976).

medical malpractice should be dealt with as a separate problem — are considerable. Inequities and inequalities are created which cannot be defended and which create social resentment. This remains one of the central difficulties in the mixture of systems that the United States has.

It has been observed in this forum already that it is a dangerous thing to make cross-cultural comparisons. It is important to observe that the New Zealand tort system never exhibited the same characteristics as the United States tort system. We are both common law countries, but the diversity that exists within the common law countries is not always capable of being analyzed in terms of the legal rules which are operating. The rules of the law of negligence in both countries are similar. The way in which they work in practice are quite different. A number of factors help to explain the differences.

The common law of New Zealand, for example, never did have strict liability for defective and dangerous products. Right there we see an important difference between the two legal systems. It would be regarded in New Zealand as judicial legislation of an unacceptable sort for judges to develop such a doctrine. The idea that a judge who is not elected would be able to make out of whole cloth the sort of judicial doctrine that Justice Roger Traynor was able to fashion in California and have it spread to other jurisdictions would not be regarded as appropriate. Law reform is the responsibility of the government, to be accomplished by legislation.

In New Zealand the constitutional differences are such that the legislature does act in accordance with the social needs. It has the capacity to do that and has few restraints on its ability to legislate. There is in New Zealand a constitutional underpinning which needs to be understood if you are ever to understand the New Zealand scheme.[81]

There are 97 members of Parliament. There is no upper house. There are no formal restraints on the power of Parliament. The executive sits in Parliament. Legislation is a government function. There are three yearly elections.

When a government is in power, it can do anything and I mean anything. All that needs to be done is to secure the agreement of the

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[81] *See* GEOFFREY PALMER, UNBRIDLED POWER — AN INTERPRETATION OF NEW ZEALAND'S CONSTITUTION AND GOVERNMENT (2d ed., 1987); GEOFFREY PALMER, NEW ZEALAND'S CONSTITUTION IN CRISIS — REFORMING OUR POLITICAL SYSTEM (1992) [hereinafter CONSTITUTION IN CRISIS].

government caucus which is members of Parliament of the majority party. The Cabinet controls that body.

These profound constitutional differences mean that the separation of powers in American terms is not operative as a doctrine. There is a fusion between the legislative branch and the executive branch which means the executive gets its legislation through in the terms that it proposes. It can be modified at select committees. But select committees have a majority of the governing party and the party discipline is very strict. So this is not democracy as Americans know it. It is more akin to the system of government that Lord Hailsham describes as elective dictatorship.[82]

Against that background let me address the question, which after 20 years is the most intriguing question of all: Why was this scheme introduced in New Zealand? It was done at a time when a Royal Commission report was regarded as a report from on high. It came from a Royal Commission chaired by a judge. Judges have enormous prestige in our society, perhaps because they are not involved in the political functions that American judges get involved in with their constitutional jurisdiction.

The two main political parties in New Zealand both supported the accident compensation scheme because it struck a chord in the value system of the country. The principle of community responsibility on which this report was based was a socially acceptable principle in New Zealand.

It was remarked yesterday that New Zealand is a homogeneous country, but that is not correct. Twenty percent of the New Zealand population is comprised of minorities. About 12 percent of our people are of Maori extraction. Nearly another eight percent are Pacific Islanders. There are quite a number of Asian immigrants in New Zealand these days. Mind you, it was more homogenous in 1967 when the Royal Commission reported than it is now.

The only explanation that I can offer is that it was done because the value system was different. This principle of community responsibility was accepted and it was a reform based on a set of principles that were carefully articulated in the Royal Commission's report.

Furthermore, the tort system as we had it in New Zealand did not have a great deal of claims consciousness associated with it. For example, in New Zealand, before the common law was got rid of, it

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[82] LORD HAILSHAM, THE DILEMMA OF DEMOCRACY 125 (1978).

was quite rare to sue doctors. And the premiums at that time for doctors were very low. Premiums for New Zealand doctors in 1970 ranged from between NZ$17 and NZ$28 per year.[83] Why people did not sue doctors for negligence is a complicated question. But it has to do with social relations; that the doctor did his best for you, he was your friend. You might have known him. Why would you sue him?

It is possible that it is a defining characteristic of Americans that they want to sue each other. It is one way of redistributing the wealth. Certainly suing is a very prominent characteristic of the American legal system and of the American value system.

While the right to sue existed in New Zealand, it was not availed of nearly with the same vigor or with the same determination that it has been in the United States. Contingent fees, of course, were unlawful in New Zealand. There were a number of factors which tended to make this a moderate system. The judges controlled it. Even though the juries made the findings of liability and the awards of damages, the judges controlled it much more than is possible in the United States because they were allowed to comment on the evidence. When judges comment on the evidence in New Zealand, the juries tend to take notice of them.

You cannot find, therefore, in the legal system of New Zealand or in the jurisprudence relating to the tort system anything that has any explanatory power in relation to the accident compensation scheme. There was little in the way of abuse or excess. It was a most mild-mannered little tort system.

In order to understand New Zealand then and now you have to change gears. You have to look at the income maintenance system. New Zealand has always had a developed welfare state. It was one of the first countries in the world to pay old age pensions, which started in 1898.[84] From that time until the time of the first Labor government in 1935, there was a gradual increase in pensions for various forms of disability. In 1938, Labor passed a comprehensive Social Security Act which had strange parallels with some of the legislation of the same name that Franklin Roosevelt promoted.

In terms of accident compensation, the most significant development was that within two years of that scheme starting to work on April 1,

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[83] *See* COMPENSATION FOR INCAPACITY, *supra* note 78 at 43.

[84] Old Age Pensions Act of 1898, N.Z. Stat. No.14. For a modern review of the New Zealand welfare state, *see* REPORT OF THE ROYAL COMMISSION OF INQUIRY, SOCIAL SECURITY IN NEW ZEALAND (1972).

1974, there was in contemplation and, indeed, it was passed through the Parliament, the most massive development in terms of cost that the New Zealand social welfare system ever saw. That was the national superannuation scheme.[85]

The national superannuation scheme came from an allegedly conservative government. It was the result of an election in 1975. What that scheme did was to say that everyone who was aged 60, whether they continued to work or whether they did not, regardless of their income or assets, would be paid a periodic benefit, increased for inflation. The rate of the benefit was set for a married couple at the rate of 80 percent of the average weekly earnings in the community.[86]

I know of no state tax-funded superannuation scheme as generous as that anywhere in the world. And, of course, the effect of that on government expenditure was dramatic. It remains one of the biggest single items of government expenditure. It is second only to paying the interest on the debt. Serious political and fiscal problems have developed concerning the retirement scheme.

The policy development for retirement had nothing to do with accident compensation but it has had a great deal to do with the difficulties that have arisen since. As the percentage of the population which has aged has increased so has the drain of this money, which is pulled straight out of general taxation. There is no contribution to this scheme. The fiscal consequences have been unbearable. If one projects it further to when more of the population becomes older, the fiscal consequences are even more serious.

There has been a great deal of political activity in New Zealand about superannuation, which is a term which does not appear to be known in the United States. So think of it as a state pension paid from general taxation. There have been political fights of the most serious character. The government which is now in power, the National government, was elected on the basis that they would not cut this program, and they have cut it.[87]

The result of cutting it has been the most serious dislocation from their point of view politically. They have almost disappeared from the polling because of their failure to follow election promises, which are taken very seriously in our system.

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[85] These developments are set out in detail in THE WELFARE STATE TODAY — SOCIAL WELFARE POLICIES IN THE SEVENTIES (Geoffrey Palmer ed., 1977).

[86] *See* COMPENSATION FOR INCAPACITY, *supra* note 78 at 321.

[87] *See* CONSTITUTION IN CRISIS, *supra* note 81 at 10.

Shortly after the accident compensation scheme in New Zealand came in there was a massive injection into a new income maintenance system for everyone aged 60 or above, whatever their position. At the same time, unemployment was increasing and so the expenditure on unemployment benefits was also going up. There were significant problems with a number of other benefits, such as the domestic purposes benefit which is paid to people who are looking after children, both men and women if they have no other source of income.

In terms of the total picture of income maintenance in New Zealand, the accident compensation scheme is not the dominant plan. It is not the most important scheme. It is probably the least important scheme in terms of its size. But it, of course, is based on different principles from the others.

The unemployment benefit, the sickness benefit, the invalidity benefit that people are paid is income-tested. They are flat rate benefits. They are not earnings related. So if you suffer an accident in New Zealand, you do much better than if you suffer a sickness.

The retirement benefits are based on a different principle again. The benefit is universal and it depends upon getting to 60, nothing else, except being resident in New Zealand for ten years. These principles in the income maintenance system were, therefore, at war with each other. The issue in New Zealand in terms of policy development was: Which principles were going to predominate?

Could you make over the entire income maintenance system in the shape of the accident compensation scheme so that benefits were earning related for all forms of incapacity? That is what we had in mind when we developed the accident scheme. We engaged in what Sir Owen Woodhouse has called — I don't know whether he has labeled it publicly but he often used to call it privately — a little bit of judicious cheating. The result of that approach in the design of accident schemes was to include as much disease as we could so that we could include all disease later. Pressures are released thereby which will tend to procure that result.

What happened in the time of the Labor government from 1984 to 1990 is this: That there were some problems with accident compensation. Many of the problems arose from a decision to change the scheme in 1982 from a funded basis to a pay-as-you-go basis.

Originally the premiums were calculated on the basis that you would take in enough money to pay for the costs of the accident this year and for those same accidents every year in the future. That was an insurance principle. That was the way in which insurance companies

used to deal with the old schemes. But it was decided that it was unnecessary to do that with a government-backed scheme, and I think it was unnecessary.

The practical result was that the biggest effect of the 1982 review was to reduce the cost on employers very considerably. That was done, and on the basis that the premiums could be less, since it was now pay-as-you-go. Imposts on employers were reduced. As the scheme was coming to maturity, that was a very silly thing to do. Obviously, it takes about 17 or 18 years for a scheme of this sort to get maturity, if it were an insurance company dealing with it. Maturity is when the universe of costs has plateaued. It's at the plateau level when it will not really get much bigger because the size of the universe of people that will be getting payments is stable, although their identity will change over time.

So what happened was that before the scheme got to maturity, the benefits were going up and the costs on employers were going down. And that led to something of a financial crisis. One of the things the fourth Labor government did when we came to power was to ask the Law Commission to review it. As Minister of Justice, I had prepared and passed the legislation to provide New Zealand with a Law Commission, a well-funded law reform body.

We asked the Law Commission to review the scheme for a good reason. Sir Owen Woodhouse, the chairman of the Royal Commission, was the president of the Law Commission. So you see, it was thought that it was good to keep this in the family.

The result of the Law Commission report was quite interesting.[88] First of all, they said that this scheme should be funded on a flat rate basis, not on a set of levies on employers that were graduated according to risk. The reasoning for that is probably not acceptable to economists. The fact was, however, that the Accident Compensation Corporation at that time was not keeping adequate statistical data. It was impossible to tell whether the levy on quarry operators, for example, was really based on proper accident experience or not. I mean their statistical bases were inadequate.

And I might say at this point that probably the biggest failure in this scheme, in its entire history, has been a failure to keep adequate statistics of a sort that would enable sensible policy changes to be made and to know what is actually going on. This was one of the greatest

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[88] *See* LAW COMMISSION REPORT, *passim*.

opportunities ever to study accidents and their sequelae. It has been lost because of the inadequacy of the corporation's effort to keep statistics.

The Law Commission recommended the end of lump sums, an item which had always been part of the Woodhouse agenda because the lump sums were never recommended in the first place. They were put in by a Parliamentary Select Committee back in 1972 as a result of pressure from the trade unions and from the lawyers.[89]

When I received the 1988 report from the Law Commission, I think I made a mistake — an error of judgment. With the wisdom of hindsight I regret it. I thought we cannot allow this opportunity to go by. What must happen is that we must extend the scheme to sickness, that we must cover all forms of incapacity.

So rather than act on that report, I persuaded the government to get a report from the Law Commission showing how the scheme could work if we extended it to sickness. It was a massive and costly undertaking. But it seemed to me that on grounds of social equity it was necessary and was a natural development of this entire reform movement.

But it turned out to be very difficult because once we got the Law Commission's work, we had to barter it through the governmental system. We had inadequate costing information and we had to get actuaries from Australia who had worked on the Woodhouse scheme in Australia, and we had to get a whole range of advice from various departments: the Department of Social Welfare, the Treasury, and so on, as to the feasibility of such a policy development. There was a great deal of skepticism in official quarters and some obstruction.

Finally, a bill was introduced in the Parliament shortly before our government ended in 1990 — the Rehabilitation and Incapacity Bill of 1990. That bill came too late, and it was a great pity. Had it been passed, New Zealand would have had an integrated incapacity compensation scheme.

The benefits in the 1990 Labor government bill were pared back compared with the existing accident compensation scheme and it was somewhat on the mean side. But that was necessary given the costings that we had and the skepticism of the Treasury about the costings. The result of all that was that we did not, therefore, change some of the features of the accident compensation scheme that perhaps we

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[89] *See* COMPENSATION FOR INCAPACITY, *supra* note 78 at 91.

would have changed had we followed the Law Commission's first report.

The mistake was, therefore, not to implement the first report but to try and be more ambitious. Had that approach not been taken, the changes which were made to the accident compensation scheme in New Zealand through the Accident Rehabilitation and Compensation Act of 1992 may not have been attempted. Since that Act is, in my opinion, an ill-advised legislative disaster, I regret now that I did not limit my desire to go all the way and confine changes to the accident scheme.

What has happened since the National government was elected to power in October 1990? The widespread acceptance of the scheme by the New Zealand public has actually insulated it against efforts of the people in the government and in the Treasury who are interested in reducing government expenditures on income maintenance across the board. There is a very strong fiscal desire to do that as Margaret Vennell pointed out yesterday. Election promises were made by the National Party in opposition. The main promise was that employers were no longer going to be levied to pay for accidents to employees which did not occur at work. A working party report was commissioned by the National government and kept secret for a considerable period after its completion. The 1991 budget delivered to the New Zealand Parliament contained a detailed statement about the government's accident compensation policy. A bill was introduced. The bill is now being reported back to the House from a Select Committee while we are at this conference. [It completed its passage through the Parliament the week the conference was held in Hawai'i].

In the context in which I have been speaking, the significant feature of the Accident Rehabilitation and Compensation Insurance Act of 1992 is the clear indication that the new National government wants to fence accident compensation off. It does not want accident compensation to be the instrument which remakes the income maintenance system. It wants to restrict it, and to have the scheme remain as the vehicle for dealing with accidents but nothing else.

Secondly, there remains a determination in the government to avoid bringing the common law remedy back.[90] There will, with the new legislation, be some nibbling away at the margins. There will certainly

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[90] Accident Rehabilitation and Compensation Insurance Act of 1992, 1 N.Z. Stat. No. 13, § 14.

be some strange developments as a result of the extraordinary statistical definition of medical misadventure.[91]

There is something of an irony in that. The basic principle of this entire reform movement was to eliminate and kill the common law action. In order to do that, as a matter of practical politics, it was necessary to buy it off — buy it off with sufficient benefits that it could not be said that this was a mean scheme.

Now 20 years later what has happened is the common law remains gone, for all intents and purposes. But the benefits have also gone down. They have been sharply reduced. Some of the literature predicts that will happen with schemes of this sort. I think the most recent legislation is lamentable in this respect. Because of the incompetence of the policy advice rather than the policy determination of the government, elements of the common law may edge back at the margins.

The government wanted to cut benefits. The scheme has been described as one in which people pay more and get less. People pay more because every person, every wage earner will now pay a levy.[92] This was necessary because the government removed from employers the responsibility for their levies to meet the compensation payments for non-work accidents to employees.

As to the removal of the lump sums in the new legislation, that is something that the Woodhouse reformers have always supported. The interesting thing is that the government was forced, as a result of the political furor caused by the introduction of the bill, to retreat quite substantially from their policy as it had been announced. They retreated three times. They retreated from their working party report which was really quite inadequate, both analytically and from a policy point of view, but most importantly, politically. They retreated from their budget statement as well, and they retreated from their own bill by changing it substantially in the select committee to ensure that some points of criticism that had been made were met by more generous provisions.

So as this National government's accident compensation legislation has proceeded, it has been improved in terms of the Woodhouse precepts because the public pressure has been substantial on it.

The Act stops employers from paying for non-work accidents. There are new definitions of coverage, medical misadventure, mental injury,

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[91] *Id.* at § 5.

[92] *Id.* at § 102.

dependency and sexual abuse. I want to say a word or two about sexual abuse. I suppose twenty years ago we did not really regard sexual abuse as something that was going to figure as much in this scheme. But the Corporation has been paying out perhaps NZ$40 to NZ$60 million a year on sexual abuse. It has been something that has grown as public consciousness about it has increased. This is something that came into the scheme that had not been anticipated. I do not think there was anything else not anticipated at that time.

There will be a lot of legal, technical problems with the new definitions in the Accident Rehabilitation and Compensation Insurance Act. I do not want to bore you with them, but many of the policy decisions were inept and they will not have the results intended for them. There is also a desire in this legislation to simplify the decision-making system on claims and reorganize the appeals. This is a serious error.

The decisionmaking system was basically internal review. If a claimant did not like the result, he or she could file an application for review. A review officer from the Corporation then had a hearing and made a decision. The claimant could then appeal to an independent appeal authority which was presided over by a judge or a legally qualified person. There were 6,329 applications for review dealt with in the 1989-90 year, and 363 decisions made by the appeal authority.[93] There were more than 185,000 claims during the same period.

The system has worked reasonably well. But the accident compensation officials felt that the appeal authority was getting more generous over time. They argued the decisions of the tribunal and the courts to which a claimant could appeal on a point of law had been expansionary. They were determined to cut down an approach that they considered had been overly generous to claimants.

So under the new legislation, disputes go to the District Court which is an ordinary court. I think that will turn out to be a terrible mistake. There will be a lack of consistency in approach around the country, the judges will have no specialized expertise and the cases may not be dealt with as quickly.

In the end, this new legislation has been attacked by Sir Owen Woodhouse as not compatible with the principles of his scheme. It was attacked because the government had been saying throughout what it

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[93] REPORT OF THE ACCIDENT COMPENSATION CORPORATION FOR THE YEAR ENDED 31 MARCH 1990, As presented to the House of Representatives, 22-24.

was doing was restoring the true Woodhouse scheme which was incorrect and misleading. So Sir Owen spoke out.

The other problem with this legislation is it does not contain any coherent policy approach. It is an unprincipled mishmash. It does not hew a consistent policy line. It is a mess and substantially diminished compared with its two predecessor Acts.

Comments: The New Zealand Experience

PROFESSOR VENNELL: Well, Sir Geoffrey has explained quite a lot about the scheme. I think, perhaps, what I will try and do is try and say why I think there have been tensions in the scheme and criticisms. I think one reason why there have been tensions is that the facets of accident are very wide. Perhaps in 1974 when the scheme first came into force and during the time before that, when the scheme was being envisioned, there was an imperfect realization of how wide a concept "accident" might be.

Sir Geoffrey has said it was not realized, probably, what would be covered by sexual abuse. And I think that, perhaps, highlights it; that the ways accidents can occur are very wide.

Sir Owen Woodhouse was appointed the Royal Commissioner, with two others, to look into the New Zealand workers' compensation scheme.[94] He took his brief as much wider than that.[95] But I think the government of the day when the bill was eventually passed and the general public in New Zealand really themselves did not realize how wide the scope of accidents might be.

And when the scheme first came into force, personal injury by accident was not defined.[96] The interpretation that was put on it followed the English House of Lords decision in 1903 in the case of *Fenton v. Thorley*,[97] which said that the expression "accident" is used in "the popular and ordinary sense of the word as including an unlooked for mishap or an untoward event which is not expected or designed."

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[94] REPORT OF THE ROYAL COMMISSION OF INQUIRY, COMPENSATION FOR PERSONAL INJURY IN NEW ZEALAND (December, 1967), (known as the Woodhouse Report).

[95] *Id.* at para. 55, p. 39; for the reasons explained in para. 171, p. 77.

[96] Accident Compensation Act 1972. Prior to the coming into force of the scheme, a medico-legal committee was appointed by the Minister of Labor to draft a definition but no definition was enacted. *See* Peter Hillyer, Q.C., *"The Meaning of Accident"* in PROCEEDINGS OF ACCIDENT COMPENSATION SEMINAR (Legal Research Foundation, Auckland, 1974).

[97] [1903] A.C. 443.

The judiciary and the administrators of the scheme were thinking of accidents as something very fast moving and sudden rather than slow moving situations.[98] And they were thinking of it in the workers compensation situation, I'm absolutely sure about that.

Well, you know, obviously, this couldn't continue and claims came in. The courts undoubtedly — I think in New Zealand we have quite a powerful judiciary who have seen that you could not operate by taking such a narrow approach. So they have interpreted the scheme, I think, to take account of the changes in society.[99]

And the government, that is, the present government, has seen this as widening the scheme too much and causing in the end a cost blowout. It is, in fact, untrue that there's a cost blowout.

But there have been tensions in certain circumstances, particularly with, as I mentioned yesterday, with minor injuries, particularly on sport fields where people have suffered injuries to their tendons and this has been classified as an accident.[100] And they've had expensive physiotherapy. It hasn't really affected their ability to work. But it has been expensive.

And one has to look at that in context, too, because our medical care system was breaking down and so a person who could be certified as having had an accident was going to get the medical costs paid for through the accident compensation scheme, whereas someone who was sick was going to have to pay quite large sums of money for their medical treatment.

So, you know, just something as really unimportant as minor injuries has weakened the scheme in the eyes of the government at least. Because they thought that these were so costly.

I think that in the days when the scheme was a fully-funded scheme, there was great fear on the part of the government and a portion of the public that so much money was held in the hands of a powerful public corporation. More recently New Zealand has made considerable moves down the road of privatization of governmental trading organizations.[101] This was before that.

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[98] Wallbutton v. Accident Compensation Corporation 5 A.C.C. (1980).

[99] REPORT OF THE ROYAL COMMISSION OF INQUIRY, *supra* note 94 at 56. *See, e.g.*, Accident Compensation orporation v. E, 2 N.Z.L.R. 426 (1992); Accident Compensation Corporation v. Mitchell, 2 N.Z.L.R. 436 (1992).

[100] *See* ANNUAL REPORT OF THE ACCIDENT COMPENSATION CORPORATION (1991), at 70-71 [hereinafter ANNUAL REPORT (1991)]. Out of a total of 27,969 sport-related injuries, only 77 were fatal.

[101] For example, telecommunications, banking, and broadcasting.

But I think that there was a fear: So much money was held in the public sector, and the Accident Compensation Corporation became the fourth largest investor in New Zealand. So it had great power, in a sense, over public companies.

When the scheme became pay-as-you-go, those reserves rapidly ran down, although the corporation still has quite large reserves which bring in about 10 percent of the income.[102] I think it is and the investment portfolio is, I think, very carefully and well-managed.

But there was also, I think, a tension between the courts when they saw that the scheme provided good benefits for economic losses but rather less benefits for non-economic losses.[103]

And we have a quite a powerful women's lobby in New Zealand. Sexual abuse victims and others took cases to court and the courts allowed claims for exemplary damages, punitive damages — as they're known here in the United States.[104] These sums have not been large.

But by the courts being able to interpret the legislation in such a way as to award non-economic losses by the means of punitive damages had, I think, an effect on the scheme. It was a recognition of a right to sue albeit in a limited way. With the removal of the lump sums from the new act, and thus the failure of the new legislation to recognize non-economic losses, the courts may well extend the range of circumstances in which punitive damages will be awarded. Whether or not there should be recovery for non-economic losses, and whether such claims properly fit into a compensation scheme are, of course, very vexed questions. So, too, such claims may not fit into an insurance-based scheme.

But there is a large portion of the New Zealand population which will get no benefits from the new scheme at all because their losses — the losses they suffer are non-economic, and the scheme is to be premised on coverage solely for economic losses. Thus some injuries will not affect people's working ability. For these there will be no compensation payments. And some injuries will affect people who are not in the work force. For those not in the work force, but who suffer

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[102] ANNUAL REPORT (1991), *supra* note 100 at 40.

[103] ACCIDENT COMPENSATION ACT OF 1982, §§ 78-79. Under section 78 a lump sume of up to $17,000 was payable for permanent loss and impairment of bodily function; under section 79 a lump sum of up to $10,000 was payable in respect of loss of amenities or capacity for enjoying life.

[104] *See, e.g.*, Donselaar v. Donselaar, 1 N.Z.L.R. 588 (1982); Auckland City Council v. Blundell, 1 N.Z.L.R. 732 (C.A. 1986).

personal injury, the entitlement is for medical and rehabilitation expenses and for a small independence allowance. The independence allowance has a threshold of 10 percent disability and is a maximum of NZ$40 per week, depending on the percentage of disability.

So when you have a meanness about compensation for what are described as non-economic losses but in real terms may be economic losses, then I think the courts in New Zealand are likely — they have that philosophy at the moment — to move in and fill those gaps. So that, I think, will again create tensions about the new scheme.

The other thing that I think will create tensions and criticism when the new scheme comes in to force is the fact that, particularly in relation to medical accidents, there are a number of situations which will not be covered by the scheme.[105] And so those people will be able to sue. And if they are successful, then there will be a comparative basis of common law damages.

For nearly 20 years there has, of course, been no comparative basis except information coming from overseas. But even information coming from overseas has had an effect. People read in the paper that someone in Sydney in New South Wales has had an accident and they have recovered two million in the courts. And they think, you know, "Well, what have we got from this scheme?"

People, of course, forget to do their mathematical calculations and calculate that someone who is severely injured at age 25 may be entitled to weekly compensation for the rest of their life.[106] And when that's added together, it may well be far more than two million. People forget to do that calculation. The two million in the hand sounds good. It may, in fact, not be as good as all that. But nevertheless if there are comparisons within New Zealand, then I think that will undermine the scheme and will be unfortunate..

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[105] For example, under section 4, "personal injury" was defined as "the death of, or physical injuries to, a person, and any mental injury suffered by that person which is an outcome of those physical injuries to that person," whereas under the 1972 and 1982 Acts the definition of "personal injury by accident" had received a liberal interpretationb by the courts.

By viture of section 5, which defines "medical misadventure," some injuries, including in particular those "resulting from the carrying out of any drug or clinical trial where the injured person has agreed in writing to participate in the trial," are excluded from coverage under the 1992 Act.

[106] Compensation is calculated on the basis of 80 percent of the amount of earnings lost by the injured person. *See* section 38.

If the courts exercise their powers and increase the sums of compensation payable by awarding exemplary damages and also broaden the circumstances in which they are prepared to award them, then this will fuel criticism of the scheme. (In New Zealand exemplary damages traditionally have only been awarded with respect to intentional torts).

But if the courts take the bit between their teeth and award exemplary damages in cases of extreme and gross negligence, which is a concept also not entirely known in New Zealand, then that will, again, have an undermining effect on the scheme. The lump sums, in a sense, were an aberration. But I think the lump sums insulated the scheme from these sort of attacks that are likely to come on it when they no longer exist.

The new scheme replaces the lump sum with disability allowance.[107] But the disability allowance at the moment, although they have said they will peg it to inflation, is to be a percentage of $40 a week. Forty dollars is the maximum for total incapacity that you can get under this allowance. And the bottom line is that you have to get over a threshold of 10 percent disability.[108]

Now, there are certain injuries that people can suffer which will not, obviously, qualify for a disability allowance because people will suffer no economic loss. So, again, that is going to, I think, create tensions against the scheme.

The scheme, as I suppose is not surprising with such an innovative scheme, suffers from very bad publicity. You hear a lot about the people who get no compensation or don't get enough compensation. You also hear a lot about certain people who have been compensated and the general public thinks they ought not to have been compensated.

And, you may have heard, a few years ago someone was escaping from jail and this fellow impaled himself on the iron spikes of the wall — of the top of the wall of the jail. Well, you know, I went overseas a few weeks later to the United Kingdom and everybody there seemed to know about this man who had gone over the prison wall and got compensation. And, of course, he was in jail because he had been convicted of the murder of a woman whose children hadn't qualified for very much compensation because the woman was not an earner.

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[107] Section 54.

[108] Lesser sums, on a graduated scale, will be paid to those having a degree of disability of less than 100 percent. *See* section 54(4).

The injured convict got a lump sum,[109] and there were these poor children who'd lost their mother and weren't getting anything, because, since they were not dependent on their mother, they did not qualify for anything. The right to compensation has always been, and under the new scheme to a large extent will be, based on dependency.[110]

Well, of course, in fact, it was the fault of the prison authorities because they hadn't charged him with escaping from prison. If he'd been charged with escaping from prison, then there was discretion within the corporation to deny him — if he had been charged and convicted, to deny compensation to this person.[111] The prison authorities thought he was in for life, so what was the point of charging him?

But, you know, the media blew this up out of all proportion. And those sort of things have, in fact, I think, an unfortunate effect on the public's perception of the scheme. The greatest problem with the scheme at the moment is that with the new scheme, with some common law claims becoming available, will this mean the end of the scheme, that is the thin end of the wedge, because it will lose credibility in the eyes of the public?

PROFESSOR MILLER: We are on the eve of a celebration that is going to take place in New Haven on April 10th and 11th (1992) in honor of Professor Myres McDougal, who was my mentor and who, of course, is reknown internationally for his and Harold Lasswell's approach to the making of law and policy.[112] It seems particularly appropriate, therefore, that I take a stab at applying a piece of "Law, Science and Policy" to the appraisal of the New Zealand accident compensation scheme.[113]

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[109] One or both of the two lump sums available under the Accident Compensation Act of 1982 §§ 78-79.

[110] ACCIDENT COMPENSATION ACT OF 1982 § 65; ACCIDENT REHABILITATION AND COMPENSATION INSURANCE ACT OF 1992 §§ 58-62.

[111] ACCIDENT COMPENSATION ACT OF 1982 § 92. Where a person is injured during the course of committing a criminal act and "the person is convicted of the offence concerned, and sentenced to a term of imrisonment, cover shall exist but the Corporation may decline, in whole or in part, to give rehabilitation assistance and pay compensation if, in the opinion of the Corporation, it would be repugnant to justice for such rehabilitation assistance to be given and such compensation to be paid."

[112] HAROLD D. LASSWELL & MYRES S. MCDOUGAL, JURISPRUDENCE FOR A FREE SOCIETY — STUDIES IN LAW, SCIENCE AND POLICY (1992).

[113] The Law, Science, and Policy approach is much more comprehensive than can be undertaken in a few short remarks. *See, e.g., id.* at 35 (describing the intellectual tasks necessary for a "policy-relevant jurisprudence").

It has occurred to me many times and particularly after reading or re-reading all the materials that we've read for this Workshop and after hearing yesterday's presentations and discussion, that the economics approach and other approaches tied to the economic approach seem terribly simplistic, as complicated as they are, in terms of the questions that might or should be asked about any particular system of dealing with accidents.

What I'm going to do, therefore, is try to consider how important values are affected by the New Zealand plan. At the outset it must be conceded that that plan is generally admirable in terms of the social welfare it does provide to accident victims. (I suspect that if you scratch every American plaintiff's personal injury lawyer, the idea of granting fulsome compensation to most injury victims would meet their approval, although the way it's been achieved in New Zealand perhaps would not. Which reminds me that if we did away with the tort system in the U.S., we might also do away with the most progressive segment of the American bar, as well.)

The values I'm going to examine are those that Professors McDougal and Lasswell identified as all the values that people seek in society (scope values) and all the values that people use in society to get other values (base values).[114] They recognized that to achieve human dignity, members of society must have access to the processes by which all of these values are created or shaped and that the values themselves should be widely shared.

Let's first examine wealth, viewed from the perspective of the accident victim. The New Zealand system handles the deprivation of wealth rather well for injured earners, regardless of whether the injury was caused on or off the job. They may receive up to 80 percent of their former earnings to a maximum payment of NZ$1179 per week (NZ$61,308 per year),[115] an amount which seems enormously generous in comparison to workers' compensation in the United States. In the Hawaii workers' compensation system, for example, the maximum weekly payment for wage loss is the State's average weekly wage, now between $400 and $500.[116] And to qualify for such benefits the accident must be work-connected.[117]

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[114] *See id.*, Vol. I, 335-46. The identified values are power, enlightenment, wealth, well-being, skill, affection, respect, and rectitude.

[115] ACCIDENT REHABILITATION AND COMPENSATION INSURANCE ACT 1992, § 48. The maximum amount is to be adjusted at least once every year to reflect changes in average weekly earnings. *Id.* at § 70.

[116] In a case of total disability, for example, the workers payment is an amount

But beyond earners — and we heard some of this from Margaret Vennell — there are a number of people in the New Zealand society who are not getting compensation for their injuries at all or receiving inadequate compensation. Housewives and non-earners, for example, receive little or nothing by way of earnings-related compensation. They do not get what they would receive in the United States in a successful tort action — lost earning *capacity*. Therefore, part of the cost of the accidents is riding on the backs of those people — a significant wealth deprivation.

With regard to the effect on foreign trade, there is considerable accident cost externalization. This occurs not only because not all the costs of accidents are compensated, but also because many of the accident-generated medical and hospital expenses and all of the payments to injured non-earners (other than in motor vehicle accidents) are paid from the general tax system rather than the activities which generate the accidents. Even more important, perhaps, is the fact that except for physicians under the 1992 Act, other enterprises are not charged for the costs of accidents they cause to persons *other than their own employees*.

It seems to me that such externalization gives New Zealand enterprises something of an unfair advantage over the competition in other nations, such as the United States, which do a much better job of internalizing accident costs. Of course, the New Zealand economy is minuscule compared to other large industrial nations. While the advantage may help New Zealand enterprises to compete more effectively — a desirable effect in light of New Zealand's economic difficulties — it is unlikely that it will lead other nations to harmonize their systems with New Zealand's solely to neutralize the competition from that small nation. On the other hand, the removal of accident costs, including especially products liability and attendant insurance costs, from enterprises is bound to appear very attractive to business leaders and business-oriented politicians in other nations. Their promotion of plans similar to New Zealand's in their nations might be well-received.

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equal to two-thirds of his average weekly ernings but not more than the state average weekly wage. HAW. REV. STAT. § 386-31.

The difference between the value of the New Zealand and U.S. dollar is arguable not important in drawing this comparison since New Zealand workers are paid in New Zealand dollars and their wages do not come close to compensating for the difference in value of the two currencies.

[117] *Id.* at § 386-3.

Advocates of the law and economics school would argue, of course, that such a scheme is very inefficient and wasteful of wealth.

Next, is the effect of the New Zealand scheme on well-being. With regard to accidents, there are two kinds of accident costs which relate to well-being: primary and secondary.[118] Primary accident costs relate to the direct or immediate costs of accidents; they can be reduced by preventing accidents or reducing their severity. Secondary accident costs refer to the post-accident consequences to victims and others. They can be reduced by providing adequate medical care, rehabilitation services, and compensation for other losses. In the past the New Zealand scheme has provided superb medical care and rehabilitative services to accident victims. Under the 1992 Act the medical and hospital benefits may be reduced somewhat to conform more closely to those available for victims of illness under the national health system, and some injury victims, such as those who suffer medical misadventure or mental distress, may be put at serious disadvantage.[119] On the whole, however, well-being of most accident victims is very adequately assured.

But with regard to primary accident costs, I'm morally certain that New Zealand is a much more unsafe place than it ought to be and that its population has a right to expect. I wish I could show you the slides I took while casually walking the streets of Wellington in 1987. They depicted an unusual number of obvious hazards that in my opinion would never be tolerated in modern cities in other advanced nations. I believe the reason is the moral hazard produced by the virtual absence of any external economic incentive to avoid accidents.[120]

There are a number of ways to produce safety, I suppose. McDougal and Lasswell described several kinds of strategies that decision makers can use to achieve important goals; they range on a continuum of pure persuasion, at one extreme, to coercion, at the other. Most modern industrial nations use a wide and rich variety of strategies to achieve safety, but the economic strategy of civil damage law suits and the consequent internalization of accident costs which is common to the common law and the civil law has been omitted as a strategy in New

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[118] GUIDO CALABRESI, THE COST OF ACCIDENTS 26-28 (1970).

[119] *See generally,* Richard S. Miller, *An Analysis and Critique of the 1992 Changes to New Zealand's Accident Compensation Scheme,* 16 HIROSHIMA L. J. 576 (1993), reprinted in 5 CANT. L. REV. 1 (1992) and 52 U. MD. LAW REV. 1070 (1993) and Richard Mahoney, *New Zealand's Accident Compensation Scheme: A Reassessment,* 60 AM. J. COMP. L. 159 (1992).

[120] My views are set forth in Richard S. Miller, *The Future of New Zealand's Accident Compensation Scheme,* 11 U. HAW. L. REV. 1 (1989).

Zealand. Thus, other than their own moral values or a desire to maintain or create a reputation for safety, most companies, landlords, health care providers, and manufacturers of products (notwithstanding a weakly enforced Fair Trading Act) have no incentive to invest in accident prevention and safety. I don't know whether human nature is that different in New Zealand from what it is in the United States, but I suspect that most people when they have a choice will put their surplus funds into something else other than safety. They may build plant or equipment or they may fly to Honolulu, for example.

In terms of well being, therefore, I think that this produces too many accidents. Unfortunately, it's very difficult to prove conclusively because the tort system in New Zealand before the accident compensation scheme was an inadequate system. According to the Woodhouse Report, the total amount of mandatory automobile liability insurance premiums paid in New Zealand in the year of the report was only $9 million![121] As under the British system, people who would bring a law suit had to worry about losing the suit and being required to pay the loser's costs, including attorneys' fees; it was risky to sue and evidently few people did. Thus, a before-and-after comparison of accident rates — even assuming the data were available — would not accurately reveal the level of accidents under an effective tort system as compared with a total no-fault accident compensation scheme.[122]

Unfortunately, the only statistics that I have found convincing on the deterrent effect of the tort system, as compared with pure no fault, are those from Quebec. Those, however, would seem to support my conclusions.

And it seems to me just as an observer who has tried to be careful in what I was observing, that the accident situation was very bad in New Zealand and the Accident Compensation Corporation's own statistics, as inadequate as they are, seemed to support that conclusion.

So I think there have been too many accidents because of the absence of effective deterrence. That should be a particular concern with regard to product manufacturers; I think Geoffrey Palmer once wrote a piece about the importance of imposing strict liability for product defects if

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[121] REPORT OF THE ROYAL COMMISSION OF INQUIRY, COMPENSATION FOR PERSONAL INJURY IN NEW ZEALAND 229 (1967).

[122] *But see* Craig Brown, *Deterrence and No-Fault: The New Zealand Experience*, 73 CAL. L. REV. 976 (1985) (concluding that the advent of no-fault compensation did not adversely affect deterrence in the motoring context).

the New Zealand scheme went into place.[123] Unfortunately, I do not think that New Zealand's Fair Trading Act is likely to achieve a comparable level of deterrence.

Part of the consequence of an absence of deterrence can be seen, I think — although the connection is difficult to prove —in the dreadful circumstances underlying the Cartwright Commission report,[124] where physicians deliberately failed to treat cervical cancer in order to experiment with the possibility that treatment was not necessary. It's inconceivable to me that a similar situation could happen today in the presence of a system driven by malpractice or the tort system or any system which somehow effectively watches out for this sort of thing.

Power. The tort system, it seems to me, places power in the hands of accident victims. To use current jargon, it is empowering. It is empowering for injured consumers as against large, impersonal, corporations — producers or goods and services that could potentially cause serious danger to all. The ability to hire a lawyer on a contingent fee to impose liability on those corporations and to recover a large judgment or settlement, is extremely empowering. It balances the wealth and power of the large firms. Clearly, a system of pure accident compensation like New Zealand's that does not charge those firms for the accidents they cause denies accident victims of access to an important source of power.

Now, regulation might furnish some countervailing power. But we haven't always had very good experience with regulatory power, as the tragic fire at a North Carolina chicken factory has recently illustrated. I think regulatory schemes, such as OSHA, tend to create an army of regulators and such regulation always creates a real risk of moral hazard — through bribery and corruption. And there is perhaps a tendency for the regulators and the regulated to get in bed together. New Zealand's scheme for regulating product safety, when I examined it in 1987, seemed particularly weak.

There is probably an imbalance of power in the accident arena in New Zealand and there should perhaps be more consideration of how to restore the balance. A rejuvenated tort system or subrogation system might restore power, and there may be other ways. But certainly we should be thinking about that.

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[123] Geoffrey Palmer, *Dangerous Products and the Consumer in New Zealand*, 1975 N.Z.L.J. 366.

[124] Discussed *infra* at p. 710.

As to the value of enlightenment, the New Zealand system keeps information about serious problems away from the public. The Cartwright report is perhaps an example of that. By way of contrast, the tort system does tend to generate publicity about serious accident problems when big cases are brought and litigated. Being enlightened about such problems permits individuals and the government to act to provide necessary protection.

Another element of enlightenment — mentioned by Professor Nesson — is the educative function of law.[125] People learn, one way or another — maybe not very well — but they learn that there are some things that they ought not to do because it's wrong. The law says it's wrong, apart from the fact that there may be penalties for it. But I daresay that in New Zealand with regard to exercising care to prevent accidents the educative function of law is very weak now.

Skill is another important value. Certainly the New Zealand scheme has been very effective in preserving, shaping, and expanding the skills of injured workers. Vocational rehabilitation is a major goal of the system, and there is considerable funding for that. Notwithstanding the emphasis given from the beginning on prevention of accidents, however (the Woodhouse report put prevention of accidents first, before rehabilitation and compensation,) I'm not sure that New Zealand does enough to encourage the development of skills of safety workers — risk control or risk prevention.

Rectitude, which I assume our philosophers will be concerned about, is likewise very weak. The system just does not contain any effective corrective justice. With regard to accidents it does not punish wrongdoing or reward do-gooding.

Furthermore, it leaves victims with little sense of justice, particularly in cases of serious, fault-caused injury. A traffic fine or penalty hardly does the job. The victim may very well feel a sense of deep injustice, especially if it's a serious accident and a serious injury, like paraplegia, where the person who caused the act was a drunk driver or clearly wrong in some other way but does not have to pay a nickel to the victim. While the right to sue for punitive damages has been retained, the plaintiff can't recover all the other collateral benefits, all the other large damages, that would be available in a tort action. And, again, the victim runs the risk of having to pay the lawyer's fee and other

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

costs if he loses. Thus, punitive damages are not an effective avenue to achieve justice; the victim's access to rectitude is severely limited.

I suppose to a certain extent that also deals with the values of respect and wealth. If a non-earner, such as a housewife, were seriously injured at the hands of someone else but recovered little simply because she were not in the paid work force, the failure of the law fully to recognize the degree of her injury may be seen as a lack of respect for the victim. Respect would require that the deprivation of her access to wealth, as a result of her loss of earning capacity, be recognized and corrected, as it is very generously in the case of earners.

Based on this analysis, I would conclude that there are some serious problems affecting values in the New Zealand system. I have suggested — and I think that Margaret Vennell and Jeff O'Connell may agree with me[126] — that it may be possible to use a modified tort-type approach as a back-up to the system, allowing the Accident Compensation Corporation to bring suit, by way of subrogation, against tortfeasors who cause injury requiring the payment of compensation. Such an approach would not only help to finance the system but could also reinstitute an interest and concern for safety. And because New Zealand has no constitutional right to a jury trial, the approach could be tailored to avoid the abuses that New Zealanders claim to see in the tort system.

So I'm — I wonder why New Zealanders don't look seriously at this sort of proposal, especially since there is going to be great difficulty extending the scheme to cover illness as well as accident. And that, by the way, is a problem of rectitude: paying big bucks to accident victims, paying little or nothing to illness victims. Once you get away from the tort system, there's no principled distinction between accident victims and illness victims; to treat them differently seems unjust. Therefore, why not go after the accident causers? As a back-up. Let the ACC bring suit. Perhaps set up an administrative proceeding to decide, but at least go after those that tortiously cause accidents and make them pay to the extent that they've caused them. That would seem to me to be at least a step in the direction of achieving more rectitude, more justice, in the system.

PROFESSOR KLAR: I wanted to comment briefly on my perceptions of the New Zealand Accident Compensation system.

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[126] At least in part. *See* Jeffrey O'Connell, Craig Brown & Margaret Vennell, *Reforming New Zealand's Reform: Accident Compensation Revisited*, 1988 N.Z.L.J. 399 (1988).

One must first recognize the innovative nature and humanity of the scheme which Professor Palmer and Sir Owen Woodhouse introduced into New Zealand in 1974. It is quite rare for public figures to bite the bullet and take such a big step, in putting into place something which they consider to be visionary and useful. Despite my own misgivings about the scheme, I would like to acknowledge their contribution.

I have, however, had difficulties with the system from the outset. I think it is important to provide a balanced analysis on the nature of the New Zealand system and an assessment of its success. In Canadian literature and conferences on accident compensation, we tend to see only one side of the New Zealand scheme. Many of those who write and speak about the system are either its proponents or those who are, in general, ideologically committed to no-fault systems. Their support of the New Zealand system is natural and understandable. Thus, it is not surprising that the popular view of the New Zealand scheme is that it is somewhat of a "miracle," and the question is asked whether the scheme, which works so well in New Zealand, could work equally well elsewhere.

My view has been that the New Zealand scheme has not been such a "miracle"; there are serious problems, from which others who might be contemplating similar reforms can learn.

I would agree with Professor Palmer that the issue of accident compensation reform is basically an ideological and not an administrative one. There are, of course, practical implications, but the essence that drives the reform, has to be an ideological one.

The ideology behind the New Zealand accident compensation system was two-fold. First was the notion of community responsibility, as explained by Professor Palmer. According to this view, the community has the responsibility to restore to full productivity all members of society who have become disabled. Second, everyone in society should have the same eligibility to compensation benefits without differentiation. The fact of being disabled is in and of itself a sufficient justification to the entitlement of publicly-funded compensation benefits. Accordingly, wrongdoers and victims should be treated equally, at least by the compensation system. Both should be entitled to the same compensation.

In order for such a system to work well, it is my impression that the public must truly be convinced of its ideological underpinnings. That is, there has to be an acceptance of the above principles and a rejection of the idea that wrongdoing is relevant to compensation and

that victims of fault-based accidents should be treated differently than victims of disease, random accidents and so on.

Ironically, however, as is shown by the New Zealand experience, the accident compensation system is not sold to the public on the basis of the above ideology. It might be that these ideas are not truly sellable, not acceptable by the public. There is legitimate disagreement concerning the idea of "community responsibility" as opposed to that of "individual responsibility" and the proposal that all should be entitled to the same compensation.

Thus, rather than sell no-fault accident compensation on the basis of ideology, it is sold on a completely negative basis. It is sold on the basis of the weaknesses of tort. Reformers try to decry the values of tort law and deny its accomplishments, hoping to thereby create a void which no-fault can fill.

This is the approach which was taken in New Zealand's Woodhouse Report. There was an expression of opinion in the beginning of the Report about the values of community responsibility and so on. The bulk of the argument in the Report, however, was directed towards the weaknesses of tort law. This is conceptually illogical. Social insurance, social welfare, in other words the idea that we need a "safety net" in society, must be supported on the basis of their own importance and internal logic, not on the basis of the weaknesses of some other system which is trying to accomplish different goals. In this respect, it is quite clear that tort law and no-fault accident compensation systems are quite dissimilar in what they try to achieve.

The values and objectives of tort law are not those of no-fault accident compensation systems. Tort law's goals of deterrence, punishment, and education, and the values of fairness and justice, are not those of no-fault accident compensation. No-fault schemes are about the efficient use of limited resources to compensate the disabled.

The link between tort law and no-fault is made only because of finances. It is the funds presently being channelled into the tort process which must be used to finance the no-fault proposal. Thus tort law must be destroyed so that no-fault can be created. We must be clear, however, that while we are removing one scheme and replacing it with another, we are not replacing it with an equivalent system, but a completely different one.

The fact that the New Zealand public was not adequately persuaded that the values of tort law should be rejected, created another problem for the no-fault scheme. If the public is not disavowed of tort law's notions of fair and full compensation for victims of fault-based accidents

and that these victims have special concerns, then the acceptability of the no-fault scheme is dependent upon the retention of tort law concepts within the scheme itself. This is why, for example, the New Zealand scheme compensates those disabled by accident, rather than by disease. Since it was the victims of accidents who were losing their tort law rights, it was they who had to be given something in return from the no-fault scheme. There had, in other words, to be a quid pro quo.

If we were to set up a social insurance "safety net" on its own without having to consider tort law, I doubt very much that we would have created a system such as the New Zealand one. Unlike the New Zealand scheme, for example, the scheme would not compensate everyone regardless of their needs and their means, would not focus exclusively on accidents and ignore diseases, would not disregard other sources of compensation, and would not disregard the conduct of the claimant.

The link between tort law and no-fault has been a constant feature of the New Zealand scheme. The promise was made to accident victims that the scheme would replace their lost tort law rights. Thus, every time the New Zealand government attempts to reform accident compensation by, for example, reducing benefits, or shifting part of the accident costs back onto the victims, there is public resistance. The public says: "We gave up our tort law rights. You said we would be no worse off. We're worse off. We want our tort law rights back."

Because the public never accepted the notion of "community" as opposed to "individual" responsibility, nor accepted the concept that all should be equally eligible for scarce compensation benefits notwithstanding the cause of disability, notwithstanding innocence or fault, there is a persistence for tort-like compensation. I do not believe that it has been shown that this notion of community responsibility and equal eligibility for compensation has taken root in New Zealand society any more than it would in Canadian or in American society. In fact, I believe that the public protests raised against accident compensation reform indicate that the values of the New Zealand public are probably fairly similar to the values of the Canadian or American public. For an example of the latter, one might look to the recent referendum in Arizona, where the proposal for a "choice no-fault" scheme was rejected by about 80 or 85 percent of the voters.

As Professor Palmer noted, parliaments have great power in British style democracies. It was a New Zealand Parliament that brought in the no-fault accident compensation without any strong evidence of public support or desire for it. It is another New Zealand Parliament

that is in the process of reforming it. The fact that these laws are brought in is no measure of their public acceptability. There are other lessons that can be learned from the New Zealand experience. Let us briefly look at the important issue of costs. It is generally stated that no-fault accident compensation programs cost substantially less than tort compensation. Parenthetically, I consider these cost arguments largely irrelevant in any event because of the completely different nature of the systems which we are comparing.

Nevertheless, one hears, for example from Margaret Vennell's comments, that 97 cents of the premium dollar in New Zealand is paid out in benefits, as compared with the significantly higher costs of tort. The cost issue, however, is more complex than this type of comparison suggests. We have learned from the New Zealand experience that there are indirect cost implications involved with no-fault accident compensation, which reflect more than merely the administrative costs of the system. For example, what are the cost implications if no-fault schemes result in more accidents or more numerous claims?

The New Zealand system is a fairly generous system. It compensated people who would not otherwise have been compensated before under the tort law system. Thus, whether the scheme resulted in more accidents in New Zealand or merely more claims being made, either way, the costs of accidents, including loss of productivity, went up significantly, as a result of the scheme.[127] This is a cost of the system which is not calculated into its administrative costs.

An accident compensation system such as New Zealand's exerts pressure on other parts of the social welfare system. That is, accident compensation is merely one part of the social insurance safety net. Victims who are not compensated through the accident compensation scheme demand equality. They want to be treated as fairly as the victims of accidents.

This is logical. There is no distinction between the two, once the notion of fault is ignored. Thus victims of disease or relatives of those who have died due to illness demand to be treated the same way as those injured or killed in car accidents. This places pressure on the whole social insurance system to increase benefits. This is another indirect cost of accident compensation.

It is also argued that some of the functions of tort law could be accomplished through other mechanisms, if tort were replaced by no-

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[127] *See, e.g.*, Berkowitz, *The Economics of Work Accidents in New Zealand*, Industrial Relations Research Monograph, No. 5, 1979; and the Nordmeyer Report, 1977.

fault compensation. Safety tribunals, regulatory agencies, and the increased use of criminal law could be used. This involves additional costs, generated by the introduction of the accident compensation scheme.

There is of course the major question of the deterrent function of tort law, which if eliminated, might result in increased accidents and their attendant costs.

In the last 20 years of New Zealand's accident compensation scheme, reform of the system has been attempted several times. As Professor Palmer points out, the major reform suggestions have generally been defeated. There have been public outcries over several aspects of the system. Despite Professor Palmer's statement that the common law is dead in New Zealand, it is my impression that common law rights have slowly been creeping back into the system. There was, for example, the re-introduction of punitive damages into the system. Lawsuits for punitive damages were not contemplated when the system first came into effect. Professor Palmer has himself opted for tort suits for all interferences with dignitary interests — assaults, for example. One might ask: "What is the scope of these interferences?" Certainly, sexual assault and other serious forms of intentional torts would qualify.

One might suggest that one could go further. Perhaps drunk driving and other forms of gross negligence would qualify as assaults on the dignity of the person. Once the door to tort is opened, one can argue for more and more extensions. It seems to me that there is, in the latest reform proposals, suggestions for an even greater return to tort law rights in New Zealand. It has always been my feeling that no-fault accident compensation cannot be successful unless the public is convinced that all victims must be treated alike, and that there is no value in having a civil justice system. I do not, however, think that it is acceptable, either in New Zealand or elsewhere, to completely abolish a system of civil justice. This, in my opinion, will continue to lead to the reintroduction of common law rights in New Zealand.

The preferred position is, in my opinion, the mixed system. That is, a system which provides for adequate no-fault benefits to those who require them, funded and based on a proper social insurance basis, while preserving common law rights as a second level of protection. This is the Canadian position and one which I predict will eventually be implemented in New Zealand.

PROFESSOR PALMER: I start by saying that in regard to Professor Klar's comments that the wish may be the father of the thought.

There is information in New Zealand of the acceptance of the New Zealand system. The Law Commission report in 1988 refers to the

data. It pointed out that in a nationwide poll of 2,500 people, 80 percent expressed support for the accident compensation scheme.[128] The accident compensation scheme in New Zealand has high levels of public support. I have detected no significant body of opinion wanting to return to the common law. The Royal Commission on Social Policy in 1988 conducted an extensive review of the entire welfare system in New Zealand. It found that in respect of sickness, injury and disability "[i]t has been increasingly accepted that the community as a whole should bear a share of the costs of relieving some of the burden on individual victims and their families."[129] What the Royal Commission wanted to remove was the "stark difference between society's response to the injured and its response to the seriously sick and disabled."[130] They did not want any return to the common law and neither does any other significant group.

So far as the point that he makes about the gradual turn to the common law, the common law now is not the subject of much public understanding in New Zealand now. It's so many years since it was present in personal injury cases that there are a large number of New Zealanders who have no recollection of it at all. And those who are old enough to have a recollection of it have a very hazy understanding about what it might have been.

So there are pockets of opinion that might be in favor of restoration of the common law action, but they are not extensive. They certainly weren't to be found in the select committee — about 500 submissions have just been heard by a select committee of Parliament. They weren't to be found in 1982 when another select committee of which I was a member looked at the question. It is really very difficult to conclude that any factual substratum for Professor Klar's comments exists. It does not.

So far as he makes the point about the way in which dignitary aspects should be protected by the common law, it was contemplated by me and by Sir Owen Woodhouse that exemplary damages should survive. I did write about that in my book.[131] We had considered the matter in the course of the Australian inquiry.

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[128] LAW COMMISSION REPORT NO. 4 PERSONAL INJURY: PREVENTION AND RECOVERY para. 78 (1988).

[129] REPORT OF THE ROYAL COMMISSION ON SOCIAL POLICY, FUTURE DIRECTIONS 757 (1988).

[130] *Id.* at 763.

[131] COMPENSATION FOR INCAPACITY, *supra* note 78 at 272-278.

In New Zealand we have no written constitution, no entrenched Bill of Rights and no second chamber in the Parliament. The police torts are of some importance in protecting civil liberties. The police torts not only have the effect of controlling police activities, they have a constitutional significance in our system. We did not want to allow police behavior, official conduct from police, to avoid civil actions by sheltering behind the accident compensation scheme.

The Court of Appeal decided the point in favor of the view that exemplary or punitive damages survived the Accident Compensation Act.[132] But, of course, one has to understand that in the context of New Zealand law the number of occasions upon which exemplary damages can be awarded are narrowly restricted. They will be available only in extreme cases of high-handed contumelious conduct.[133] So, although this decision was taken some years ago in 1982, there has not been much increase in the amount of litigation.

I do not think that you can deduce from that there is sort of a creeping return to the common law. It is true that the 1992 legislative changes may increase that tendency, depending on how they are interpreted and depending how the government reacts when it finds out what the courts will do.

Therefore, I find the logic of Professor Klar's arguments in relation to how the system was established quite accurate. That is to say this was an attempt to kill the common law action. What people aren't prepared to face up to here is that attempt was made because the common law action was regarded by the policy makers as a positive social evil of its own. It wasted a lot of resources that did not need to be wasted. It achieved no positive public good; that whatever sound objectives it had, they were not being achieved. In the New Zealand context that is pretty hard to argue with.

Speaking for myself, if I thought that tort law was a good idea, I would be an advocate of Professor Ernest Weinrib's concept of corrective justice.[134] If you take the tort system seriously, you ought to have a tort system where wrongdoers pay. You ought to have a system which gives plaintiffs a sense of corrective justice. But the tort system in New Zealand did not meet elementary standards of corrective justice.

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[132] Donselaar v. Donselaar, 1 N.Z.L.R. 97 (1982).

[133] *Id.* at 115.

[134] Ernest J. Weinrib, *Legal Formalism: On the Immanent Rationality of Law*, 97 YALE L. J. 949 (1987); Ernest J. Weinrib, *Understanding Tort Law* 23 VAL. L. REV. 48 (1989).

The common law was backed by a compulsory insurance system. Wrongdoers did not pay, their insurance companies did. For motor insurance, the premiums were set and companies had to accept the business. There was a whole range of difficulties with the tort system.

A pure, corrective justice system is one thing from the point of view of legal theory. It is quite another in terms of social reality. But the objectives of the tort system on the ground in New Zealand seemed so confused, so lacking in coherence, that they were themselves a positive reason for reform. The tort system achieved little good and did promote a lot of harm. Now, that is clearly a controversial view. But that was the view that we took and that remains the official policy in New Zealand.

Can I say something about Professor Miller's comments? I do think that it was interesting to use the law, science and policy analysis in accident compensation. I have not heard of that being done before. It is a welcome change from the law and economics in this field of which we hear so much.

I do not think, however, the analysis would look the same as the one presented by Professor Miller if you take it from the point of view of the misfortune of the victim and what one ought to do for the victim. The point about helping human beings is what really propelled the New Zealand reform. I remain convinced that helping them is the matter of the highest priority.

I would just like to conclude these comments with some reference to the economic questions. We did discuss those yesterday and I think they are very important. I started out this long journey as a believer in the principles of general deterrence that Guido Calabresi sets out and the need to have an accident compensation scheme which implements them. I felt that the law and economic analysis even at the early stages of the development of this policy — and it was quite primitive in those days — had validity. I set out to try and make it work. I couldn't. The data didn't exist. The administrative problems of segmenting the injuries down to the causes of them to internalize them effectively was such a hard administrative job that you couldn't draft a statute. And I ended up being, after many years of difficult experience in a number of jurisdictions in this area, a skeptic about whether it could be achieved. There are a whole range of problems about it. One of them is how important are the costs of accidents compared with other costs that a firm may have. Are they enough to make any difference to the behavior of the firm. There are number of problems in that area.

There are problems about what is the cost of what. That was wonderfully demonstrated in the New Zealand scheme by all the motorcyclists who had their levy go up because the Accident Compensation Corporation of New Zealand had been paying out a lot of money to injured motorcyclists and said, "Gee, we better put their levies up." They drove around the Parliament with their silencers off, making a big noise. They said, if it wasn't for motor cars on the road, motorcycles would be very safe. It raises an interesting point about whether motorcycle accidents are a cost of driving a motorcycle or a cost of driving a car.

I remember another occasion where we were looking at the levies in the Cabinet. The Cabinet has to set the levies each year in the New Zealand scheme. Aerial top dressing is a big industry in New Zealand. It is the cheapest way of increasing the grass growing capacity of steep slopes. In order to make the grass grow so that lambs can eat it, super phosphate is applied by plane. It is a mountainous country and the planes tend to hit the hills on occasion and kill the pilots.

The accident rate is high and had been increasing. The Corporation recommended that the levy should go up to a very high level to internalize the costs of accidents. In a sense, the occupational classification of top dressing pilots is really a subset of a much larger industry, the industry of farming. That industry would not necessarily bear the cost of the increased levies, and the economic analysis becomes quite complicated.

But the political analysis was not complicated. The Cabinet decided that if it put up the levies to the extent the Accident Compensation Corporation recommended on aerial top dressing, the farmers would raise a great hue and cry. We did not do it.

It is just that unprincipled approach to decisions which I regret to say is common, that makes these ideas hard to get accepted. I gave George Priest the figures that appeared in *The Dominion*, a newspaper in Wellington, because the non-work accidents have been interesting in New Zealand. We find the non-work accidents which now people are going to be levied for in New Zealand, individually through the income tax system, are basically home accidents. Of the 76,000 non-work related claims lodged last year, home claims cost NZ$95.5 million, which is something we've always known, namely, that the home is quite a dangerous place. But if you look at the sports injuries, rugby, almost a religion in New Zealand, cost the system NZ$19.5 million and Rugby league, NZ$5.2. Cricket, of course, a superior game in every respect, cost only NZ$2.8 million.

It is quite sensible, one would suppose, to try and ask those sporting organizations to pay something towards the cost of those accidents. Most economic analysis would suggest that would be an appropriate thing to do. You will never be able to pass that bill. You could not in the New Zealand Parliament introduce a bill that would levy rugby clubs and expect to survive. You can't do it. It's not in the realm of the possible and politics is the art of the possible. There are other values at stake and the community values those other things more than internalizing the costs of accidents.

There are severe problems with the law and economics approach down at the level of detailed implementation. What I would like to see from the law and economics advocates is practical work about how to do it. I would have loved to have had that work at hand when I was in a position to legislate on these matters. I have never seen a scheme for the achievement of general deterrence worked out effectively, statistically, rigorously, that could be passed. I bet it cannot be constructed. Instead of the theoretical justification of the approach which has been argued intensively, I want to see the scheme. I would very much like the law and economics people to develop that because it hasn't been done. Design it, get it implemented, and monitor its performance. Then we might be able to know if the game is worth the candle. My instinct is that it is not. The idea is a plaything of those who inhabit ivory towers, where ideas are important but their practicality is not.

PROFESSOR KLAR: I am not aware of the public opinion poll discussed by Professor Palmer. I did not try to suggest, however, that the New Zealand public did not support accident compensation or that the public supported it less enthusiastically than it did other social programs. I do not know if the public was asked whether or not they would support an improved system with the introduction of the right to sue, and how they would feel about that.

Studies on the tort system also indicate a significant level of satisfaction with it as compared to other compensation systems. I question how much reliance we can place on these, in any event, since they would depend on how informed the public were, what questions were asked, and so on.

My impression that notions of fault and justice have not left New Zealand society is based upon the 1986 Review By Officials Committee Of The Accident Compensation Scheme. This was a review of the scheme in which the Chairman of the Accident Compensation Corporation, the Deputy Managing Director (Policy) of the Accident

Compensation Corporation and senior officials in the Departments of Social Welfare, Labor, Health and Treasury participated.

The Committee noted: "During the course of the review there was a considerable public debate on the provision or otherwise of compensation for persons injured in the course of criminal activities, drunken driving and exposure to sporting and recreational hazards."

The Committee went on to ask: "Another question is whether objectives of accident compensation and sickness assistance may be different. The main argument is to what extent it is still relevant that many accidents are still suffered through specific wrongdoing of other individuals? Although New Zealand has had a no-fault system in place for more than ten years, the concept of 'justice to the victim' is still important as a philosophical basis for policy. This review, however, is not in any position to assess the degree of that importance."

There are other comments from the Review Committee Report which suggest to me that the committee did feel that some of these values were still relevant to several persons who made submissions.

The second point that I want to comment on is the way the New Zealand scheme was enacted in terms of tort reform. As I indicated, the tort system had to be killed in order to create the financial backing for this accident compensation system.

Professor Palmer, in his book *Compensation for Incapacity: A Study of Law and Social Change in New Zealand and Australia* makes some interesting comments about how this was accomplished. He states:

> The 1967 Woodhouse Report recommended that the common law action for personal injury "has been increasingly unable to grapple with the present needs of society and that something better now should be found." The excoriation of the common law in the report dealt with negligence; nothing was said about intentional torts involving interference with the person where damages could be had. How and to what extent the common law was to be done away with was not examined in any technical way. Neither was the issue discussed in any of the subsequent official documents, the matter being dealt with on the basis of broad policy arguments, for and against retention of the common law. So the method of taking away the common law remedy and the extent of its removal fell to a committee of officials which recommended policy decisions to a Cabinet subcommittee.[135]

Professor Palmer also notes that a feature of the Woodhouse attack on the common law process was that "it was largely based on principle.

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[135] COMPENSATION FOR INCAPACITY, *supra* note 78 at 271.

There were almost no empirical data in New Zealand on who got what, when and how from the common law system. Only modest amounts of information were collected by the Royal Commission itself."[136]

Professor Palmer also concedes that "the assessment of the common law in the Woodhouse Reports was hardly balanced. Little was said about its advantages. . . . The one-sided nature of the material on the common law offended a number of people."[137]

I think it is clear from these comments that there was not, in New Zealand, any major effort made to get data on the tort law system, to see how it worked and to see how it could be improved. One of the reasons it is important to recognize the fact that tort law reform is an ideological issue, is because if it were simply a matter of efficiency, serious reformers would focus on how the tort system could be improved. The commonly cited faults of the tort system such as delay, costs, protracted litigation, and the forensic lottery, do not present intractable problems. I would assume that bright, dedicated and knowledgeable people committed to making the system better could try to devise solutions to deal with tort law's problems. But because the debate is ideological, this is not the agenda. The agenda is not to make tort law better. The agenda is to take tort law at its worse as an excuse for its abolition. That is why it is important to recognize the ideological nature of the debate and to avoid falling into the trap that a universal compensation program should be adopted because tort law's problems are beyond resolution.

PROFESSOR SCHWARTZ: I want to compliment Geoffrey and the commentators for a splendid set of presentations. Let me ask Geoffrey just a couple of questions, which share a common factual base. Geoffrey suggested, at least implicitly, that he is dismayed that American reform has not moved in a New Zealand direction. He also pointed out that as of 1970 the legal rules of medical malpractice in New Zealand and the United States were about the same. Still, as he noted, various features in the American legal system led to a level of liability in the United States that was vastly higher than the level of liability in New Zealand. Indeed, in New Zealand, the cost of malpractice liability was then apparently trivial. Once one acknowledges that there are many features of legal systems that dramatically affect

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[136] *Id.* at 26.

[137] *Id.* at 31.

comparative outcomes,[138] doesn't that acknowledgment mean that one needs to be very cautious in extrapolating from New Zealand to what the results would be were a New Zealand-like compensation plan adopted in the United States? That's my first question.

My second question is this. I'm puzzled by the suggestion that New Zealand, in adopting its compensation plan, was motivated by a hatred of the tort system. From the description Geoffrey offered, it's hard to see how there was *any* tort system then functioning in New Zealand that could plausibly have been hated. From what I can tell, there was almost no malpractice litigation. Moreover, from what I've learned from other sources, there was almost no products liability litigation — and certainly no litigation inquiring into the adequacy of product designs. I've also been told that there was then very little personal injury litigation against government agencies. In all these ways, New Zealand was quite unlike the United States — and also unlike Japan. As suggested yesterday, tort claims are frequently brought against the Japanese national government for the inadequate implementation of regulatory controls.

From what I can tell, the only significant area of tort litigation in New Zealand in the early 1970s was auto. And as for auto, liability insurance was then priced — under government guidelines — in ways that ignored all the variations among drivers that American insurers routinely take into account. Consider George Priest's son, whose hormonal imbalance leads to irresponsible driving patterns. Had he been living in New Zealand, despite his bad driving record he would have been charged the same insurance premium that Margaret Vennell was then being charged. In New Zealand, a driver could have had several drunk-driving convictions and accidents on his record, and that would not have showed up at all in his insurance premiums. (Granted, at some point the licensing authorities might have intervened and suspended his driver's license). Now whatever the potential advantages of a regime of tort liability as applied to motorists, when the regime is compromised by insurance practices of the sort I've described, it's hard to see how those potential advantages can possibly be realized.

My question is this: Given the very low level of tort litigation in most areas, and given the way in which artificial insurance practices in auto litigation unduly interfered with tort law's efforts to achieve its goals of fairness and deterrence, what *was* there in the tort record in

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[138] I discuss these features in Schwartz, *supra* note 23 at 63-76.

New Zealand in the early 1970s that might have prompted or justified a general hatred of tort?

PROFESSOR PALMER: Professor, those are both interesting questions.

The first question about the relevance of the New Zealand experience to the U.S. or, indeed, to anywhere else. I used to think when I was young and enthusiastic, that possibly the New Zealand reform could be made into a messianic crusade that could export reform of the tort system everywhere. I no longer think so. In fact, I think the problems in the United States, the complexity of the United States society, the size of the United States makes the business of reforming anything in the United States much more difficult. And, obviously, difficult for sound reasons a lot of the time. I don't want to underestimate that. So, I no longer think that you can extrapolate from the New Zealand experience to anything anywhere else, sad as that is.

The differences in the practice of the system that you draw attention to were very considerable: Party and party costs on the English model, no contingent fees, no class actions, jury behavior and that intangible factor of claims consciousness which is really just about impossible to quantify. But it is a true sociological factor in the equation.

So I do think you have to be cautious.

So far as the performance of the New Zealand tort system — one autobiographical point — I used to do this sort of work when I was very young lawyer. It was known in the legal profession as "blood and bone" work. And it was a great deal of fun. That's one of the reasons why I got involved in the reform because I had done a fair bit of it when I was very young. There were two areas in which the tort actions were prominent. One was in employment accidents. Unlike workers' compensation accident systems in the United States and Canada, the common law action had always remained against the employer in New Zealand. The situation was that you could get workers' compensation benefits if you couldn't get common law. That in practice you used your workers' compensation periodic benefits to keep you eating while you proceeded with your common law action. Trade unions were particularly prominent in helping their members sue the injured worker. I remember acting for a union against Swift, a big United States corporation which owned a packing house or a freezing works as we call them in New Zealand. The union always wanted to sue them. We used to sue them in circumstances which were highly doubtful. I remember one case we managed to get a verdict where we alleged the shepherd had fallen over a dog. He was herding

the stock into the place of slaughter and he fell over the dog. It wasn't his dog. It belonged to one of the other shepherds employed at the works. The argument was the dog shouldn't have been there. This was negligence for which the company was liable, we argued. The jury said yes. There wasn't a great deal to commend the verdict. We were not even sure there was a dog there to fall over. Getting to the jury, that was the main thing. You had to have a good enough case for the judge to let you go to the jury.

There were one or two quite prominent actions involving medical malpractice but, really, the level of litigation in those years was extraordinarily low by American standards. It is true there wasn't a lot to hate in the New Zealand common law, except in the view of the reformers.

I should have perhaps pointed out that there was an effort made previously to the Woodhouse reforms by a committee that sat in 1963 called the Committee on Absolute Liability. The Committee on Absolute Liability had insurers and other people on it, and it failed to recommend the abolition of the common law. So the Royal Commission was set up three years later to do the job in a more thorough and comprehensive fashion.

Now, the Chief Justice at that time (Sir Richard Wild), who had been a Solicitor General at the time of the Committee on Absolute Liability, was really responsible for selecting the Judge that the government selected for the 1966 Royal Commission on Personal Injury. So New Zealand is a society where the interpersonal networks are exquisitely subtle and effective.

I would say that is what was wrong with the law when the Royal Commission sat was that the workers' compensation system hadn't been revised for many years. The benefits were mean and paltry and that was the main engine for reform. And in order to keep that engine in good working order, the government took a lot of care not to reform the scheme until the Royal Commission had reported. That way some traction was generated for the reform.

The common law was excoriated in the Royal Commission Report for a strategic reason. The common law had to go in order to capture the compulsory insurance money with which to fuel the new system. New money would not be available for a reform of this sort, the fact that you could do the reform without using any new money was one of the scheme's major selling points. Your reform would never get off the ground unless you killed the common law. You didn't like it anyway. You thought it was capricious for personal injury cases. You

thought there were a lot of delays. You thought it was very expensive. About one percent of people who were injured got anything through the common law in New Zealand. In Australia, we actually did quite a lot of empirical research to demonstrate what the common law system in Australia was actually doing and it wasn't performing well. But certainly that wasn't done in New Zealand. The reasoning proceeded on the basis of general principle. If you know the values you believe in a strong case can be generated.

PROFESSOR MILLER: I think it's clear that whatever social ideology may have led to the New Zealand system, it was clearly not an ideological attack on the tort system because the tort system remains intact except for accidents. That is, you can find many cases of negligence, such as accountant's negligence, and all other forms of negligence not in the accident context, that are still being tried. Now, if there was really an attack on the common law system, obviously those cases would have gone out as well and they have not.

Another point, it seems to me, relates to general deterrence. Something I don't quite understand is why you would want to move to a uniform levy (or premium) for all employers in all industries. Until recently New Zealand did have at least some cost internalization built into the system, the notion being that you put the cost on the activities that caused the injuries by imposing different levies on each industry according to the accident costs of its employees. And it appeared that some industries were causing a lot more accidents to their employees (not necessarily to third persons) than others. And therefore it made some sense to charge those industries more even though the individual firms within the industry could not get a reduced rate if they were more safe or a higher levy if less safe. Why then move from a variable levy to a flat levy applicable to all employers?

Another question I had relates to the failure to gather accurate accident statistics. Certainly, it is one of the sad parts of the New Zealand experience that the hope of the framers for the best accident statistics in the world were never realized and that, in consequence, we don't really have any useful statistics. It might have been a good move to include in the 1992 Act a requirement for the mandatory collection, and for the funding of the collection, of statistics so that at least some kind of general deterrence based on levies could have been built back into the system. It seems to me that can yet be done and should be done in order to insure that levies or premiums better reflect the costs of accidents produced by individual premium payers — experience rating — as required under the 1992 Act.

What I'd like to ask you specifically, Professor Palmer, is this: I made some recommendations for a tort "backup," alluded to earlier, in my article. Of course, it was a long and boring article and at the end of it were my recommendations. Maybe no one got that far, although I did get a reaction from Jeff O'Connell and Professors Vennell and Craig Brown,[139] as well as from the Law Commission.[140] But the concept of somehow using a back-up system which would re-introduce a lot of important values without causing the kind of problems that some people perceive in the ordinary tort system, seems to me to be a fairly easy thing to do. That is, I recommended that both the injured person and the Accident Compensation Corporation should together bring suit against the defendant who may have negligently caused the accident and that while the injured person could not duplicate any benefits already received, she could recover those losses that were not covered by accident compensation. And the Accident Compensation Corporation could recover the amounts it paid out or would pay out over the life of the accident victim. I also recommended that the rights of the Accident Compensation Corporation should take precedence over the rights of the victim if you had to settle for less than 100 percent of the damages.

Jeff O'Connell, Margaret Vennell, and Craig Brown came back and criticized me for recreating a tort system. But they, in the course of their attacks, said, well, it wouldn't be so bad if there were a tort back-up — a subrogation action by the Accident Compensation Corporation of some sort or other, but no action by the victim. It was clear to me that they came back and said, yes, let's re-institute some kind of a tort action against tortfeasors by the Accident Compensation Corporation. That would recapture money for the system which could be plowed back into benefits, expanded benefits. It would re-introduce the notion of accountability and would begin to re-educate people.

Now, because of the problem of financing accident compensation, maybe the reason you don't want to adopt this proposal is the cost — potential accident causers would have to purchase liability insurance. They'd have to pay for that in addition to premiums for no-fault compensation. That might reduce the amount of money available to pay for the ACC and, perhaps, that's the reason.

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[139] Jeffrey O'Connell, Craig Brown & Margaret Vennell, *Reforming New Zealand's Reform: Accident Compensation Revisited*, 1988 N.Z.L.J. 399 (1988).

[140] New Zealand Law Commission, *Comment on "The Future of New Zealand's Accident Compensation Scheme" by Richard S. Miller*, 12 U. HAW. L. REV. 339 (1990).

But even there you could say: this would be uninsurable, or perhaps you could impose a mandatory deductible in the liability insurance. A defendant held liable in a judgment or even in a settlement would have to pay the first thousand or two thousand dollars out of his own pocket with the liability insurance only being available to cover the balance. Such a deductible might significantly strengthen deterrence.

In short, there are any number of ways, it seems to me, to avoid difficulties that may be perceived in a full-blown tort/insurance system. You could mandate binding arbitration or establish administrative procedures. If subrogation were available you would not necessarily be building an aggressive plaintiff's trial bar of the kind that American tort reformers believe creates excessive costs and overdeterrence.

My question is, why wasn't such a scheme seriously considered?

PROFESSOR PALMER: The first thing is that there has been a degradation which has taken place in the last 20 years within the executive branch of the New Zealand government on the capacity to advise government on this scheme. There has been an institutional loss of memory.

When this scheme began, it was the biggest game in town. It was the biggest policy change that was going on. It is now hardly of any significance. It does not get the attention that it used to get because there are other, far bigger policy issues which are taking the attention of the government's advisers and the government itself.

When you couple that with the fact that there's no one left in the public service who actually knew how this thing was put together, the quality of advice available to the government has gone down. The Accident Compensation Corporation itself has turned out to be a totally incompetent adviser when it comes to matters of policy. They're quite able to run the thing quite efficiently and control it in an accounting fashion and it's no accident that the chief executive is an accountant. But the truth is when it comes to policy advice, it's appalling, absolutely appalling and often based on what is the administrative convenience of the corporation itself.

The problem is that there is no adequate counterweight in the executive government to advise ministers what is wrong with the advice they're getting. Some of the advice has actually been coming outside of government itself. The only repository of knowledge on this matter remains the Law Commission. The Law Commission had been so heavily involved in the Labor government's initiative to extend the scheme to sickness that the new government didn't really want to take advice from that quarter, although they've started taking it in recent

times when they found that the public clamor against some of their changes was so high.

So the short answer is that this a proposal of such complexity and sophistication that you won't actually get it into the system and get it through. It may have merit, but no one is really prepared to take this whole idea seriously about accident costs in order to make the effort to do it.

Now, that may sound rather a cynical explanation. But those proposals have been published. I just get the impression that while they have merit, people think, well, it just isn't worth the trouble. Margaret Vennell might have some views on it.

PROFESSOR VENNELL: Well, I think it is partly that people think it not worth the trouble.

The insurance argument raises its head. I mean, I have argued quite strongly that there should be right of subrogation. Because I think that there are advantages in the tort system. You know, I think there is an element of deterrence. I think there's also the educative element.

In the existing scheme, there is a right of subrogation in respect of a claim arising overseas which the Corporation can exercise. There is no right of subrogation in respect of accidents arising in New Zealand, where no claim arises overseas. The arguments that are raised by the executive against subrogation is that everybody would be insuring, and that's only increasing the enterprise costs of economic activities.

So the reason for that, Dick Miller has pointed out, is that, I think there just isn't the will and there hasn't really been the will to look at questions of deterrence and the educative role to any extent. I think there is a lack of accountability in the New Zealand society, which has been illustrated particularly in the medical area. And there doesn't really seem to be the will to introduce elements of accountability into the scheme.

In some ways, I think the Scandinavian systems may work better simply because they have specific schemes, which can cover the same ground as the New Zealand generic scheme. These at least focus on the causes of accident and enable methods to be developed to prevent accidents.

I don't think there's been the will in New Zealand, and I don't see it with the present administration of the scheme, to go out and actually spend a lot of money and a lot of effort in prevention of accidents through the means that are readily available.

I think if you've got a compensation scheme, you've got to take very strong preventative measures.

PROFESSOR PRIEST: Allow me respond to some of the broadside attacks on the economic approach.

Almost all speakers other than myself have, in passing, referred to the inadequacy, ineptness, or bankruptcy of the economic approach at one point or another. I could not reply to each of those comments, arising at every one of them. But after they accumulate to form an avalanche, as they have at this point, I believe that I should speak up.

Professor Palmer criticized the law and economic approach on the grounds that it had not yet generated a system for him or for New Zealand or for any other country that was legislatively possible, that he could get passed.

It seems to me that is a very unfair criticism of an analytical approach: that its implications aren't politically acceptable or compatible with the views of the electorate at that point.

Ernie Weinreb's system of corrective justice is, I think, no more politically palatable currently than the economic approach. But that is not the function of an analytic method that attempts to address the consequences of policy. Einstein's theory of relativity may not have been palatable according to the then-current opinion, but if it led to successful empirical predictions upon the eclipse of the sun; it was a valuable theory. Similarly, it is not surprising that economic analysis is unpalatable to those, like Professor Palmer, who believe deeply in the New Zealand plan, because if studies bear out its predictions that adoption of the New Zealand plan will increase the accident rate, those deep beliefs become morally suspect.

Secondly, one common criticism of the application of the economic approach to the design of compensation systems that many have mentioned here, that is visible in Guido Calabresi's *Costs of Accidents*, and has been a feature of the debate since then, is the claim that, if one is going to take economics seriously, then one has to define a system that perfectly discriminates among activities or among individuals or firms that engage in those activities in terms of risk-generating characteristics. That is, anything less than perfect discrimination among firms or individuals or activities that generate risk means that the system will be inoperative and one might as well as throw in the towel and lump everything together. That seems to me to be a mistake.

There are costs and benefits of any form of insurance discrimination. At some level, it is worthwhile to discriminate among activities or among actors engaged in those activities. At other points it will not be worthwhile. Professor Palmer invoked rugby and the

combined $24.7 million costs of rugby activities to non-work-related claims. As I look at these figures, and this is simply a quick calculation, those costs are about eight percent of total non-work-related claims, and it is not clear that it is worth making rugby a distinction for a cost that comprises only eight percent, especially when there are obvious difficulties in enforcing that form of discrimination.

Perhaps the New Zealanders are such that they would always report a rugby injury as a rugby injury if it were priced separately. Nevertheless, they might also report a rugby injury as a home-related injury or some other injury: "My wife kicked me" instead of, "It happened in a scrum." Those problems, unfortunately, are serious ones when one gets to a level of discrimination of that precision.

So it is not clear to me that the failure to discriminate separately for rugby, not to mention cricket or soccer, is a failure of the system. It may only be an economic reality.

Professor Palmer did say that, when he was thinking about designing a system, he could not figure out how to make the discriminations appropriately, given the lack of evidence. I think that would be true for any of us in this room, or any single public policy analyst or most groups of them. Indeed, insurance is a very complicated business.

It seems to me the one analog of what might be possible is the operation of private insurance regimes in a competitive environment in which the forces of competition and the advantages of offering lower rates to individuals are such that it encourages insurers to make whatever discriminations are economically efficient and to ignore the rest.

Now, when we look at the private insurance market, which is perhaps more heavily developed in the United States than elsewhere, we see for first-party insurance, in which most of these non-work-related injuries would be covered, that there are very few discriminations. That is, in the first-party insurance market in the United States — though I don't claim to suggest that it is operating with perfect efficiency — there are very few discriminations made in terms of activities.

There are exceptions. For example, private flyers, aviators, pilots, must buy separate life insurance. Such differentiation is worth the effort since the risks that those individuals bring to a first-party market is sufficiently different to justify excluding them from the typical first-party life insurance market and requiring them to buy separate insurance.

Secondly, there are some efforts to try to define separable markets of non-smokers, but that has not been terribly successful. There are some exclusions with regard to specifically dangerous activities. Many first-party policies, for example, have exclusions for spelunking; some for mountain-climbing, but not a lot. So it is not even worth excluding that high risk activity.

Now, on the liability side, we see many further distinctions. It is worthwhile for private insurers to introduce many further distinctions and discriminations, not only in the context of auto coverage where repeated accidents or even a single accident will cause one's insurance rates to rise very dramatically, but also in the context of other forms of liability insurance.

One of the features of the expansion of liability in the United States is to shift many losses that would typically be covered under a first-party policy to third-party policies. For example, there are now extensive recoveries against the third-party policies of ski operators. Twenty years ago, if one injured a knee skiing or broke a leg, a person recovered against one's first-party policy. Today, it is very common to sue or at least to file a claim — the suit seldom goes to court — against the ski operator for failing to groom the slopes or for not warning that the slope was not for a beginner.

Similarly, many other activities that are going to be non-work-related in the New Zealand plan, have become liability related with the expansion of liability in the United States. Swimming pools are an example. There are distinctions in swimming pool policies: Diving board or no diving board? Full-time lifeguard? Is the pool fenced in or locked at night; are there ropes across the pool? How deep is the pool?

The increase in liability for pool operations has led to very severe changes in pool design. No diving boards are being introduced in new pools. Pools are designed to be much shallower although there are offsetting problems there because there has been liability attached for too-shallow pools where people have dived in and broken their necks. The insurance system influences those changes.

That is not to say that there is no discrimination on the first-party side. In workers' compensation, it has proven valuable in the United States to discriminate again, chiefly for larger firms, according to their experience in accidents, the number of employees and the severity of employee injuries. But there are limits to the effectiveness of even that discrimination.

Now, I suppose one could view it as a puzzle that the New Zealand system has not found it worthwhile to introduce equivalent discrim-

ination; though its failure to do so is certainly consistent with the values that Professor Palmer described as underlying the New Zealand system. But the New Zealand failure is not really so surprising. It is a feature of every government insurance system that discrimination is avoided. It is hard to discriminate as a government agency because citizens object to any perceived inequality, and the grounds for discrimination in insurance, which are typically financial only, are not accepted motivations of a government operation.

That is one reason that there are many advantages of having compensation systems provided privately rather than publicly. Of course, there are limitations to private insurance. Individuals have to have money to buy insurance. If they don't, they cannot become insured. Thus, there is always a role — an important and necessary, and, I think, undersatisfied role in the United States — for government provision of compensation for the poor.

But, my point is, that the implication of the economic approach is not that we ought to have perfect discrimination among activities. Rather, I believe that the economic approach is one that seeks to illuminate what the implications are of providing compensation through one mechanism or another.

PROFESSOR MORISHIMA: I'd like to make a comment on the so-called back-up system of common law. In our country, we don't have a common law system so I will refer to the civil court system. In Japan we have also introduced various administrative compensation systems and some special compensation system dealing with liability.

For example, in a workers' compensation system, the employers are liable for the accidents which occur in the workplace, and the government introduced a no-fault insurance scheme.

Similarly, we have a compensation scheme for the victims of pollution. The government introduced a scheme where the polluters — I would say not the actual polluters, but the parties who discharged the pollutants — are levied in accordance with the amount of discharge of pollutants to contribute to maintain the fund. The fund pays the victims who are certified by the government as pollution victims. The payment system covers expenses related to medical care and lost income up to 80 percent of average wages and does not compensate for general damage items like pain and suffering. We also have administrative compensation systems in the areas of adverse effects of medicine and inoculation. These systems are basically the same in terms of the level of compensation and the procedure of certification victims.

Thus the workers' compensation scheme and the new administrative compensation scheme have a different payment schedule. And as a result, there are various differences between these payment schemes and the payment systems of the civil court system.

So far no one in Japan has even dared to dream of the abolishment of the civil court system in favor of compensation schemes. And when we traced the history of the abolishment of the common law system in the area of workers' compensation in the United States, we discover that the ultimate purpose of the abolishment of the common law system is merely to save the money of the employers. So instead of combating a workers' compensation scheme, naturally employers in the United States supported the abolishment of the common law system. Thus the abolishment of the common law system is a movement undertaken not for the sake of the victims, but for the sake of the party or parties who might be held responsible for paying for the costs of the accidents. Thus to maintain a fair and just compensation system for the victims, I think, as Professor Klar told us, basic compensation should be made by compensation systems, but the civil court or common-law remedy should be maintained for damage in excess of the minimum compensation.

In Japan, because of the difference between the amounts of compensation and because of the public belief that the civil court system remains as forum of last resort where compensation could be awarded — although in Japan as well, the court is not always very efficient — it takes a lot of time and money to secure full compensation. But still many — if not all — people believe, that the court could be the last resort to get full compensation. Thus in Japan the court system functions as a form of "backup" system for the compensation schemes in place.

My point is that compensation schemes and the civil court system of seeking compensation are not mutually exclusive alternatives, but rather may work in a successful scheme together.

PROFESSOR MORIGIWA: The problem seems to be whether the institution of comprehensive compensation systems and that of the tort system comprising a subsystem of a traditional system of common law or civil law are in a trade-off relation. If so, it would have to be one or the other. But if not, mixed systems would be possible. There would be no absolute reason to reject a mixed system which would compensate victims and also uphold corrective justice at the same time. The problem in the final analysis, is a practical one: whether such an institution can be designed and actually implemented.

But in order to go into that question, we would first have to identify the values that the comprehensive compensation system would have to uphold to be justifiable, and see if they are compatible with those of the tort system.

One thing that has troubled me is the fact that the dichotomy always seems to be in terms of output: compensation or damages? I am sure that the basic spirit behind the values that are to be upheld by any accident law system would have to have prevention as its priority and compensation or damages coming later, in case of tragedies which could not have been avoided.

Compatibility should not be a problem so far. The justice and fairness rationale should not be a problem if considered only in allocation and distribution contexts. Problems do arise when we begin to consider corrective justice and retribution. Perhaps because of such anticipation, we seem to be emphasizing the deterrence and the compensation aspects of the systems to be considered and sacrificing the fairness rationale.

If I remember correctly, the ALI report expressly took the position of doing away with the fairness rationale. If there is an occasion to do so, I would appreciate if Gary Schwartz would give his comments on whether he thinks that was a very good idea; whether that has anything to do with possible implementation of tort reform in the United States.

Proposals For Reform

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I.

Ideology is an important part of the debate about accidents — their prevention and the compensation of their victims. In order to emphasize my point, I will describe five different models for the management of risk and its consequences, giving these models explicitly ideological labels.[141]

The first I call the libertarian model. In this model, putting aside fraud and other intentional wrongdoing, risk and its consequences are supposed to be managed by the market and by contract.

People see what risks are presented, and they decide for themselves when to take their chances, given the benefits that flow to them from running those risks. Unless the source of a risk has promised in advance by contract to compensate victims, compensation is to be dealt with (or not) through voluntarily purchased first-party insurance. You buy disability and health insurance if you want protection. Or if you don't, you don't buy that insurance. It's your libertarian right to do so or not. What's fair is that you get what you choose in terms of both risk and compensation.

In this model, government adopts a hands-off policy toward the managing of risk. We rely instead on the market to control conduct. For example, we assume that providers are concerned about their reputation because they will want to make future sales and that this helps assure that they won't take advantage of current customers.

This approach reflects, to a certain extent, some views Professor Epstein has put forward.[142] Under his proposals, as a practical matter,

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[141] Stephen D. Sugarman, *A Restatement of Torts*, 44 STAN. L. REV. 1163 (1992).

[142] *See, e.g.*, Richard A. Epstein, *Medical Malpractice: The Case for Contract*, 1976 AM. B. FOUND. RES.J. 87.

there would probably be no third party liability in settings where parties deal with each other by contract. Doctors and product sellers could contract with patients and buyers to provide them compensation in case an accident occurs, but probably they would not; rather, the parties would probably agree that the consumer/patient would bear the loss.

This was, in important respects, the law of England in the 19th century with all of its "no duty" rules, especially with respect to product manufacturers.[143] From what Professor Matsumoto said earlier, this model may best describe the de facto law in Japan, even now, given all the barriers to bringing litigation.[144]

My second model I call the conservative model. This model is embodied by the traditional common law tort system. From what we have heard from Professor Klar, this model is well represented by Canadian tort law today.[145]

I call this model conservative because it reflects several appropriately conservative values, most importantly, individual rights to sue and an emphasis on fault. It focuses on deserving victims and aims to provide them with full compensation, for example, replacing all of their wage losses even if they're wealthy.

This model relies upon the decentralized system of individual lawsuits to control behavior. Unlike the libertarian model, the assumption of the conservative model is that the market and individual contracts alone will not sufficiently control wrongdoing, and that society must create enforceable rights to sue by those who are injured by another's fault.

The third model I call the liberal model. It draws on those early 20th century progressive values on which contemporary liberalism rests. Central to this model is the idea that it is primarily organizations and institutions that cause harm, and not so much people that cause harm. Hence, individual fault is de-emphasized. During the 1960s especially, liberals talked about crime in this way too. Crime was seen to be caused not so much by individuals but rather by larger, social forces. Because, in this liberal view, organizations are really responsible for accidents, then they should bear the costs. Workers' compensation clearly embodies the liberal model.

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[143] Robert A. Rabin, *The Historical Development of the Fault Principle: A Reinterpretation*, 15 GA. L. REV. 925 (1981).

[144] *See* Tsuneo Matsumoto, *supra* beginning at p. 577.

[145] *See* Lewis N. Klar, *supra* beginning at p. 583.

In the liberal model, victims are to be assured the basic needs they have as citizens. We don't try to restore the wealthy to their pre-accident financial position as in the conservative model. And we don't pay fine-tuned attention to victims' intangible losses either.

The liberal model is congruent with the Japanese compensation systems for drug accident victims and pollution victims as they have been explained here.[146] It also fits the Swedish medical accident scheme[147] and the scheme recently adopted in the United States (as elsewhere) for vaccine damaged children.[148] Under these plans victims are to be assured that their basic human needs are met by the large enterprise or sophisticated actors who cause the loss and regardless of fault.

The liberal model depends upon the funding mechanisms of the compensation schemes to achieve socially desirable behavioral effects. That is, the social cost accounting employed by these plans internalizes the costs of accidents so as to give organizations the financial incentive to take the socially appropriate level of precaution.

Auto no-fault schemes don't so neatly fit my liberal model because they don't concern large institutions. Nevertheless, these plans are driven by some of the same broad ideological values — de-emphasizing personal fault, viewing accidents as things that just happen, and internalizing the costs of auto accidents to the enterprise of driving (even if it isn't an enterprise of the sophisticated, complex organizational sort).

I call my fourth model the collective or communitarian model. It rejects the idea that the causes of disability matter. Rather, people become our collective concern simply because they are disabled. In this model the disabled are to be cared for in a reasonably uniform way, and all members of society should contribute to the funding of that care.

On the compensation side, this model employs broad social insurance arrangements to deal with the needs of the disabled. Inasmuch as it doesn't cover all the disabled, New Zealand's approach of the past 20 years lies somewhere between the collective model and the liberal model.[149]

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[146] *See, e.g., infra* at p. 717.

[147] *See* Jan Hellner, *Compensation for Personal Injury: The Swedish Alternative*, 34 AM. J. COMP. L. 613 (1986) and Carl Oldertz, *Security Insurance, Patient Insurance, and Pharmaceutical Insurance in Sweden*, 34 AM. J. COMP. L. 635 (1986).

[148] *See* SUGARMAN, *supra* note 24, at 106-110.

[149] Geoffrey Palmer, COMPENSATION FOR INCAPACITY, *supra* note 78.

The proposal by Donald Harris and his group at Oxford for a comprehensive English disability compensation scheme[150] and the Woodhouse proposal for Australia[151] are better exemplars of the communitarian model. My comprehensive income support and health care proposal fits this model as well.[152] In the collective model, neither individual lawsuits for money damages nor targeted cost internalizing through funding mechanisms is relied upon for behavior control. Rather social channeling of conduct is pursued through regulation.

My final model I call the socialist model for which I draw on the writings of Professor Abel.[153] The first principle here is that we currently have inequality in risk-taking which is unfair; that is, the lower classes are involuntarily and disproportionately subjected to too much risk. What we need are collective mechanisms for both redistributing risk and reducing risk. A second principle is that we have too much income inequality in society.

So, under the socialist model, we'd have more worker control over risk creation than we have today. In addition, society would provide a generous minimum income guarantee, restrictions on income inequality, and a nationalized health insurance system. No special compensation arrangements would be provided (or thought needed) for those injured in accidents.

To sum up, each model has its own mechanisms for treating people fairly in terms of paying out benefits and paying for those benefits. Each has its own approach to accident prevention.

Although each model represents a distinctive ideological position, it is not necessary to view these models as mutually exclusive. For example, a society might adopt one model for one type of accident and others for other types. To illustrate, many countries, such as Canada and the United States, have traditionally employed the liberal model for work accidents and the conservative model for most other accidents.

A society can also embrace cascading models. In Japan and Britain, for example, the treatment of worker injuries involves laying the liberal model on top of the conservative model (instead of substituting one

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[150] Donald Harris, et al., COMPENSATION AND SUPPORT FOR ILLNESS AND INJURY (1984).

[151] *See* COMPENSATION FOR INCAPACITY, *supra* note 78.

[152] SUGARMAN, *supra* note 24, at 127-152.

[153] *See, e.g.*, Richard L. Abel, *A Critique of Torts*, 37 UCLA L. REV. 785 (1990).

for the other). So, too, many people favor laying the regulatory force of the collective model on top of the behavior control strategy of the conservative model. When you utilize overlapping approaches in these ways, you get an ideological mixed (although not necessarily bad) system.

Some people in the United States would find it odd that I call the tort model the conservative model because people associated with Liberalism, such as the consumer activist Ralph Nader, are big supporters of the tort system.[154] The reason for this, I suggest, is that, over the past 25 years the tort system in practice in the United States has taken on a lot of the ideology of the liberal model. Indeed, this is a large part of what Professor Priest and others have been complaining about.[155] U.S. tort law is no longer only about lawsuits on behalf of individuals; instead, we have many mass actions. Fault has become much de-emphasized as courts use rhetoric endorsing the principle that organizations should pay for harms they "cause" without being too concerned about whether we can identify any wrongdoing on their part.

II.

In my own writings I have proposed interim reforms inspired by the liberal model. For some accidents I would substitute a liberal model solution in place of tort law;[156] additionally, I would alter tort law's damages rules to mimic the benefit arrangements of liberal compensation schemes.[157] But for the longer run, as noted above, I favor solutions that embrace the collective model.

Because Professor Klar has argued that there is no necessarily logical connection between criticisms of the tort system and proposals such as mine,[158] I'd like to try to make that connection here.

I believe that the U.S. tort system fails miserably to achieve the various social objectives set forth in its defense, including the "mor-

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[154] *See, e.g.*, Ralph Nader, *The Assault on Injured Victims' Rights*, 64 DENV. U. L. REV. 625 (1988).

[155] *See, e.g.*, George L. Priest, *supra* at p. 544, and PETER W. HUBER, LIABILITY: THE LEGAL REVOLUTION AND ITS CONSEQUENCES (1988).

[156] *See, e.g.*, Stephen D. Sugarman, *Choosing Among Systems of Auto Insurance for Personal Injury*, 26 SAN DIEGO L. REV. 977 (1989).

[157] Stephen D. Sugarman, *Serious Tort Law Reform*, 24 SAN DIEGO L. REV. 795 (1987).

[158] *See* Lewis N. Klar, *supra* beginning at p. 583.

alizing'' function which Professor Miller has addressed.[159] On the other hand, I concede that the U.S. tort system does in fact provide substantial victim compensation, albeit at an extravagant administrative cost.

So this leaves me in somewhat of a quandary. If I simply do away with U.S. personal injury law, I am left with uncompensated victims, an especially acute problem in a nation with such a porous social safety net. Therefore, I feel I must offer to replace tort with an alternative compensation scheme that will better address victim needs. By the same token, even though I conclude that U.S. tort law does not effectively achieve sufficient accident reduction, I of course find that a desirable goal, and hence my proposal contains new measures aimed in that direction too.

I admit that I am being politically expedient when I say that if we eliminate personal injury law this will free up money to be used to pay for my proposal. But, on the other hand, it hardly seems fair to make a proposal like mine without giving some attention to how it is to be financed.

I agree that the U.S. is not going to adopt my long run solution right now all in one large step. But I want to explain how we might move towards my vision of the collective model through several smaller steps.

The first strategy, I think, is to try to get the little cases out of the tort system. I mean cases where people are only temporarily unable to perform their normal activities and are not either permanently impaired or permanently disfigured in a serious way. Nor have they been intentionally or gravely wronged by the conduct of another. These little cases cost a lot of money in both awards and claims adjustment expense. They generate, at least in the United States, a lot of what I consider to be nonsense pain and suffering awards that are the result of the nuisance value of the cases; indeed, the availability of substantial pain and suffering awards promotes fraudulent claims.

Furthermore, I think that most people in these smaller injury situations would be quite satisfied if they could get their basic needs promptly and sensibly taken care of — their income needs, their medical expenses and their other costs. And I believe that through a collective approach we in the U.S. could more cheaply provide for the basic needs of a larger number of minor and modest accident victims than tort law does

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[159] *See* Richard S. Miller, *supra* beginning at p. 626.

today. This means eliminating pain and suffering awards and largely cutting the lawyers out and then redirecting the savings (or much of it) towards compensation for out-of-pocket losses.

Here's how I think we should take care of the small injury cases. First we need a universal health care scheme which, of course, other countries such as Canada, New Zealand and Japan already have. But with more than 30 million people currently uninsured, we don't really have a health care system in the United States.

To be sure, those 30 million plus people do get some health care. But they don't have advance arrangements for the payment of that care. Rather, they often wander into public hospitals long after they should have seen a doctor; they use emergency room service when cheaper care would be better; they tend not to seek preventive care; and sometimes they simply do without much needed medical care. So we need a better system — both for its own sake and so as to be able to say that tort law isn't really needed to provide for accident victims' medical care.

Next, we need a good system of income replacement for people with moderate injuries. I have offered two alternatives in my writings. One combines mandatory sick leave for very temporary disabilities with mandatory temporary disability insurance for disabilities lasting up to six months[160] — programs that are already mandatory in many other countries.[161] My alternate income replacement proposal is even more ambitious. I call it Short Term Paid Leave, and it envisions a kind of forced savings scheme.[162] Under the plan for every five days you work, you would earn one day of paid leave. Whenever you don't work and you want to get paid, you draw down one of your earned days. This plan would replace paid holidays, paid vacations, sick leave, temporary disability insurance, unemployment compensation, and so on, as well as eliminating the need to resort to tort law for short term income replacement. Details are set forth in other writings of mine.

Notice that both of my proposals for short term income replacement have nothing to do with particular types of accidents. Indeed, they are not at all restricted to accidents. Rather, the first one is organized around disability generally, and my Short Term Paid Leave plan is even broader in its reach.

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[160] Sugarman, *Serious Tort Law Reform*, *supra* note 157.

[161] Stephen D. Sugarman, *Personal Injury Law Reform: A Proposed First Step*, 16 INDUS. L.J. 30 (1987).

[162] Stephen D. Sugarman, *Short Term Paid Leave*, 75 CAL. L. REV. 465 (1987).

Once the small cases are removed from the tort system, we would be in a far better position to think carefully about our social obligation to people who are seriously injured. These are relatively few, but, of course, the total amount of their harm is very substantial.

It is important to appreciate here that many people who are clearly victims of tortious conduct by others go uncompensated or are vastly under-compensated through U.S. tort law today because their injurer is uninsured or underinsured. In California, for example, in perhaps two-thirds of automobile accident cases there's no possibility of obtaining more than $50,000 from the other driver. This is because we have 20 to 25 percent uninsured motorists, and of those who are insured, half or more carry $50,000 or less in coverage.[163]

There is more than a little irony here. In the U.S., where tort law is relatively pro-plaintiff and promises Rolls Royce level damages for those who are successful in the system, the cost of auto insurance is relatively high. Hence many don't purchase it, or else buy too little of it. In Canada and Japan and in Europe generally, where tort law is formally less generous, auto liability insurance is more affordable, coverage limits are typically much higher or unlimited and more people buy it. Indeed, other countries are politically more able to insist upon insurance as a condition of car ownership than are we in the U.S. Furthermore, we let people who do insure get away with intolerably low limits of liability. But, of course, a seriously injured person would rarely be fully compensated with $50,000 or less.

The failure of U.S. tort law to compensate seriously injured victims runs through other areas as well. Consider medical malpractice. A recent Harvard study and Professor Paul Weiler's book *Medical Malpractice on Trial* tell us that of 100,000 hospital admissions, there are 4,000 medical accidents, which is four percent. One thousand of those accidents are caused by negligence.[164] So upon entering a U.S. hospital you run a one percent chance of a medical malpractice injury.

Out of those 100,000 hospital admissions about 125 tort claims are filed, and about 60 people actually get money. Of those, 25 to 30 are undeserving, in the sense that they really weren't the victims of malpractice. In fact, they may not have even been injured, but they recover at least something by way of settlement. The other 30 to 35 who recover really were the victims of malpractice. In short, of 1,000 victims of negligence, 30 to 35 are compensated by tort law.

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[163] Stephen D. Sugarman, *Nader's Failures?*, 80 CAL. L. REV. 289 (1992).

[164] Stephen D. Sugarman, *Doctor No*, 58 U. CHI. L. REV. 1499 (1991).

To be sure, many of those who don't recover have relatively small injuries. But, still, there are many patients in that 1,000 who suffer serious injuries (including a large number who die from malpractice) who are not compensated by tort law.

In the face of these numbers, one strategy is to shift the treatment of serious medical injuries away from the conservative/tort model and over to the liberal/no-fault model. Indeed, that is exactly what Professor Weiler proposes. Moreover, he argues that by redirecting the money now put into the medical malpractice system, we could provide sensible compensation to all seriously injured victims of medical accidents, not just seriously injured victims of medical malpractice. Under such a plan, he argues, not only would those seriously injured by accident be better off, but, as a class, medical malpractice victims too would be better off, even though, of course, many of those 30 in 100,000 who recover huge pain and suffering awards in tort today would come away with far smaller recoveries.

I have proposed a somewhat similar approach to serious auto accidents. In homage to New Zealand, I call for the creation of an Auto Accident Compensation Corporation (AACC).[165]

In the tradition of the liberal model, the AACC would collect revenue from three sources: (1) gasoline taxes; (2) drivers, based upon their driving record and driver experience so that young people and other novices would be charged more; and (3) vehicle safety, determined by an index measuring the safety of the car. These funding sources are designed to target costs in ways that promote both behavior control and a sense of fairness as to who should pay.

With these revenues, the AACC would pay no-fault benefits at a very generous level: Income replacement of 80 or 85 percent up to twice the average weekly wage, that's up to at least $50,000 a year; medical expenses of up to at least $500,000; plus other kinds of first party benefits such as for replacing home services. In addition, if this were socially desired, the plan could afford to pay modest lump sums of the New Zealand sort for pain and suffering, impairments and disfigurements.[166]

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[165] Stephen D. Sugarman, *California's Insurance Regulation Revolution: The First Two Years of Proposition 103*, 27 SAN DIEGO L. REV. 711-714 (1990) and Sugarman, *Nader's Failures?*, *supra* note 163 at 299-305.

[166] Palmer, COMPENSATION FOR INCAPACITY, *supra* note 78. For recent New Zealand developments, *see* Richard S. Miller (forthcoming).

When I say the plan could afford those benefits, I mean that the AACC would have enough money to cover them even by setting contribution levels such that most drivers would pay into the AACC substantially less than they now pay for auto insurance that would no longer be needed. Obviously the AACC would provide many auto victims with much better compensation than does the current U.S. system, including many people who are victims of the fault of others. Combined with one of my proposals for handling smaller injuries, the AACC could sensibly concentrate on seriously injured victims of auto accidents.

Other liberal model schemes like this are also clearly possible. For example, we could adopt a no-fault air crash compensation plan. I've discussed this elsewhere.[167] Drug accident compensation plans, vaccine damage compensation plans, and so forth could add to the list.

Imagine now that the U.S. has adopted liberal model plans of this sort covering many types of accidents. At this point people would have to start asking themselves: why treat these classes of the disabled better than the disabled generally? And I think such distinctions would be difficult to maintain.

Once that conclusion were drawn, the logical policy response in the U.S., I believe, would be to improve the benefits paid by our Social Security disability system, a scheme aimed at the disabled in general.[168] In this way, the compensatory role for the specialized schemes would be reduced. This assumes, of course, that eligible claimants were required to seek social security first and the liberal model compensation plans paid only where social security coverage was lacking. That is, I am assuming that social security would be "primary" and the focussed no-fault plans "secondary."

I admit that not everyone would prefer social security to be primary even in a nation with a generous social net. For example, in Germany today, in the name of good social cost accounting, social security is secondary; the liberal model compensation plans and tort law are liable first and the social net is ultimately liable only where the others fail to apply. The upshot is that much accident litigation there essentially involves one insurance pool suing another. I am highly skeptical about whether any important gains in terms of fairness or behavior channeling

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[167] Stephen D. Sugarman, *Right and Wrong Ways of Doing Away with Commercial Air Crash Litigation*, 52 J. AIR L. & COM. 681 (1987).

[168] SUGARMAN, *supra* note 24, at 127-152.

are achieved by this, and I would want to save the administrative costs involved (although I admit that others see this differently).

I would be even more comfortable with the collective approach if other mechanisms were put in place to harness the talents of those who now try to police corporate wrong-doing through the personal injury system. Hence I favor arrangements that give ordinary citizens and their representatives better leverage to prod the regulatory process to act and that reward citizen efforts to uncover negligence by enterprises.

I am happy to see the personal injury lawyer well-rewarded for coming forward and identifying corporate wrongdoing. Certainly there are some areas where personal injury lawyers seem to have exposed dangers before others have done so, and we wouldn't want to lose that source of socially desirable disclosure. But the work of most plaintiffs' lawyers has nothing to do with uncovering secret wrongdoing; and even where products are newly shown to be harmful, the current system most rewards those lawyers who bring a series of cases concerned with the same basic problem, rather than moving on to new problems.

I admit that my proposals for more citizen involvement in the regulatory process may turn out to be naive and might not function as I hope. Nonetheless, this is the direction I think we should be heading. In short, we should combine a more populist approach to regulation with a community responsibility approach to compensation; or, as I have said in my writings, the idea is to de-couple the compensation of victims from the behavior control and fair punishment of wrongdoers.

This, of course, is a radically different approach from one which would try to improve tort law so as to have it better serve multiple goals simultaneously. Recently a study team engaged by the American Law Institute undertook a comprehensive examination of U.S. tort law.[169] This study at least collected data on the libertarian, liberal and communitarian alternatives to the conservative/tort approach. But when it came to making recommendations, the team largely proposed a modest tinkering with tort.[170] So far as the communitarian model is concerned, the ALI team begged off on grounds of (a) political implausibility and (b) lack of expertise. I find the latter reason so modest as to be disingenuous. The former reason might be right, but it is a little sad to have scholars shy away on those grounds, especially when

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[169] ALI REPORTERS' STUDY, *supra* note 2.

[170] Sugarman, *A Restatement of Torts*, *supra* note 141.

so much of what the study team did propose (much of it very clever) is now being ignored by the U.S. political process.

The authors of the study appear to have tried to generate support for their recommendations by portraying them as a compromise between the selfish interests of the plaintiff and defendant sides. But the report seems not to have been received in that way. Many advocates on both sides believe (or fear) that the report's recommendations would, on balance, be harmful to them.[171]

Perhaps the hostility of the defense side to the report is explained by the fact that in the wider U.S. political arena the defense interests have been trying to use their muscle to push back tort law in a one-sided way, that is, without giving up something in return. Some advocates want to push it back to the very modest role it played in the 1950s.[172]

Yet these defense-side efforts have not been all that successful. Business, physicians, and municipal governments have won some roll-backs here and there, but the changes have been uneven from state to state and not enormously great anywhere. This suggests to me that there may be room for some sort of compromise after all.

But rather than trying to compromise within tort law, the key might just lie in taking a wider vision. For example, business could say: "We'll agree to provide better compensation benefits for our workers and our customers through other mechanisms if we can be relieved from some of the burden tort law." And through this sort of deal, steps could be taken in the direction of the collective solutions that I favor.[173] Whether this will really happen, of course, only time will tell.

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[171] For a good example from the plaintiffs' side, *see* JERRY J. PHILLIPS, COMMENTS ON THE AMERICAN LAW INSTITUTE STUDY OF ENTERPRISE LIABILITY FOR PERSONAL INJURY (Apr. 1991 processed).

[172] Stephen D. Sugarman, *Taking Advantage of the Torts Crisis*, 48 OHIO ST. L.J. 329 (1987).

[173] For a proposal to achieve a similar solution via contract, *see* Robert Cooter & Stephen D. Sugarman, *A Regulated Market in Unmatured Tort Claims: Tort Reform by Contract*, in NEW DIRECTIONS IN LIABILITY LAW (Walter Olson ed. 1988) at 174.

Comments: Sugarman's Proposals For Reform

PROFESSOR SCHWARTZ: I'm happy to be invited to comment on Steve's presentation of his proposals for reform. I hope my audience can understand, however, that it's somewhat difficult to prepare in advance comments for a presentation that hasn't yet been delivered or circulated. Accordingly, what comments on Steve I do have are somewhat disparate in character. Moreover, they are comments more on the general topic of proposals for reform and less on the particular proposals that Steve has advanced.

Steve's presentation discusses a collective approach to tort problems. Let me use this opportunity to point out that a collective approach to the production of goods and services has by now been rather soundly rejected by world history. Whatever one might think about the humane quality of the ideas underlying such an approach, as a method of producing and allocating goods it simply doesn't work. Call this first-order collectivism, and acknowledge that it has been rejected by the path of world history.

Second-order collectivism relates to the welfare state — how government responds to (and anticipates) the various forms of distress that result from the primary private-sector production of goods and services. At this second-order level, collectivism is by no means dead; indeed, it is taken very seriously. Geoffrey's presentation dealt with the choice between collective responsibility and individual responsibility in terms of society's policies toward various forms of distress. The dichotomy suggested by Geoffrey relates to one of the larger set of categories that Steve discussed.

My own sense, however, is that it would be a mistake to insist on some need to render a categorical choice between collectivism and individualism. Rather, the proper role for public policy is to work out an appropriate *accommodation* between the impulse on behalf of collectivism and the impulse on behalf of individualism.

In discussing the New Zealand program, Geoffrey referred today to the distinction it draws between accidents and diseases — the program generously compensates for accidents, while largely neglecting diseases.

Geoffrey suggested that this preference is analytically unsound. Still, he acknowledged that it has proven politically unfeasible to recommend expanding the New Zealand program to cover diseases. Recent proposals on behalf of such an expansion have not turned out to be politically dead-on-arrival.

Politics apart, for policy reasons the proposed expansion seems quite compelling. Consider first the magnitude of the disability problem, and compare the incidence of disability caused by accidents to the incidence of disability resulting from disease. The ratio of the latter to the former is something like five-to-one. Accordingly, as a response to the problem of disability, any program that limits itself to accidents and does not include diseases seems radically underinclusive.

Secondly, in considering the appeal of notions of individual responsibility, one can acknowledge that almost all accidents are due to either the fault or the risky conduct of some defendant, or of the victim himself: driving badly, choosing to play rugby, or whatever. Many tort cases discuss the doctrine of "unavoidable accident." In fact, however, very few accidents are unavoidable in the way this rhetoric suggests. To repeat, almost all accidents in society are due to the fault of the plaintiff or the defendant — or at least to the clear decision by one or both of them to engage in some form of distinctively risky conduct. For these reasons, notions of individual responsibility have considerable appeal in the area of accidents.

Yet the same evaluation does not apply to diseases. A large percentage of all diseases really are unavoidable. They cannot be prevented by immediate precautions that the victim himself might have taken; and most of the time, one can't even identify any party that could serve as a plausible defendant in a tort action. Moreover, even when it can be said that some defendant has caused (or negligently caused) the victim's disease, difficulties arise in converting this perception into a meaningful tort claim. For such claims are very hard to administer. There can be vexing problems of the causation or etiology of diseases, especially diseases that develop during a long latency period. In comparing diseases to accidents, then, one can acknowledge that many diseases really are unpreventable. Moreover, even when diseases do seem preventable, it is difficult to convert this point into meaningful tort liability. For these reasons, notions of collective responsibility are far more appealing in the context of disease than they are in the context of accidents — which, again, are typically caused by the clear negligence of one or more of the parties.

From this perspective, I find revealing — as does Professor Klar — how auto no-fault plans treat the drunk driver. In fact, American plans

have displayed a considerable ambivalence. The Keeton-O'Connell 1965 book tended to duck the issue — it indicated that it would allow the status of the drunk driver to be decided state-by-state.[174] My understanding is that some jurisdictions have brought the drunk driver within the protection of auto no-fault statutes — at least in the sense that such drivers, if injured, can collect no-fault benefits. Other states, however, have concluded that this goes too far — that the drunk driver should not be eligible for benefits automatically provided by a government program. Similarly, insofar as no-fault curtails the liability of negligent motorists, states have varied in their treatment of drunk drivers. Some states do shelter the drunk driver from liability. Yet other states establish a special rule stipulating that the drunk driver remains fully liable for his victim's harm — at least insofar as that harm goes uncompensated by the no-fault plan itself.

We have learned of the public opinion problem the New Zealand plan faced when it awarded accident benefits to the jailed prisoner who was injured in the course of attempting an escape. The case is fascinating. Still, it is something of a fluke — it is not a case that is likely to frequently arise. But the drunk driver problem is not at all flukish. A very large percentage of all serious auto accidents are due to drunk driving (or to some other form of extreme driver misbehavior, such as serious speeding). Indeed, something like 50 percent of all auto fatalities in the United States involve some degree of drinking on the part of one or more of the drivers. And if public policy or public opinion is ambivalent about bringing the drunk driver within the protection of no-fault — for purposes of either granting no-fault benefits or relieving the driver from common law liability — that ambivalence goes a long way toward suggesting that there is something inadequate or shaky in the very theory of auto no-fault.

If an analyst is inclined to advance a collective responsibility model for society's response to disability, that model would rest on the idea that disability is a fortuity — a matter of bad luck — a morally neutral result brought about by largely uncontrollable forces. This perception of moral neutrality may well be substantially valid in the context of disease. It seems much less valid in the context of accidents.

A scholar like George Priest, oriented around the goal of deterrence, can recommend something like a negligence liability rule as an intel-

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[174] *See* ROBERT E. KEETON & JEFFREY O'CONNELL, BASIC PROTECTION FOR THE TRAFFIC VICTIM 396-97 (1965).

ligent way of controlling the level of negligent behavior. Similarly, a scholar like Ernest Weinrib, operating within an ethical orientation, can support a negligence liability standard as a very fair way of allocating liability between the parties.[175] To be sure, for both deterrence purposes and ethical purposes, one can identify arguments in favor of strict liability. But in general, these arguments, once advanced, tend to be contestable, and for that matter applicable only to a limited range of cases. With something resembling the negligence standard, there really is no need to choose between a deterrence rationale for tort liability and a fairness rationale. These two rationales can join together by way of supporting the idea that the negligent party should bear the burden of liability for the accidents caused by his negligence.

My comments so far have been hostile to the New Zealand plan insofar as it focuses on accidents rather than diseases — if anything, the priority should be exactly the other way around. Let me now advance, however, a certain way of thinking about the New Zealand plan, and about auto no-fault as well. This analysis can be more affirmative in discussing those legal reforms. As far as accidents are concerned, they are already covered by a substantial tort regime. As for diseases, however, with certain limited exceptions — including asbestos — they go largely uncovered by the tort regime in its ordinary applications. Not many victims of heart disease secure recoveries in tort.

Tort law strives to achieve the goals of fairness and deterrence. Many critics of tort law, however, conclude that tort law is in fact quite ineffective in achieving these goals. Assume now that you agree with these critics. If so, then you will be led to conclude that tort law involves a huge allocation of resources that fails to produce appropriate policy outcomes. You could therefore be easily persuaded that it would be intelligent public policy to divert the resources currently flowing into the tort system into a compensation program that itself could serve as a response to the problem of accidents.

Now this is an argument in favor of no-fault plans that is both practical and political. Yet in another way it is also quite principled, and this is so whether one's principles are derived from Pareto or from Rawls. To repeat, if one believes that tort law as applied to accidents is ineffective in achieving fairness and deterrence, then one could also believe that all relevant groups currently covered by the tort system

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[175] *See* Ernest Weinrib, *Understanding Tort Law*, 23 VAL. U. L.REV. 485 (1989).

— patients and doctors, consumers and manufacturers, pedestrians and motorists — would be better off if the money currently allocated to tort could instead be diverted to a compensation program.

I began, then, by suggesting that it was anomalous for compensation programs to focus on accidents rather than diseases. For the current tort system focuses on accidents, and that system aims to achieve the goals of fairness and deterrence. If the tort system succeeds in achieving those goals, then we should not be willing to give it up. If, however, one believes for whatever reasons that tort law, as applied to accidents, fails to achieve its objectives of fairness and deterrence, then there might be practical as well as principled arguments for replacing the tort system with a program of accident compensation.

MR. KOJIMA: I am not a professor. I am an actuary working for a Japanese life insurance company and I would like to offer my comments.

Professor Sugarman properly analyzes the characteristics of American tort law and its effect upon both the tortfeasors and the tort victims. His proposition to limit the application of tort law to cases involving outrageous torts for which punitive damages are appropriate is unique, and it provides a very useful direction to those who study the relationship among tort law, compensation of the tort victims, and liability insurance.

I understand that although the policy considerations underlying tort law are the compensation of the tort victims and the deterrence of the tortious conduct, tort law has not been functioning adequately to fulfill those policy objectives. Its failure is reflected in the current liability insurance crisis, where businesses can no longer afford liability insurance coverage, and where the insurance companies refuse to provide such coverage.

It is my opinion that tort law and liability insurance must be discussed separately. "Liability insurance," as I use the term here, refers to liability insurance policies offered by private insurance companies, such as products liability insurance policies.

Putting aside the issue of tort law, I will turn to the discussion of liability insurance. One may obtain liability insurance so as to be able to compensate the tort victim for his or her injury; or potential tortfeasors, such as businesses, may obtain liability insurance to guaranty their solvency in the event they are held liable in tort and required to pay damages.

The latter reason for obtaining liability insurance predominates among businesses, which are concerned about the payment of both the

damages and attorneys' fees in case they lose at trial. Because the amount of money at issue is tremendous, the tort law system is frequently said to be a lottery. The liability insurance system is used to fund this lottery. Liability insurance is thus being used for purposes that far deviate from the intended purposes of an insurance system.

Insurance is intended to apply to risks that can be classified based on some articulable standards, where the probability of an occurrence is determinable and stable, and where the premiums for the insurance can be determined with some certainty. Insurance is intended to apply to such insurable risks.

Tort liability possesses characteristics which make it difficult for private insurance companies to sell policies covering such liability. Among the most salient of those characteristics is that tort liability involves a risk for which many opt not to obtain insurance coverage. Not all industries, not all business enterprises, and not all individuals desire to obtain tort liability coverage. Instead, only certain industries and certain business enterprises, and only certain professionals (such as physicians), with high risks of exposure to tort liability voluntarily opt to obtain coverage. Thus, self-selection takes place to limit the number of those who do obtain insurance for tort liability. This situation is aggravated by the fact that there are those major businesses which choose to self-insure, and those who voluntarily withdraw from business activities which expose them to high risks of tort liability.

To make up for astronomical punitive damages and attorneys' fees, insurance premiums rise correspondingly. As a result, premiums exceed what the businesses can bear.

On the other side of the equation, tort victims take advantage of the highly insured tortfeasors and pray for damages far exceeding what would be appropriate for their injuries. This creates a vicious cycle, requiring potential tortfeasors to obtain insurance with yet higher policy limits, which in turn leads the tort victims to pray for yet even higher damages. Although insureds are invariably self-selected to a certain extent, unless the insurance industry controls that self-selection process, insurance cannot serve its function of spreading the cost of the risk. The life insurance industry in Japan has in the past experienced the adverse effect of an uncontrolled self-selection process involving a hospitalization benefit rider to the health insurance policy.

About fifteen years ago, when we relaxed the restrictions on the payment of health insurance benefits, the claims for such benefits increased sharply. The rise occurred throughout the nation, although it was phenomenal in some areas. This increase was not limited to our

company, but was experienced by all the life insurance companies in Japan.

An example would illustrate what had happened in that case. An unscrupulous person purchases health insurance policies with a hospitalization benefit rider from several life insurance companies. He then malingers and gets hospitalized. He receives the daily hospitalization benefit of about $150 from each policy. If he purchased four such policies, the daily benefit would add up to $600, and in one month, he would obtain $18,000 in hospitalization benefits.

This example describes what became a frequently encountered insurance fraud scheme. The relaxation of the restrictions on the payment of health insurance benefits thus resulted in the self-selection of the unscrupulous insureds, thus adversely impacting upon the insurance industry. Insurance ceased to serve the function it was intended to serve.

The Japanese insurance industry learned its lesson, and now imposes certain restrictions on the payment of daily health insurance benefits. Further, an industry wide system of registration for individual insurance policies was established, in order to prevent similar insurance fraud.

In the example described above, the pricing of the premium for the health insurance policy with a hospitalization benefit rider was appropriate. What went wrong was that the relaxation of the restrictions on the benefit payment resulted in the self-selection of certain insureds, which in turn led to the artificial inflation of the probability of an occurrence.

Returning to the discussion of liability insurance, as mentioned above, the problem of self-selection of the insureds poses a serious threat to the viability of tort liability insurance. But in addition to that, the risks at issue in tort liability insurance cannot be classified based on any articulable standard, and the probability of an occurrence is unstable and therefore virtually impossible to predict.

If insurance is offered to cover tort liability, it must have a high deductible, and must include a 20 to 30 percent coinsurance clause. It is certainly not feasible to offer one hundred percent coverage. As means to compensate the tort victims for their injuries, a social welfare and/or an employee benefit system providing comprehensive coverage, funded by contributions from the government, businesses, and individuals, would be more desirable than a private insurance system funded by potential tortfeasors purchasing individual liability insurance policies. On this point, I agree with Professor Sugarman.

In cases where tortious conduct causes damages that are widespread — as in environmental torts, public nuisances, and pharmaceutical

products injuring a large number of people — not only is there a problem of huge damages, there also arises the question of the social and moral responsibility of the tortfeasor. Where society suffers an immense loss due to some business enterprise's negligent failure to take necessary precautions against foreseeable risks, it is necessary to require the payment of punitive damages in addition to damages for the compensation of the victims. There is room for discussion as to whether the solution to these problems lies in tort law, or in an administrative system where the power to regulate the enterprise is vested in an agency.

I conclude with the following comments. First, tort law notwithstanding, the compensation of tort victims should be handled within the currently existing systems that provide for social welfare benefits and private employee benefits. Second, litigation as a means to obtain compensation for the tort victims must be avoided if at all possible, because of the exorbitant attorneys' fees involved, and also because the adversely impacting self-selection process applies to tort litigants. Third, tort law should be applied only in those limited cases where the tort causes widespread damages. Fourth, for the purposes of compensation and deterrence, we do not need tort liability insurance.

Finally, I would like to also comment on what Professor Morishima pointed out yesterday and what Professor Miller commented upon this morning. We must pay attention to the deterrence and prevention of torts, in addition to the compensation of the tort victims. For example, we must try to find out ways to prevent an automobile accident from occurring in the first place, in addition to dealing with the problems of compensating the victims of automobile accidents.

An insurance system is not a panacea. Neither is it a system of charity. It is a method of mutual contribution to the cost of a known risk. Where the probability of an occurrence approaches 100 percent, no insurance is needed. Thank you.

PROFESSOR PALMER: I am put in mind of views expressed by the late Professor Richard Titmuss, an Englishman. In a small book he published on social policy, he explored the paradigms by which welfare could be provided for people.[176] It has been observed by Professor Schwartz that the production of goods and services by the state is no longer a very live issue except for most things.

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[176] RICHARD M. TITMUSS, SOCIAL POLICY — AN INTRODUCTION (1974).

In our own situation in New Zealand, the great issue has been whither the welfare state. We have had a great deal of deregulation in New Zealand. We have had a lot of privatization. We have had considerable economic reform, all so far to no avail in terms of increasing the gross national product. We live in hope.

The economic recession, almost a depression, has produced for a lot of people much suffering. And the one thing the Labor government was not prepared to do was to cut the welfare state. We were prepared to embrace the market but not to cut the levels of state support for people. The new government, which has been elected, did not advertise before the election its aim of cutting the welfare state but that is what it did.

There is a great debate going on in New Zealand now about the extent to which the state has an obligation to support people who cannot look after themselves. Is it a safety net or is it a more ambitious concept? Should we provide subsistence or should we look after people and give them what one of our Royal Commissions said was a sense of belonging to the society — a sense of being able to participate and function as a citizen without feeling that provision was limited to being given something to eat.

My sense is that debate in New Zealand after more than 50 years of a fairly highly developed welfare state is not going to be decided in favor of the minimalist position. The minimalist position has made a case, and the budget deficits give some credence to that case. But if the restructured economy does produce, especially if the GATT talks are successful, New Zealand would be a wealthy society. If that occurred the instinct in New Zealand would be that the welfare state should be preserved.

For example, a discussion has been going on in relation to medical services in New Zealand. There has been a passionate debate when some part charges were introduced, which by American standards were extremely modest. The people got terribly excited. My instinct is that free market solutions in relation to what traditionally have been, at least in our society, welfare state matters will not progress much further. I think there are good reasons for that. I hope that that turns out to be the position. Similar arguments might be made in Western Europe, in countries like Holland and the Scandinavian countries as well. The debate that has gone on in New Zealand has been one that is now far away arguing that the private market solution is always best, despite the fact that is a fashionable thing at the moment. I think that fashion is about to pass.

PROFESSOR PRIEST: Professor Sugarman's remarks were entitled "Proposals for Reform," and though I think that it is possible, as he did in his conclusion, to sweep them all into one proposal, as I was taking notes, I counted 16 separate plans and proposals that Professor Sugarman has recommended to us.

Rather than responding to each of them, I thought that what I would like to do is to express somewhat more affirmatively, as both a criticism of Professor Sugarman and as a suggestion of an alternative, what I think to be an approaching consensus within this group on the type of system for dealing with accidents and compensation.

Indeed, I believe there is within this group a general consensus on the values that are most important and largely a consensus, though maybe not a perfect one, on the mechanism for achieving those values.

This is not meant to be a criticism entirely of Professor Sugarman's proposals or of the New Zealand plan. I think all of us admire the New Zealand plan and not only its ambition, but in its achievement over this last decade and a half. And all of us also admire the ambition of Professor Sugarman to compensate individuals as broadly as possible.

What I hope to suggest as an alternative is to accept the best aspects of tort law and to meld them with the type of compensation system that is best designed to provide the broadest and most extensive compensation. Let me explain how I think that can be done.

First of all, I think we have to agree that the pre-eminent goal of any system, mixed or otherwise, is to prevent as many accidents as possible. Of course, if accidents occur, we want to compensate for them. But we all must accept that compensation is never adequate. Financial compensation, even in kind compensation in the form of rehabilitation, is never the equivalent of avoiding the accident in the first instance. So that, if it is possible to incorporate within a system some features for the prevention of accidents, then that should be done.

Now, it seems to me that many of us agree that some definition of tort law serves this purpose. We can argue over what the definition is. But some definition of tort law will have some effect on reducing the number of accidents.

Professor Klar and I have not emphasized the data that supports the deterrent effect of the tort system as much as we might have done. I do not mean to rest the entire case on empirical data, as you will see. But I think that the data are very strong.

First of all, the aggregate data where they exist, and they do not exist in many areas, but where they exist, support the deterrent effect of tort judgments entirely. The Quebec studies are perhaps the best,

both the Gaudry study and Rose-Anne Devlin's study.[177] I have read her dissertation and it is a very sophisticated study of the deterrent effect of the legal system; perhaps the best that has been written.

There are a number of other studies that have been written employing regression analysis, all of them similar in one regard or another. There are other data suggesting the effect.

But even beyond specific studies of deterrence, if one looks more broadly at the impact of financial penalties — and a tort judgment to an enterprise or even to an insured driver who will find his or her rates going up is a financial penalty — the impact of imposing financial penalties in the context of accidents undeniably has an effect on the level of safety.

There are more intuitive ways of understanding this issue. For example, I write in the products liability field and I suggested yesterday that one might compare cases that were litigated in the 1950s against cases litigated today. Simply to look at the design of products such as lawnmowers that were tolerated in the 1950s and 1960s compared to designs today suggests that the expansion of liability has had a substantial effect on design and, in turn, on the reduction of accidents.

The absence of specific concerns about manufacturing design is a shocking feature of the New Zealand plan. It is unthinkable in most advanced societies to assert that manufacturers of products should have no particular penalty to pay beyond an extraordinary regulatory remedy if their products prove to be injurious.

Once New Zealand suffers episodes resembling the Dalkon Shield episode or perhaps the new breast implant episode in the United States or an episode resembling asbestos, the feature of the New Zealand plan that does not make manufacturers liable or make them pay for those particular actions will raise severe questions. I am surprised that Ralph Nader has not bought his crusade to New Zealand.

That is not to say that we should abandon alternative ways of regulating harm-causing behavior such as fines, direct regulation or safety-related specification, where they can be justified. Indeed, we want to encourage these alternative means of regulation to the extent that they have the effect of reducing accidents. To do so, would imply

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[177] Marc Gaudry, *The Effects of Road Safety of the Compulsory Insurance, Flat Premium Rating and No-Fault Features of the 1978 Quebec Automobile Act*, *supra* note 62; Rose-Anne Devlin, *Liability v. No-Fault Automobile Insurance Regimes: An Analysis of the Experience in Quebec*, *supra* note 62.

that we would maintain a smaller tort system than we might preserve otherwise.

I believe that no one here wants an over-arching tort system that deals with every malady that is suffered in the society. To the extent that we can reduce the numbers of injuries that occur by direct regulation, fines and penalties, of course, we want to do it, not only to reduce the injuries but also to reduce the necessity of invoking the tort system to deal with those problems.

Professor Miller made very important points today about other values that are associated with a tort system: values of rectitude, concerns about victims. A tort law that is designed to provide for tort law remedies where the injurer could have prevented the injury but failed to do so, fulfills many of these values. There is a common sense to prevention.

Similarly, Professor Sugarman is entirely correct in alerting this audience and the world to the problems of auto insurance in California: the scandalously low liability limits that are allowed, the pathetically inadequate supervision of whether people have insurance. There is simply no reason whatsoever that in this society we ought not to tighten up standards of financial responsibility, not only for auto but also for manufacturers, especially foreign manufacturers. One of the attractions of foreign manufacture in Mexico and in other countries than the U.S. is that often these foreign manufacturers can undersell U.S. manufacturers by being under-capitalized and under-insured, facing only a low-cost insolvency when suit is filed. There are entire industries in the U.S. that have been eaten away by that phenomenon. One good example is the motorcycle helmet industry in which there are now no U.S. manufacturers of motorcycle helmets and only foreign manufacturers of questionable solvency.

So I think that, within some range, most of us here would agree we need some type of tort system for deterrence purposes. I think that the evidence is strong that the tort system produces a deterrent effect. Indeed, given the moral concerns that all of us share regarding the incommensurable loss of actual injury, I believe the burden of persuasion must be shifted quite dramatically requiring a showing of no effect or an adverse effect before one can support abandoning tort law altogether. It is a very serious proposition to advocate subjecting the society to a risk of additional injury on the grounds that some features of the tort system are unattractive.

A slightly different argument is that it is simply too costly to operate a tort system and that, whatever deterrence that is gained or whatever

reduction there might be in accidents, is outweighed by the administrative cost of the tort system. In some ways, the no-fault arguments build upon this point.

First, I believe that the argument is grossly overstated, especially if the liability system were retrenched in the way that I have suggested. Put differently, the transaction costs of the tort system in the United States are relatively small. One of the reasons that the adoption of no-fault systems in auto have really never successfully reduced premiums by a substantial amount over a prolonged period is that the savings in transaction costs are small. The reason for that is pretty clear: 96 to 97 percent of cases that are filed in the United States settle out of court prior to litigation. As a consequence, the savings available from eliminating the tort system are relatively limited. The important point, however, is that it requires a deep devotion to cost savings — perhaps greater than that of most economists — to risk subjecting the society to greater injuries for the sake of reducing transaction costs.

The United States provides a two-tiered compensation system. The major portion of the compensation system is private insurance, first-party health insurance. And though there are problems that Professor Sugarman has pointed out about permanent partial disability and other disability categories, as we all know, every compensation system has problems with these forms of intermediate disability. I am not certain that these problems are worse in the U.S. than in other countries. But the issue requires further study.

A subject of very important debate, however, is whether and to what extent private and public compensation systems ought to be melded or whether one is clearly superior to the other. Professor Palmer a moment ago indicated his view that free market approaches were not solutions, and that better results might be obtained otherwise. I am not clear about that at all. Though there are complaints in the United States about the costs of health insurance, and there are problems in the delivery of health insurance for those that can't afford it, on the whole, the level of health care actually provided is superior in the United States through private insurance than in most other advanced nations. As much as I admire the various provincial health plans in Canada, health care in the U.S. is superior for those that can afford insurance. Private insurance mechanisms in the United States are superior. Indeed, there is a good deal of free riding by Canadians on the advances of American health care.

But there is little doubt that health care in the U.S. is extremely expensive. The United States spends more on health care per capita

than any other country in the world. Admittedly, it is an expense that most Americans are willing to pay, though they would prefer it to be lower.

One of the serious problems that I discussed earlier today with compensation systems or health plans that are solely government-operated is that they often become political balloons that are subject to the vagaries of political whims in ways that are very unattractive. Sometimes, the broader electorate can discipline politicians, but electoral discipline is limited.

On the other hand, in a private market, if one's health care system begins extending the time between making an appointment and seeing a doctor, incorporating the types of delays that are characteristic of many government health plans around the world, it is very simple to switch health plans to directly discipline that particular health system. Again, it is very difficult to achieve that result, for example, with the various provincial health plans in Canada.

That is not to say that private insurance is the only answer. We all recognize the need to deal with individuals who cannot afford insurance. Professor Sugarman referred the figure of 37 million individuals in the U.S. who do not have insurance. That figure, however, is misleading. Roughly 22 million of the 37 million qualify or would qualify under Medicare if they sought current care. Those that remain above that qualification level, with very few exceptions, are those with modest incomes who would qualify for Medicaid or Medicare if they became seriously injured.

Thus, the extent of those that actually cannot obtain some form of health care in the U.S., is pretty small. Those that are not going to get adequate care is a more complicated issue. And I think all of us here would endorse expanding the level of benefits in the form of care provided to the poor or the aged under U.S. Medicaid and Medicare.

Professor Sugarman referred to the problem of the libertarians, risk-takers that simply don't want insurance. This is, in fact, a trivial problem. The numbers show that those people without insurance that are earning more than $40,000 a year in the United States is a very, very small number.

I believe that this type of mixed system of tort law and compensation: modest but hopefully effective tort law dealing as much as possible with deterrence, plus a compensation system providing compensation as extensively as possible for all others, represents the direction most countries will take over the next decades.

Why? Because it is the most effective way of achieving all of the values to which we aspire: of achieving the value of reducing injuries

— and no moral system prefers more injuries to less — as well as achieving the value of providing compensation as extensively as possible.

In his response yesterday, Professor Sugarman criticized my claims about harmonization and about competition among countries on the grounds that those terms or those movements are conflicting or that the competition between nations would lead to the lowest common denominator of tort law or the lowest common denominator of insurance.

I strongly contest that characterization, largely because our legal system is constrained constitutionally and also by the will of the electorate to providing some appropriate level of care for citizens. In every country the citizens themselves are really the predominant consumers of both the tort system and of the compensation system. The least common denominator problem is unlikely to develop.

I also believe that the relationship between harmonization of the law and increased international competition cannot be denied. The European Community's 1992 impulse is a very strong example. The European Product Liability Directive, for example, is motivated specifically by the desire to facilitate mutual trade among the members of the European Community and to facilitate international competition against the Japanese and U.S. giants. Similarly, as we know, the Japanese are looking very closely at the European Community Directive to consider whether their law should be harmonized with it.

I believe that, when the new market of Europe becomes strong, other nations, including the U.S. which has remained provincial for a long period of time, will have to address the reality of its dysfunctional products liability law. Whether the motivator is some form of free trade competition, whether it is some desire for harmonization, or whether it is simply a reanalysis of what our basic values are and what our system of law is trying to achieve, the direction will be the same. And that is toward a tort law that tries as effectively as possible to deal with the problem of deterrence, to reduce the level of injuries, and then toward methods to provide as extensive compensation as possible for injuries that cannot be prevented.

PROFESSOR SCHWARTZ: At the end of yesterday morning's program, I indicated that the ALI Enterprise Responsibility project seems effectively over — except insofar as it is evolving into a revision of the Restatement of Torts on Products Liability.

As those of you know who have looked at the current Restatement, there really is only one section — the famous § 402A — that professes

to address products liability.[178] Indeed, this section has been read as the source of the entire field of products liability doctrine. True, there are other Restatement sections — like § 388, on the obligation to warn — that have been interpreted as having some application in products liability actions.

What the ALI is now proposing is to leave the general Second Restatement as is, but to revise the particular portions of the Restatement that deal with products liability. Revising them would undoubtedly entail enormously expanding them as well. A products liability Restatement would almost certainly contain separate sections on the separate categories of defects. Thus there would be one section on manufacturing defects, and how they can be identified; an additional section on design defects, and how they should be defined; a further section on the various ways in which product warnings might be inadequate. The proposed revision of the Restatement would seek to cover the full range of products liability issues. Products liability currently is the subject of several competing treatises, some of them multi-volume efforts. So one can appreciate how elaborate a Restatement of Products Liability could turn out to be.

When the ALI was considering initiating this project, I was asked for my views as to its appropriateness. My reply was that I thought a Products Liability Restatement would be a good idea if it could be done well — but that I had some doubts about its doability. Let me classify my doubts in the following way.

One set of doubts concerns politics. When products liability was introduced into the Restatement in the early 1960s, the entire process was generally uncontroversial — as George Priest has shown.[179] Section 402A was approved by the ALI membership without any significant dissension or even debate among the ALI membership itself. Yet whatever products liability is now, it is hotly political out there in the world of practicing law. The letter from John Vargo, which all of you have received, suggests a lot about the political controversies that are currently at work in the products liability field.

Secondly, if products liability has become controversial at the political level, it has likewise become controversial at the academic level. If you bring together a dozen top torts scholars and ask them to express their

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[178] RESTATEMENT (SECOND) OF TORTS § 402A (1965).

[179] George L. Priest, *Strict Products Liability: The Original Intent*, 10 CARDOZO L. REV. 2301 (1989).

views on products liability, you're likely to get 12 very different views. It would be very difficult to develop an academic consensus on products liability rules, or even a consensus on the basic criteria that should be taken into account in formulating those rules.

The final problem is the technical lawyers' problem of integrating a revision of the Restatement on Products Liability into the general Second Restatement of Torts, which otherwise would remain as is. Granted, the Second Restatement contains special rules that apply to products liability. Still, those rules relate to or grow out of more general tort doctrine. It will hence be difficult to reconsider those special rules while avoiding reconsideration of those more general doctrines.

Let me give a simple example of the technical legal complications. The example concerns contributory negligence as a defense in products liability actions. As American courts considered this issue in the late 1970s, they did so against the backdrop of the more general doctrine of comparative negligence — a doctrine that had been recognized in negligence actions in the early 1970s. The question courts asked themselves was whether this comparative negligence defense should be extended into the context of products liability. The courts proceeded to divide on this point, with the majority ruling in favor of the comparative negligence option.

Still, comparative negligence as a partial defense in negligence actions is a doctrine that had developed only in the early 1970s — after the approval of the Second Restatement. That Restatement, published in the mid-1960s, accepted contributory negligence as a full defense — except in cases involving the defendant's last clear chance or the defendant's willful and wanton misconduct.[180] It will be very hard for the ALI to consider the issue of comparative negligence in products liability without reopening the more general provisions in the Second Restatement — which do not yet recognize comparative negligence as an ordinary tort doctrine.

In short, I see lots of promise in the proposed ALI project. But I likewise see problems in pulling that project off at the political level, the theoretical level, and the level of technical legal drafting.

PROFESSOR SUGARMAN: I want briefly to address the role of tort law in controlling behavior. Professor Priest has argued that there is pretty much a consensus among those attending about tort law. Perhaps we all agree that it is unwise to rely on tort for the purpose

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[180] RESTATEMENT (SECOND) OF TORTS §§ 476, 479-80, 482 (1965).

of providing victim compensation. But what social goal does tort serve well? For Professor Priest, recall, the central function of tort law is deterrence. I want to reiterate here my doubts about tort law's effectiveness on that score.[181]

Notice that Professor Priest has pointed prominently to studies of workers' compensation.[182] I remain doubtful about whether the effect of experience-rated insurance premiums on workplace accidents is as powerful as some of these studies claim. My doubts stem in large part from the many other reasons employers have to be interested in workplace safety apart from workers' compensation insurance rate increases. But even if these studies are right, this evidence comes, after all, from a compensation plan and not tort law.

What is the case for deterrence in areas where tort does apply? Turning to the automobile accident side, Professor Mashaw in his book *The Struggle for Auto Safety*[183] points out that one of the consequences of the tort system is that there is no real feedback mechanism to encourage vehicle buyers to invest in occupant safety measures.[184] This is because the benefits of such safety devices would only reduce someone else's liability to you, and not your liability to third parties. In other words, if I buy a car with an air bag, the people who are going to benefit financially are those who carelessly run into me because I'll be hurt less that I would otherwise.

As Professor Mashaw points out, an auto no-fault plan is one way to promote the purchase of occupant safety devices. Indeed, the evidence from practice is that if you buy air bags in no-fault states, the major insurers do give you a substantial percentage discount on your no-fault premium. And, of course, the larger the no-fault benefit is, the bigger the discount you get. On this analysis, a properly designed no-fault solution to the auto accident problem promises to be more effective than is tort in promoting safety.

In reviewing Professor Mashaw's book, Professor Trebilcock expressed the fear that if you switch from tort to no-fault, although you may promote greater investment in safety by car buyers, you lose the existing deterrence effect of tort liability on drivers.[185]

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[181] *See generally*, SUGARMAN, *supra* note 24, at 3-34.

[182] *See, e.g.*, M. MOORE & W.K. VISCUSI, COMPENSATION MECHANISMS FOR JOB RISKS: WAGES, WORKERS' COMPENSATION, AND PRODUCT LIABILITY (1990).

[183] JERRY L. MASHAW & DAVID L. HARFST, THE STRUGGLE FOR AUTO SAFETY (1990) (hereinafter MASHAW).

[184] For my review of the book, see Sugarman, *Nader's Failures?*, *supra* note 163.

[185] Michael J. Trebilcock, *Requiem for Regulators: The Passing of a Counter-Culture?*, 8 YALE J. ON REG. 497 (1991).

For those who are impressed by Mashaw's point but concerned about Trebilcock's reservation, Andrew Tobias and I have separately proposed similar no-fault compensation schemes that contain incentives on both sides.[186] Rather than relying on individual insurance premiums, our plans centrally feature a "pay at the pump" funding mechanism. But they would also include both motorist and vehicle charges designed to reward both a safe driving record and the use of a safer car. So, whatever safety gains are achieved through tort are likely to be exceeded through our approach. (Personally, in contrast to Professor Trebilcock, I am skeptical about just how much auto safety can be achieved by any of these regimes — tort or no-fault. But at least Tobias' and my solutions would appeal to many people on fairness grounds, especially because, unlike U.S. tort law in practice, all drivers would be forced to contribute to the scheme).

Next, consider medical injuries. Based upon Professor Weiler's new book on medical malpractice,[187] we must be extremely hesitant about concluding that tort law has a positive net effect on doctors. Indeed, my judgment about the evidence is that we very probably get more perverse than positive behavior from physicians because of tort law.

The case for Professor Priest's confidence in the tort system, it seems to me, comes down to its impact on product makers. But where is the evidence that products are safer because of tort law? As I read the George Eads and Peter Reuter's study for RAND's Institute of Civil Justice,[188] the core finding is that companies largely treat the product liability risk as random noise. They don't know how to relate to the law because it is so unpredictable; and so they largely ignore it. Perhaps if tort liability were reformulated as Professor Priest has proposed, it would be more certain and thus might prompt socially desirable responses.

But even if threatening manufacturers with the costs of the accidents their products impose on others really is promising as a way of channeling conduct, tort law is not the only way to do that. For example, as Professors Franklin and Pierce pointed out years ago in separate articles,[189] a comprehensive accident compensation scheme

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[186] *See* Andrew Tobias, *Auto Insurance Alert!* (forthcoming) and Sugarman, *Nader's Failures?*, *supra* note 163 at 299-305.

[187] PAUL C. WEILER, MEDICAL MALPRACTICE ON TRIAL (1991).

[188] GEORGE EADS & PETER REUTER, DESIGNING SAFER PRODUCTS: CORPORATE RESPONSES TO PRODUCT LIABILITY LAW AND REGULATION (1983).

[189] Marc A. Franklin, *Replacing the Negligence Lottery: Compensation and Selective Reimbursement*, 53 VA. L. REV. 774 (1967); Richard J. Pierce, *Encouraging Safety: The Limits of Tort Law and Governmental Regulation*, 33 VAND. L. REV. 1281 (1980).

could be funded with charges on those activities that cause the plan to pay out benefits.

I admit that it can sometimes be difficult in the public sector to achieve what might be called efficient classification of risks — that is, charging sources of risk based upon their dangerousness. But it is also by no means clear that the classifications adopted in the private sector, even if efficient, are considered fair by the public at large.

For example, in 1988 the voters of California voted to change radically the way we price auto insurance because people were incensed about the way private insurance companies were doing it.[190] This hardly proves that the insurance companies were pricing inefficiently, only that when sufficiently aroused, the public is capable of condemning private conduct it finds unacceptable — in this case the actuarial practice of territorial rating that charges people based upon where they live and not on how they drive.

Consider, as a further example, insurance treatment of people who test HIV positive. The insurance industry may believe it is doing something that is actuarially sensible by refusing to provide health insurance to this group at ordinary rates, but again many people are up in arms about the consequences.

I have learned at this conference that in Japan there currently are no smoker/non-smoker differentials in insurance. In the United States by contrast these differentials are the norm for individual life insurance policies. And more recently some U.S. insurers and employers have begun using smoker/non-smoker premium differentials in health insurance.

Yet, suddenly, in the past two years more than twenty U.S. states have adopted smokers rights laws which, in many of those jurisdictions, are meant to overturn these employment-based differentials.[191] From the viewpoint of insurers and employers, charging more to high risk people can make considerable sense. It might even encourage people to stop smoking. Yet, we now have a civil rights reaction against that practice, at least as to health insurance.

The lesson I draw here from this experience is that it is a false dichotomy to suggest that private pricing systems are preferable because

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[190] *See* Stephen D. Sugarman, *California's Insurance Regulation Revolution: The First Two Years of Proposition 103*, 27 SAN DIEGO L. REV. 683 (1990).

[191] *See* Stephen D. Sugarman, *Employer Discrimination Against Workers With "Unhealthy Lifestyle" Indicators*, in THE CHALLENGE OF FINANCIAL INCENTIVES AND RISK RATING (S. Muchnick-Baku ed. 1992).

they are immune from the political pressure to which public pricing systems are subject. For this reason, I continue to believe that schemes of the sort Professors Franklin and Pierce proposed are alternatives to tort that should not be forgotten by believers in safety promotion through economic incentives.

PROFESSOR MILLER: Let me just step back to the beginning of Professor Sugarman's presentation in which he described very interestingly five different models of systems that we might use. I think the description is obviously very, very useful in distinguishing among systems. But I think that there may be a danger in ascribing labels to different approaches.

Steve Sugarman has placed himself in sort of the collectivist category. And yesterday, I think Professor Palmer complained bitterly, "What ever happened to collectivism?"

My feeling is with the world going the way it's been going in terms of privatization — this has been true obviously in New Zealand even though some of you don't think it's going to keep going that way — and particularly with regard to attitudes generally in the United States, that aside from our private discussions, it does not do your programs any good to call them collectivist. And except for the purpose of identifying them, it doesn't do much by way of decision-making to help us decide what kind of a system to have.

So I guess my suggestion is that maybe we have to step back from political labels, because they tend to put you in the box or out of the box too early in the game, and start asking ourselves about what it is we want to do in terms of more practical and pragmatic categories.

And I think a first step — and, again, having in mind Myres McDougal's reception coming up — would be to try to clarify the policies, the objectives, of what we're looking for, and in the course of doing that, we might come up with some very interesting things. That is, we may find out that we all agree that we have to reduce the cost of accidents. And that brings in Guido Calabresi's three kinds of accident cost reduction and so forth. It's not just a question of reducing accident transaction costs but also preventing accidents, reducing compensation costs.

We may want to go through all those values and as to each value process ask what goals, what objectives we have. We may come out with some interesting things. And let me just give you an example.

I've been reading, in order to fall asleep at night, Bertrand Russell's autobiography for the period of 1914 to 1944. And he records an episode — and it's easy to fall asleep with it, by the way — he records

an episode in 1931 when, in a fit of depression about what he foresaw as the downfall of England, he said, quote, "In the world at large, if civilization survives, I foresee the domination of either America or Russia, and in either case of the system where a tight organization subjects the individual to the state so completely that splendid individuals will be no longer possible."

I asked myself, what the hell is he talking about? It sounds like a "Garrison State." But isn't the United States the seat of individual freedom and liberty, et cetera? Why has Russell characterized us this way?

And I thought perhaps — I'm still not sure because he doesn't explain it — but I thought to myself maybe he's talking about a society in which we're over-lawed — where there's too much law.

And the specific examples I thought about, were these: In New Zealand on sabbatical leave I bought a car on an agreement by the seller to repurchase it at a specific price when I left. The seller was a used car dealer. I paid a lot of money for it, but he agreed to buy it back at $1,500 less and he would have the use of the money and the interest in the interim.

And the car's power steering later died. In trying to find out how to get it fixed — because it was not the seller's responsibility, but mine — I called around and I finally called the dealer who sold it to me and I asked, "Do you know where I can get this fixed?" He gave me an idea where to get it fixed. Then he said, "By the way, you're going to be without a car, aren't you?" And I said, "Yes, I am." He said, "Why don't you come by? I'll loan you one." He had no obligation whatsoever to do that. When we arrived to pick up the car he said, "Here's the keys. No charge. Just take it." I didn't even have to sign anything!

That was a luxury that would not be likely to happen in the United States because of the potential liability, the cost of liability insurance, and perhaps because of the requirements of the liability insurer. By way of contrast, when I borrow a "loaner" from the dealer who services my car, I have to fill out a long form before I can even take it out of the driveway.

Now, the other side of the coin is this car that was loaned to me, as I drove around a rotary circle in Wellington, the back doors flew open suddenly. And when I went up a steep hill, the water ran out of the radiator. It was sort of a menacing thing and potentially very dangerous. Evidently, the lender didn't care about that either and just offered me another car to replace it when I called to inform him of my troubles.

The second example occurred out in a farm — if you want to see royal albatross in New Zealand, there's a beautiful place to view them. Right nearby there's a farmer who has seals and penguins on his property. If you want to see the seals and penguins what you have to do is you go to the farmer and you pay, I think, six dollars, three dollars of it as a deposit for the key. You "uplift" the key, open the gate yourself and drive on to his land. The farmer said, "Just keep on going on the road and eventually on one side you can see penguins and the other side you can see seals."

Well, I found that road to be one of the most menacing (though most beautiful) drives I think I've ever taken. Again, I can't imagine farmers in the United States agreeing to have people come on their land when there's a danger that they might fall off a cliff, or run over a sheep running in front of you, or get stuck in heavy mud, or get lost. But they just would not do that in the United States, at least not in my experience.

So there is a certain freedom of action, you see. In New Zealand there is an advantage to having eliminated the tort system for personal injury accidents.

And that is a policy, we might identify: we don't want to over-restrict ourselves, or overdeter. We may want to avoid some restrictions even when they arguably serve a useful purpose.

Thus we should examine all important values and try to clarify all the other important policy goals, even if some of them are conflicting. The goal in this case, I think, is not to be overly constrained by regulation. Perhaps the relevant value is power, or respect. But we should examine all the values, the ones I discussed earlier, and reflect upon the appropriate policy goals with respect to each.

Then, secondly, what do we want to do after we've looked at these values and framed our goals? We can try to resolve contradictions. We don't have to fight it out necessarily on the basis of a political ideology. We can fight out our goals on practical and pragmatic grounds; what are we trying to achieve in terms of values.

Then, secondly, we have to look around and see two things: one, what are the relevant trends of decision-making? How are decisions — not just judicial decision but all effective decisions both formal and informal — going with regard to these policies that we've clarified? Are they achieving them or not achieving them? And that may require us to get the help of other people than law professors, such as sociologists, the people who may be able to conduct meaningful empirical research to determine the effects of decisions on values.

The third — again, some of you might find these five intellectual tasks familiar if you've studied McDougal and Lasswell's work — would be to examine the societal conditions in which all of this is taking place. And those conditions change frequently. They've changed in New Zealand considerably since the accident scheme was first put in. They've changed in the United States. I'm sure they've changed elsewhere.

Then you look at the goals, the decisions, the societal conditions, and you try to appraise whether or not the goals that you've identified are being achieved or not. If you decide everything is fine, then you stop there. But if you don't, then you begin to frame alternatives.

But, you're doing that without any preconception about whether this is a collectivist view or whether this is a liberal view or a conservative view. You're trying to do a systematic and "policy-oriented" examination of the problem.

Along the way in developing the alternatives, we come into some of the problems that you've just mentioned. How do we — as Gary has mentioned — assuming we can figure out some alternatives, how do we get them adopted?

You examine the conditioning factors. If you make a judgment that the relevant community will not buy your alternative, that it's not going anywhere, then you've got to find some others. That is, practicality, or effectiveness, is part of this study. So coming out with beautiful ideas that aren't going anywhere is not the objective. You've got to take into account some of the practical realities of achieving goals. I would just think that that's the appropriate way to go about this study and not come out *a priori* with ideological postures about it, but to try and do it much more systematically.

Now, I've thought in the past that, with regard to deterrence, in spite of these studies, we really don't know which way it's going. The studies help us a little bit, but they are controversial.

It seemed to me that with regard to any accident problem that we have, we have a number of different devices which together impact upon that problem. And certainly we'd want to consider all of those devices. They are part of the conditions. So with regard to deterrence of accidents in the context of motor vehicles, we have the federal highway traffic safety organization, with the possibility of recalls of vehicles deemed defective and requirements for safety devices such as seat belts and air bags. We have the police enforcing traffic regulations. The criminal justice system deals with serious violations relating to driving. We have the tort/insurance system. What else do we have?

Safety inspections, such as those that motor vehicle owners have to have once a year here in Hawaii, is another system of examining safety. Even driver education plays a role, either when training people to drive, or when exhorting all drivers to drive carefully or not to drink through the public media. There may be other modalities of safety, as well.

Now, it seemed to me likely that the combinations of these systems produce together more safety than any one of them alone would produce; that is, that there is a synergistic effect. And if you remove one of those systems, you may reduce that synergistic effect significantly.

And I think someone's already suggested this, but I would like to emphasize that if you — without the adequate information, if we remove a system, such as the tort system, to replace it with something else, we may substantially increase the number of accidents because of the loss of this synergism.

So I think maybe the burden of proof, or persuasion, of moving from one system to another is — as someone during this Workshop has already suggested — is on those who would change the system or who would eliminate a certain part of it.

I also thought, incidentally, with regard to the New Zealand scheme, that there was enough evidence that I'd come up with of the dangers in New Zealand that I've thrust the burden on those who would retain the system in New Zealand to prove that it wasn't causing too many accidents. And I'm not sure that the response to my article from the New Zealand Law Commission adequately established that the New Zealand scheme was not allowing too many accidents.

PROFESSOR PALMER: I'd like to respond back to what Dick Miller said and something that George Priest said earlier.

I've always thought that Professor Miller's anecdotes about New Zealand suffered from one glaring defect. He was not in a position to know what New Zealand was like before the introduction of accident compensation. Yet for the comparison to be fair it must be before and after the introduction of the scheme. The essential difficulty with his analysis stems from the fact that it was just the same before the introduction of the scheme.

This is a pioneering society with an agricultural, not an industrial, base, where the people have plenty of room. In the South Island of New Zealand, when I was a kid, when you drove around it and you saw another car, you waved because there were not many people. I remember doing that driving between Nelson and Christchurch.

Obviously, it's a mountainous country. I've driven Americans around New Zealand who, when they get up what I call "hills," get afraid of the height. It is very steep and it becomes steep fast. It's not like driving to the Rockies where you drive all day across Nebraska and finally get to Colorado. It's not like that.

So the difficulty about all those stories is that, really, I don't believe very much has changed. It's true that something might have. I think Margaret thinks, perhaps, that something has. I don't myself think much has. And I'm put in mind of the exam question I set last year at the University of Iowa to the Advanced Torts class. Professor Steve Sugarman's book has some wonderful stuff about deterrence and the tort system in it. There's about four pages where he concludes that, really, the tort system doesn't have any deterrence in it.

So I extracted that from the book and set it as the final exam question and said, "Do you agree?" The student response was quite remarkable in a sense. There were quite a few students who agreed with him. There were quite a few students who thought that he'd overstated it a bit. And there were other students who fundamentally disagreed with him.

Now, so far as this debate is concerned, which has been going on for many years now, I do not accept that the onus of proof should be reversed. I reject that completely. It seems to me that if you're going to spend all this powder and shot on an enormously complex, intricate and expensive tort system, you ought to know whether it's achieving these deterrence objectives or not. You shouldn't just guess or hope.

I haven't had the advantage of reading the Quebec study. But I have read most of the other material. None of the other material that I have read convinces me that there is any deterrent aspect in the tort system at all. And I state that categorically.

Now, the next point that I want to make concerns George Priest's little excursion about Ralph Nader in New Zealand and products liability. The problem with that argument is that it founders on the facts. Ralph Nader has been to New Zealand and has been there in recent years, and he hasn't commented on the absence of tort remedies for personal injury mainly because he's too politically smart to do that.

Now, the point about product liability in New Zealand, however, is instructive and may have wider significance. And Dick Miller commented on it this morning. When the scheme was put in, having had all this exposure to the wonders of product liability law in the United States, I thought, "There is a gap here. We are not getting any money from the manufacturers."

So at a triennial New Zealand Law Society conference in 1975, I introduced them to the pleasures of law and economics American style and made an analysis of the situation which suggested that there was a gap and we should do something about it.[192] Nothing was done. That proposal fell on deaf ears. It was a serious policy proposal worked through to try and say, "Look, dangerous and defective products need attention." I used the examples that are quite familiar in American product liability law. The reason that it fell on fallow ground was clear. Under the previous existing law, which in 1975 was not a hazy remembrance, you could not bring an action under English or New Zealand law for dangerous and defective products unless you could prove negligence.

The idea that a manufacturer would be strictly liable for dangerous and defective products would have run up against serious corrective justice arguments from the point of view of justice to the manufacturer in the New Zealand context. And New Zealand judges would not have been prepared to make the policy leap. They never made it. Indeed, it was only in 1932 that English law generally got to the point of holding that manufacturers owed a duty of care in negligence to their consumers — that was the celebrated snail-in-the-bottle case.[193] Even then the case is not notable for the breadth with which the scope of liability is set.

If you're going to do anything about product liability in that sort of context, you're going to have to do it by legislation. When you can't get traction for the legislative proposal because the case doesn't seem compelling enough to the people who are involved, you've got a problem.

If I just may turn the debate around a little bit, we are spending an enormous amount of time at this seminar concentrating on the questions of deterrence. No doubt those questions are important. They are not, in my judgment given the state of the evidence, nearly as important as the questions about the welfare of people and maintaining their income, to which we are not giving the same sort of systematic attention.

If you consider that problem, the contrast that I come up with is something like this: Here we have the United States with the most

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[192] Geoffrey Palmer, *Dangerous Products and Consumers in New Zealand*, 1975 N.Z.L.J. 366.

[193] Donoghue v. Stevenson, A.C. 562 (1932).

developed tort system in the world, without doubt, a lot of suing going on, a lot of liability theories, a lot of insurance, a lot of activity. We still don't know — the evidence doesn't convince me — that there's any deterrence in it.

At the same time, we have the United States, one of the most advanced countries in the world, which is, in terms of income maintenance, a less developed country. I do not mean to be offensive when I say that. But if one examines the situation in, for example, Germany and most European countries and Britain, in Japan if one looks at the employer benefits that the employers bestow on their employees in Japan, one would have to say that the arrangements in the United States border on the primitive.

Why is it that the value system of the United States says, "We're going to concentrate on this question of tort and deterrence and we're going to think very carefully about that." There is not, as far as I could see when I was last teaching in the United States in 1991, currently a case book on welfare law in print.

There used to be more emphasis on it in the Sixties. It seems dead and buried. I would have thought from the point of view of poor Americans, it was a matter of concern. I would worry greatly about it were I an American. I just wonder about the priorities of the society.

Perhaps analysis can be free from political ideology, although my experience in the recent past doesn't convince me of it. Politics is the language of priorities. Politics determines the priorities. The priority here is to expend an enormous amount of energy thinking carefully about a problem to which there is no solution, as far as I can see. Namely, whether the tort law has any deterrent effect or not.

It seems to me strange that when one has a relatively under-developed system of income maintenance for helping people that more legal talent is not devoted to thinking up solutions for that. When I look at the state of the United States' cities and the sort of life people lead around my alma mater, the University of Chicago, I wonder whether the priorities are the correct ones.

PROFESSOR PRIEST: This conference is very unusual. Among conferences dealing with accident law that I have attended over the last ten years, with perhaps the exception of one that I attended with our host Professor Morishima in Sweden some years ago, all have been directed not toward the question of should we have a tort system or not, but rather toward the question of should we not continue to expand tort liability in order to solve accident problems and enhance consumer welfare.

Much of my work parallel to that of Professor Palmer has objected to that approach. There is a very strong belief among many in the United States that the continued expansion of liability, not only in the product sphere, but for services and in other contexts, will lead unambiguously toward a benefit to the society. Indeed, there is the belief that the expansion of liability will have helpful effects on the problems of poverty in the country. Here the thought is that, if poor people are injured, they will be able to recover substantial amounts through the tort system.

I have been doing some empirical work recently on the extent to which individuals with low incomes recover through the tort system. I will give you a quick summary of the results: They do not recover often.

I have studied products liability judgments over a 30-year period in the Cook County, Illinois civil courts, which includes the City of Chicago, a large urban jurisdiction that has a very substantial poor population. I have found from these court records that people that are below the U.S. poverty level recover very infrequently in tort litigation. Those that more frequently recover tort judgments, as one might expect, are middle- to upper-middle class individuals, most commonly individuals who have separate insurance opportunities. Roughly sixty percent are workers who are covered by workers' compensation. Others are people with relatively high incomes and many are people with very large incomes. Tort law is not an effective way of dealing with the problems of the poor.

In my comment on Professor Sugarman, I began by stating that I think that we have some type of consensus here. Indeed, I believe that we are much closer to a consensus in this room about the appropriate role of tort law versus compensation than any other conference I have attended over the last decade. Not all of us would go as far as Professor Palmer and Professor Sugarman to eliminate the tort system entirely, but our differences are relatively small in comparison to the differences between all of us here and the wide majority of people interested in the tort system today. So I agree with Professor Palmer entirely that society is wasting an enormous amount of money because of its expanded tort system. I must add that I believe the Palmer-Sugarman proposal to do away with tort law and their dismissal of deterrence effects goes too far. While we may not have definitive evidence on deterrence, I believe there is enough evidence to endorse retaining tort law for deterrent purposes.

Put differently, the radical suggestion that Professor Palmer and Professor Sugarman are proposing of eliminating tort law entirely has

no political salience in the U.S. It is not clear to me that it is worth taking on that last gauntlet of throwing out tort law entirely, rather than accepting "Yes, we'll keep it for accident reduction purposes subject later to showings that it has no effect there." I am happy to entertain such a proposal. In addition, we need to start to think systematically about how to provide some form of health support for the poor, which today is inadequately provided in the U.S. We have inadequate levels of basic health and medical care for the poorest of our population.

But I think the notion that tort law is solving those problems is harmful, and that, I believe, is a conclusion upon which all of us here would agree.

PROFESSOR MORISHIMA: I'd like to quote the final word in which Professor Palmer said, "Politics decide the priorities." And in Japan, we try to expand the compensation, or in other words, the income maintenance system through several ways.

But, I think at present — I don't know in about the 22nd century, but at least for the foreseeable future, Japanese politics will not allow us to introduce a comprehensive compensation system abolishing the tort compensation system.

So I think that what George said, as far as — at least my feeling is concerned, we are trying to expand liability instead of introducing a comprehensive compensation system. And then by expanded liability, I believe we can give some relief at least to the poor people as well as the rich people.

And, also, the deterrent effects should not be ignored. But as I said this morning, I have some doubt about the deterrent effect of all tort liability. And in some areas, such as where the industry can calculate in advance what could be the cost of the liability, in that area, the deterrence effect might work, but the deterrence effect of torts idea would not work in all areas.

So my concern is how to expand the income maintenance function — and then, if that is possible, I would say — how we can combine the deterrence effect with the income maintenance function.

And so far, the second one, the deterrent effect, has not been very much successful. And that's the reason why, as Professor Miller has said, we need various kind of regulations and some other sanctions to promote deterrence effect.

So I don't know if we reach a consensus, but obviously I think that, unlike George, I don't think we have reached any consensus. But we have some feeling that the income maintenance function is very im-

portant. And then, regardless of whether we have a tort liability system or a comprehensive system, we have to look for deterrence and the prevention of accidents. That's my comment. I'm not the representative of Japanese scholars, but I feel that most of the Japanese scholars feel in that way.

PROFESSOR MORIGIWA: Being a Japanese scholar who does not feel that way, I feel that it's about time that deterrence should be taken seriously and that compensation should be addressed as a matter of straightforward social welfare — in terms of social welfare methods rather than through these alternative methods.

It may be that the time is ripe for a change in the general view. Those who see the point should speak out.

PROFESSOR SHIMAZU: I just wanted to clear up one point: What do you mean by deterrence? Because, so far as I understand it, we tend to use this word only in the economic sense. That means we are speak of deterrence as an economic incentive to induce the hypothetical being *homo economicus* to refrain from a dangerous practice. On the other hand, Professor Miller used the term "synergetics." This synergy, if we are to consider it honestly and seriously, must include not only economic but also moral deterrence, or anything which brings about the real behavior of refraining, and which people would say, if asked, is the real reason why they should or should not do a certain thing.

So one thing I want to ask Professor Palmer is, after you introduced this new system, did the moral deterrence seen among people's behavior change or not?

All countries have, of course, some moral deterrence or control over people's behavior. But if that control — or the morality itself — is not supported by legal decisions, we probably would have much less deterrence acting in the real world of human behavior.

At times in Japan — and very likely elsewhere as well — we have cases litigated for nominal amounts of money. The plaintiffs in these cases are not seeking economic gain; rather they seek support for their moral causes by seeking a nominal amount of money, and in effect saying that they are fighting for a cause or a right.

It seems to me, if deterrence is to work upon real flesh-and-blood people, moral deterrence must be supported by legal decisions consistent with this principle. And if we use the word "deterrence" in this synergetic sense, I believe our discussion must be a little different.

PROFESSOR PALMER: I think the use of the word "deterrence" refers to the incidence of an undesirable activity and how to prevent

it. In the sense that I've always thought about the word it has been defined in modern tort usage for most tort scholars by Dean Guido Calabresi's book *The Costs of Accidents*.[194] That book analyzed the idea in a way that caused people to think about it differently for ever after that book was published.

Calabresi taught us that general deterrence was an economic idea. It had not been fastened on in that way before. Specific deterrence was something where the legislature passed laws and did things of a regulatory nature which may deter dangerous behavior. I've always, in my own thinking at least, really followed that categorization of how things work.

In the criminal law, for example, it's frequently said, in law-and-order debates that the biggest deterrence in the criminal law is not the penalty but the threat of detection. When we use the word "deterrence" in its most direct English form, we are trying to convey the idea of preventing certain behavior from occurring. By allocating the costs of accidents after they have occurred, we are saying that the way in which we do that may influence future behavior of an accident-producing type.

That, at least, is the way I approach the use of the word deterrence, but it has several meanings. I think, probably from our Japanese scholars' point of view, it might be a rather nuisance sort of the word because of the several different ways in which it's used in common law systems.

So far as the question of moral deterrence is concerned, I put in mind Harold MacMillan's admonition that if people want to know about morals, they should ask their bishops. I'm not sure what moral deterrence really is in the terms that you're putting it to me.

I remember once negotiating with the State Department in Washington concerning New Zealand's anti-nuclear policy. I told them New Zealand was a nation of church-going people. That caused great offense because it seemed to suggest that Americans were not. I cannot grasp this idea of moral deterrence. I need further explanation from you in order to answer that really.

It is true to say that there have been hazards created which should not have been created — we had the swimming pool example here earlier. One of the things that happened in New Zealand was that a private member of Parliament sponsored a bill to fence all swimming

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[194] GUIDO CALABRESI, THE COSTS OF ACCIDENTS (1970).

pools in New Zealand. There was a great uproar about it. People said it would cost too much to fence the swimming pool in their backyard. But the argument was it would stop children from drowning. So the law was passed by the Parliament after a big debate.

There have been a number of specific deterrence laws of that character passed which I think probably would not have been passed had the negligence system still been in full operation. One can't be sure about that. But that particular legislation the Parliament took very seriously indeed.

There have been a lot of efforts to tighten up drunk driving law in recent laws which are beginning to yield results, much more severe penalties, random stopping, and widespread testing. That sort of thing does seem to be effective and has been engaged in almost on the basis of political auction: which party is tougher on law and order?

So, you see, there are some things that come out of deterrence which can be good. You can get a sense of moral outrage against drunk drivers pretty easily. My impression is, when I first became a lawyer, the law about drunken driving in New Zealand was very lax. I got a man off once by calling an orthopedic surgeon to say that my client walked with a rolling gait anyway because he had arthritis in his legs. It was not caused by drinking. And the judge said that raised a reasonable doubt, and away my client walked, although he probably had been drunk as a skunk. There were no blood tests or breath tests in those days.

Now it is all different. It's all high-tech breath tests, blood, the works; people get convicted and the available defenses are few. Public opinion has changed greatly in New Zealand on this issue over the years. The lawyer in New Zealand who named his racehorse "Breathalyzer" because of all the money he had made out of drunk driving cases is not in such a good position now because the legislature has tightened the law repeatedly. So people have now taken on board that the behavior isn't acceptable. The risk of going to jail is high.

I don't think the politics of that has been influenced by accident compensation in any way. It was quite a separate social development. No one ever thought the tort system, even when we had it, did anything to deter drunken driving.

PROFESSOR LEFLAR: I would endorse Professor Morishima's suggestion that the effect of the civil law system on preventable accident-causing behavior differs from field to field. The medical malpractice field is different from the auto accident field which, in turn, is different from the products liability field. With that premise understood, I will make just three points.

My first point concerns the intractable problem of reducing medical injury, the dimensions of which Steve Sugarman set out earlier this afternoon. There is virtually no valid, quantifiable evidence that the tort law system as it presently stands, in America at least, has any effect on reducing the extent of medical malpractice. Even if one were to assume that a significant deterrent effect exists, the value of that effect may well be outweighed by the costs and inefficiencies of the concomitant practices of defensive medicine.

Professor Sugarman has properly suggested that we focus on other mechanisms of accident prevention. One mechanism that has not yet been discussed here has to do with increasing the amount and usefulness of information about medical quality available to consumers of medical services.

There are some interesting developments in the United States on that front. Both the Health Care Financing Administration, which is responsible for paying the costs of the Medicare and Medicaid programs, and entities such as the New York State Health Department have recently been gathering highly detailed information on health care outcomes and have been making that information public.

For example, hospital-by-hospital mortality statistics are released to the public on a yearly basis,[195] so that if you require heart surgery then you can obtain a pretty good idea, at least based on past records, of which hospitals are likely to give you better results and which hospitals you have a greater chance of dying in.

Hospital-by-hospital mortality statistics are not all that is available. Last December a New York area newspaper, after winning a Freedom of Information lawsuit against the New York State Health Department,[196] received and published *surgeon-by-surgeon* risk-adjusted mortality statistics for cardiac bypass surgery.[197] The statistics demonstrated quite clearly that, as one might expect, surgeons with more experience are less likely to fail than those who have very little experience.

That sort of consumer information is bound to have profound effects on both the hospital-seeking behavior of American health care consumers and on the legal system in terms of the types of information that

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[195] *See, e.g,* HEALTH CARE FINANCING ADMINISTRATION, THE MEDICARE HOSPITAL INFORMATION REPORT (1992).

[196] Newsday Inc. v. New York State Dep't of Health, 19 MEDIA L. REP. 1477 (N.Y. Sup. Ct., Oct. 15, 1991).

[197] David Zinman, *Heart Surgeons Rated; State Reveals Patient Mortality Records*, NEWSDAY, Dec. 18, 1991, at 3.

physicians will be in the future required to give under informed consent law.[198]

To the extent that disclosure of this sort of data on a statistically honest basis is possible, not only throughout America but in other societies as well, then consumers are bound to benefit and accidents to be reduced.

In the area of auto accidents, Professor Palmer has suggested that what makes a difference is a combination of severity of sanction and likelihood of detection. With that there can be no argument.

In Japan, the likelihood of detection of vehicular negligence is relatively high. I think that our Japanese conferees would agree. And the severity of the sanction is also very high. Imagine: professors at publicly-funded universities who are caught driving while inebriated will be dismissed from their jobs. That is the kind of sanction that has some bite.

Concerning products liability, the extent of tort law's accident-preventive effect has been a source of controversy here. Professor Sugarman does not believe tort law has much deterrent effect, nor, it seems, does Professor Palmer.

The logical difficulty with their arguments stems from a basic principle that the epidemiologists are fond of stating, namely, that no proof of an effect is not the same as proof of no effect. Assume that we lack clear statistical proof of products liability law's effect in deterring accidents. Nevertheless I am inclined to side with Professor Priest: tort doctrines such as automobile crashworthiness have certainly had a profound effect on manufacturers' choices of safer designs, the study that Professor Sugarman cited to the contrary notwithstanding.

Those favoring drastic cutbacks or abolition of tort law in the area of products liability need to be prepared to state either how regulatory mechanisms are currently adequate to ensure product safety, or if they are not adequate, how they ought to be strengthened or other safety-enhancing measures adopted.

Professor Sugarman recognizes that obligation in his book.[199] He sets out somewhat sketchily, I fear, a few areas in which regulatory mechanisms ought to be strengthened.

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[198] *See* Aaron D. Twerski & Neil B. Cohen, *Comparing Medical Providers: A First Look at the New Era of Medical Statistics*, 58 BROOK. L.REV. 5 (1992).

[199] *See* Sugarman, *supra* note 24.

It is this problem that unfortunately has been given insufficient attention in the proceedings of this conference: is there significant regulatory failure regarding product safety, and if there is, what should be done about it?

I will offer some observations based upon my own experience for three years as an "FDA watchdog" in Nader's Health Research Group. My job was looking at the way that FDA regulates medical devices. Conference participants have referred to problems with Dalkon Shields and breast implants. The list of problems is far more extensive than that. There is a great deal of litigation on heart valves,[200] and also on a whole series of medical devices that the FDA, supposedly the world's paragon of the strict regulatory agency, has cleared for marketing.[201]

One reason for FDA's regulatory failures on medical devices, to which Professor Sugarman has adverted, is the fact that the agency has not been very good in obtaining information on product hazards. Amazing though it may seem, FDA until very recently has never required hospitals to report to the agency about device-related injuries and deaths.[202] A system to that effect is now starting to come on line, but there is no effective penalty on hospitals that fail to report.[203] An agency ignorant of the safety problems of the products within its jurisdiction can scarcely be an effective regulator.

Second, FDA sanctions have historically been weak, and in most cases available sanctions have not in fact been imposed on manufacturers of defective products. There is a pattern within the agency — one has to look at institutional and organizational behavior theory to appreciate it — of FDA field inspectors, when they find out about a problem through a factory inspection, recommending hard-hitting penalties. But when they send the information back to the central offices

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[200] *See, e.g.*, Bowline v. Pfizer, Inc., 143 F.R.D. 141 (S.D. Ohio 1992) (approving proposed settlement of class action, and summarizing litigation history); Bravman v. Baxter Healthcare Corp., 984 F.2d 71 (2d Cir. 1993); Khan v. Shiley, Inc., 266 Cal. Rptr. 106 (4th Dist. 1990).

[201] *See* cases cited in AMERICAN LAW OF PRODUCTS LIABILITY 3D, ch. 90 (1987 & Supp. 1993).

[202] *See* United States General Accounting Office, MEDICAL DEVICES: EARLY WARNING OF PROBLEMS IS HAMPERED BY SEVERE UNDERREPORTING 38-51 (1986); Robert B Leflar, *Public Accountability and Medical Device Regulation*, 2 HARV. J. L. & TECH. 1, 38-41 (1989).

[203] Safe Medical Devices Act of 1990, Pub. L. No. 101-629, § 17(b)(2)(B) (providing for exemptions from penalty provisions of reporting requirement in 21 U.S.C. § 333(f)).

outside of Washington, the field inspector's proposals to take further action tend to get watered down.

The people in the central office making those decisions then proceed into executive positions in the industries they have regulated or into partnerships in the law firms that represent those industries. The same career pattern is well known in Japan with its *amakudari* system.[204] The FDA is perhaps one of the best of the agencies. One proceeds downhill from there, in terms of stringency of safety regulation, towards the Consumer Product Safety Commission, the Environmental Protection Agency's pesticide programs, and so forth.

Professor Sugarman has offered some suggestions about ways of strengthening agency access to product hazard information. Some of those ideas involve rewarding whistle-blowers inside companies and rewarding private attorneys and private citizens for bringing product hazards to the agencies' attention.[205]

These suggestions are all well and good, but their premise is that agencies will take conscientious action on the basis of the information obtained.

That brings to the table a whole set of other problems, not the least of which is the administrative law doctrine that in recent years has given extreme deference to agency decisionmaking.[206] The idea that consumer groups can go before agencies in administrative proceedings, make suggestions, and have them acted upon is a bit naive because the general tendency, at least over the past decade, has been that those suggestions are ignored.

Therefore, until you have an administrative law doctrine that will take a harder look at agency decision-making practices, or perhaps a change of administration, you are not going to get very far with the interesting ideas for citizen involvement that Professor Sugarman has advanced.

PROFESSOR KLAR: Professor Palmer's challenge to the Americans concerning their "primitive" income maintenance system, in conjunction with his unhappiness over the fact that we have been focusing a lot on the deterrent function of tort, again raises the false dichotomy

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[204] *Amakudari*, literally "descent from heaven," refers to the common Japanese practice of top government officials, upon reaching retirement age, taking high posts with companies that had previously been under their jurisdiction.

[205] SUGARMAN, *supra* note 24.

[206] *See, e.g.*, Chevron U.S.A. v. Natural Resources Defense Council, 467 U.S. 837 (1984).

which I find frequently to be a feature of accident compensation discussions. The assumption is made that somehow the failings of tort law are responsible for society's inadequate income maintenance or other social programs.

The civil justice system has to stand or fall on its own merits. If, upon evaluation, it is determined that tort is worth retaining, or is in need of reform, then that ought to be done. If not, then it ought to be abolished, and some other system, such as suggested by Professors Sugarman or Ison, or the New Zealand scheme, ought to be considered. It is not correct, however, nor is it fair, to connect an inadequate income maintenance system with the retention of tort. If American society does not have adequate income maintenance programs, it is not because there is a tort system. It is probably a function of many factors, such as politics, taxation policy, approaches to free enterprise, and so on. Because one advocates the retention of tort, does not imply anything about how a person feels about income maintenance. The two are not related. I reject Professor Palmer's suggestion that it is a backlash into right wing ideology which has maintained interest in the tort system.

We have focused on the deterrent function of tort, perhaps unduly so. The deterrent function is one of the more controverted aspects of tort law because of the difficulty in testing for it. You cannot have a controlled experiment in which all of the variables, except for the presence or absence of tort, are kept constant. It is, nevertheless, a matter of common sense and economic theory that tort liability can serve a deterrent function. There are specific examples. The fact that tort liability has driven manufacturers of sport safety equipment out of the market in the United States is an example.

There have also been studies. Unfortunately, one of the features of the no-fault debate is that people ignore the studies unless they support their view. This takes us back to the ideological nature of the debate. Because the debate is really ideological, the studies tend to be minimized. There is the Gaudry study and the Devlin study concerning the effect of no-fault in Quebec,[207] as well as the work done by Landes and Posner.

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[207] Marc Gaudry, *The Effects of Road Safety of the Compulsory Insurance, Flat Premium Rating and No-Fault Features of the 1978 Quebec Automobile Act*, *supra* note 62; Rose-Anne Devlin, *Liability v. No-Fault Automobile Insurance Regimes: An Analysis of the Experience in Quebec*, *supra* note 62.

Professor Sugarman does deal with the deterrence issue quite extensively in his book.[208] His treatment of this issue, however, illustrates another problem which arises in this debate. There is a tendency to use inconsistent reasoning when that suits the specific argument. For example, Professor Sugarman generally argues that tort law does not deter. He cites a study conducted by Professor Wilie which indicated that a Washington state judicial decision requiring the testing for glaucoma patients had very little impact on Washington doctors.[209] Wilie's conclusion was that the survey data seemed to cast doubt on the assumption that appellate court decisions are able to change the standard of practice, which would indicate that perhaps tort law does not affect medical behavior.

Professor Sugarman also argues, however, in another part of the same chapter that tort law over-deters in the area of medical practice and that doctors "engage in an enormous amount of defensive medicine in the form of ordering more tests, gathering more information from patients and making more records. . ."[210] This is noted as a perverse effect of tort law. This illustrates the problem of apparently inconsistent arguments.

The final point on the deterrence issue is the point that although we can see all the accidents which tort law did not prevent, it is impossible to see the accidents which did not occur because of tort law's influence.

PROFESSOR MORIGIWA: As Professor Palmer is leaving and just to make sure that I would not be regarded as a right wing reactionary by Professor Palmer, I would like to clarify my position.

First of all, we're talking about a policy decision that's going to stay for a long time. Because of the institutionalization process, it takes a long time to implement. And we're talking about allocation of social capital, the amount of money that no private individual, however rich, cannot really do much about.

I thought the dominating theology until now was that it is a good thing to have a more complete and comprehensive safety net in a risk-neutral or risk-loving society. I say that a safer society would be better than a society with a stronger safety net. I say that this is the right direction for allocating social resources in the future.

I regard myself as thinking in terms of everyone in the community concerned and not forgetting about the poor and unfortunate. In fact,

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[208] SUGARMAN, *supra* note 24.

[209] *See id.* at 31, note 37.

[210] *Id.* at 18.

it's because I have the victim in mind that I think that there should be less and less victims rather than well-cared-for victims.

PROFESSOR VENNELL: Well, I just wanted to expand on a few problems I think have arisen in the New Zealand system, particularly in relation to medical events and the medical devices and pharmaceutical products. And I think these problems can arise in other areas too. One must bear in mind that when the scheme was introduced in 1974, there was very little claims consciousness in New Zealand. Then, too, the medical system of provision of health care actually operated in what I think was a very paternalistic way.

At that point of time, we had a very good social welfare health system, which possibly encouraged the paternalistic approach to the provision of medical services to continue.

When we set up the accident compensation scheme, there was no real way built in to ensure some accountability, which tort may not necessarily have effectively provided, but which could have been provided in other ways. Thus there was no real incentive to look for a way to provide any effective system of accountability.

Really the medical system has operated in New Zealand in a vacuum in relation to the patient. There's been a lack of information supplied to patients about what's going on.

And this was highlighted in the inquiry that I think someone alluded to earlier today, the Cartwright Inquiry,[211] into the lack of treatment of women who had pre-cancerous cervical condition which was allowed to develop into full blown cancer. The women on this program where it turned out there was no treatment, but rather a monitoring of the progress of disease, tended to come from a lower socioeconomic group of society. They were brought into the state-operated hospital and put on the program without being told they were on a program at all.

Many of these women had great personal problems in getting to the hospital for their treatment. Some had to travel, like Lewis, on the bus for over an hour, leave their place of work for sometimes a whole day. The hospital ran no appointment system so they were kept waiting in a gown, that didn't do up properly, in a drafty passage, before they were ultimately seen by the professor. And this went on for years with the same group of women. They did not question it. They were belittled by the treatment system. They did not question it because they were not educated enough to question it.

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[211] REPORT OF THE CERVICAL CANCER INQUIRY (1988).

And it was only questioned when one of the women, as an older student, more mature student, went to a university and became a school teacher. And then she said to the doctor, the professor, one day, "Why are you treating me like a guinea pig?" She had been going for something like ten years on this regular basis. And he said to her, "You'll do as you're told," as though she were a child. And then she was, without any reason, dismissed from the treatment program presumably because she had questioned it.

And she assumed she was cured. That's why she'd been put out of the system. It turned out that she, in fact, had invasive cancer, and then eventually she publicized what had happened to her and the inquiry was ultimately set up.

But to me this exposed the fact that we had a vacuum in our system.

In other common law countries, the doctrine of informed consent had developed. In New Zealand, there was no reason to obtain people's consent. And the same has been true with drug trial programs. Drug trial programs have taken place in New Zealand without people even being aware that they are on a drug trial program. Under the bill that's before Parliament in New Zealand at the moment,[212] people on drug trial programs will be able to sue because they will not be covered by the bill.[213] And if there's a failure to obtain informed consent, again, in limited circumstances, those people may be able to sue.[214] The wording of the section is far from clear. Nobody knows exactly what it will mean until it comes before the courts for interpretation. But it does seem that there may be some areas which have been taken right outside the scheme.

And, you see, all sorts of unfortunate things have happened in New Zealand. The Dalkon Shield was widely used in New Zealand. Women who suffered injuries as a result of using the Dalkon Shield claimed from the Accident Compensation Corporation and were refused compensation on the ground that the risks of injury from the Dalkon Shield were fairly common. Therefore, it wasn't an accident because you only recover for a medical mishap if it's rare. So it wasn't rare. The only thing they could do was join the class action here in the United States.

So the advantages of the availability of the class action in the United States assisted those women, but the expense of doing so is considerable

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[212] Enacted as the Accident Rehabilitation and Compensation Insurance Act of 1992.

[213] *See supra* note 58, at 573.

[214] *Id.* at § 5(6).

for people. Even though they can use the contingent fee system in the United States, to do it from New Zealand becomes expensive. But they have advertised in the media in New Zealand for those women to come forward and join the class action.

The fact that this sort of thing can go on and has been able to go on in New Zealand is most unfortunate in the extreme. It might not happen here, but if you're going to have a scheme of compensation, then you do have to look for regulatory systems to control people's actions. Because if it doesn't cost people anything to either act one way or another and there is a profit to be made at the end, then I suggest people will take the profit line.

As you have heard Geoffrey has referred to the passing of the swimming pool fencing legislation. Well, I think that, yes, it was marvelous that that legislation was passed through Parliament. But Parliament left it to the local authorities to enforce.

And we became concerned at the Accident Compensation Corporation, when I was on the Board, that local authorities were not enforcing it. And we wrote to every local authority in New Zealand to ask them what they were doing about enforcing the swimming pool fencing legislation because a large number of children were being drowned in swimming pools. And the local authorities, most of them — a few were enforcing it, but most of them were supremely unconcerned.

I live next door to a person who has an unfenced swimming pool and I fenced our property when my children were small so that they couldn't get out of our property into the neighbor's swimming pool. And I took them to learn to swim when they were very small so that if they did get out, they were safe.

But what do people say, "Why should we have to fence a swimming pool? Why should that be an extra cost to owning a swimming pool?" Well, New Zealand's an egalitarian society. Why should you have to do it? And in the main the local authorities don't care.

So, you see, properly enforced regulatory controls is something that I think you've got to ensure that you have if you have a compensation scheme.

Tort may be inefficient but if you give tort away then you really might have to make sure that there's something else.

PROFESSOR MILLER: With regard to medical malpractice and defensive medicine, as discussed by Rob Leflar and Lewis Klar, what Margaret Vennell just said about the importance of having some sort of a tort system to regulate conduct, unless you have a substitute system in place, seems to make sense.

I'm also wondering about the new information systems that you've been talking about that have developed to provide better information. To what extent are those systems a response to medical malpractice? In other words, it seems to me an awful lot of what has happened in terms of new systems, peer review, and many of the positive things that are happening today in hospitals and in medical administration to improve the overall situation of harm in the hospital may largely be driven by concerns about medical malpractice costs and premiums.

So it may not be the case that we have a wonderful substitute and, therefore, can drop medical malpractice, but that medical malpractice has produced systems which will reduce the amount of medical malpractice, which is perhaps what we might want it to do, and we should perhaps be cautious about replacing it.

Let me — towards the end — make a couple of other points clear. I talked about clarifying goals and then I talked about looking at the realities of the conditions in the community.

And Professor Morishima, I think there may be wide agreement among many, if not all of us, about the goals with regard to not only accidents, but social welfare, — as to what is desirable in terms of human dignity when we're talking about people who cannot achieve certain levels of minimum dignity for whatever reason — accident, being out of work, or disease — that we may share those goals.

The problem, as you pointed out, in Japan about moving, let's say, to a non-fault compensation system relates to the second inquiry: What are the realistic conditions in which we're making our decisions? And if, in fact, the politics — and that's where the politics become relevant — are such that the people will not approve a no-fault system, then it may be unproductive to recommend one, and it wastes a lot of effort and a lot of resources.

And I'd finally like to add with regard to Professor Palmer's comment that I think if we engage in goal clarification — if we look at these problems (and it may well be as Professor Klar suggests that we should look at tort apart from other systems) and clarify our goals more systematically, then perhaps the welfare problems will rise to the fore. We'll begin to realize the true nature of our problems and begin to assign some goals with regard to poverty, with regard to accidents, with regard to illness, et cetera, et cetera, and then maybe our priorities will not be skewed.

And, obviously, we have a serious problem in this country with regard to our welfare safety net. Contrary to what George suggested, I think that it really isn't adequate. It is a welfare system which is

minimal and it surely does not do the wonderful thing that I think New Zealand's accident compensation system does, which is to enable people to maintain their standard of living after they've been injured, even to continue paying their mortgage.

So we should be developing and clarifying policies and looking at the poverty problem as well. Maybe the reason we're emphasizing torts in this workshop is because the co-producer is a torts teacher and several of the principal participants are also torts teachers.

PROFESSOR MATSUMOTO: I would like to raise the issues of cost savings and deterrence. As I said in my brief country report yesterday, I believe that the cause of the tort crisis in the United States is not produced by substantive tort rules, but by the rules of civil procedure and judicial practices which implement tort law.

And if I understand it properly, Professor Priest said in his comment that he prefers the mixed system of limited tort law and private first party insurance.

But if you cannot separate substantive tort law from procedural law and rules, the situation could not be changed. For example, if you repeal § 402A and you don't touch other factors surrounding tort litigation, for example, contingent fees, jury trials or discovery rules, how much of the transaction costs in the resolution process would be reduced?

If your major concern in the United States is just the matter of cost savings, then I think Professor Sugarman's proposal of various compensation systems is more fruitful. But I don't think the function or the value of tort law could ever be replaced by the compensation system, even if it would save costs.

I agree with Professor Miller in his comment this morning that tort has an educational function. It is quite difficult, however, to ascertain whether tort law is successfully deterring accidents because we lack reliable data. But I can say, at any rate, that tort allows or encourages the individuals, the victims, and the citizens to take part in the process of deterring further accidents. So I would like to emphasize that kind of deterrent effect. And I believe that is a form of education for the people.

PROFESSOR SCHWARTZ: Let me offer some additional comments on the issue of the empirical evidence that bears on the goal of deterrence. Steve has referred to a Rand study that grew out of interviews with officials of eight major manufacturers as to the extent to which products liability does or does not affect these manufacturers'

design decisionmaking.[215] The introduction of this study proclaims that products liability is extremely influential in improving the safety in products — more influential than regulation or the pressures of the marketplace.[216] However, when the text of the study gets down to the actual interviews, the evidence provided from these interviews does not really support the bold language employed in the introduction.

The particular passage in the study to which Steve refers is an indication that companies regard particular products liability opinions as no more than "random noise."[217] Elsewhere, however, the study indicates that companies *do* realize that if they design products in a more "careful" way, they will succeed in reducing their liability.[218] Now this acknowledgment seems to be all that one really needs in order to affirm that there is some deterrence advantage in products liability rules.

Still, we can take account of the manager's perception that individual decisions are random noise. Why might that be? It's partly because products liability opinions are often written in language like the following: "A product is defective when it does not provide the safety which a person is entitled to expect, taking all circumstances into account." Now as it happens, the language I have just quoted is not actually drawn from an American court opinion (although it could be). Rather, it's the language from the EC Directive on products liability — the language that defines liability for purposes of that Directive.[219] If I were a manufacturer encountering language of that sort, I would disregard it. There is no way that I could conform my product to a standard that is as vague and circular as that contained in the EC Directive.

The point is this: If we *are* concerned with deterrence as a possible rationale for products liability, we should urge judges to draft the operative language in their opinions in ways that make it easier for manufacturers to comply with whatever it is that courts think they want.

A second point is somewhat limited to the United States. American manufacturers that distribute their products throughout the nation have no real ability to modify the designs of their products to comply with

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[215] GEORGE EADS & PETER REUTER, DESIGNING SAFER PRODUCTS (1988).

[216] *Id.* at viii.

[217] *Id.* at 95.

[218] *Id.* at viii.

[219] The Directive is discussed in Schwartz, *supra* note 23 at 41-46.

the demands that might be imposed by 50 sets of rules. At least in the American context, then, if we want to improve deterrence, we should support a national products liability statute that could set forth uniform standards with which manufacturers could at least make a reasonable effort to comply.

Looked at in these terms, what the corporate manager's statement to Rand really means is that a regime of state-by-state common law products liability opinions is far from ideal. But if so, then we should urge judges to redraft their opinions, and we should likewise urge the American Congress to develop national products liability standards.

PROFESSOR PALMER: Since I'm going home at midnight tonight, could I just say, I want to say on my own behalf, and probably Margaret would join me, the New Zealand contingent has been very grateful to have been invited to this meeting.

We share with the Australians the characteristic of being rather blunt and sometimes vivid, not to mention colloquial in our utterances. In my case that has been exacerbated by spending 12 years in a Westminster-style legislature.

If any of my utterances have offended — perhaps I've been characterizing people in unfair, unscholarly and unacceptable ways, I do want to apologize for that.

And I want to thank everyone very much for what's been for me a memorable experience.

The Japan Experience
The Japan Scene and the Present Product Liability Proposal

Akio Morishima, Nagoya University

I. Introduction

Japanese tort law was first codified in its civil code, which was enacted in 1898. In it, negligence forms the core of tort liability. Prior to World War II, Japan as a nation was still in its early stages of industrialization. During the war, because people had to serve the nation, no one could, in fact, claim their own individual rights. Consequently (and ironically, as war itself may be the greatest tort of all), tort litigation was then not considered to be very important in Japan.

However, several important changes were observed during the pre-war period. The first concerned the law of employer liability, as found in Article 715 of the civil code, the construction of which expanded the meaning of "employment." Under this expanded meaning of employment, employers were held liable for the conduct of their employees, even though such conduct was in a strict sense not within the scope of their employment. For example, an employee driving a company car for his personal purpose on a holiday still gave rise to employer liability.

The second significant change concerned the concept of proximate cause as it relates to damages. The Japanese courts adopted an idea similar to that found in *Hadley v. Baxendale*.[220] That is, although damages must be limited to some extent, when they are foreseeable, there must be compensation. Today, the idea is neither special nor radical. How-

[220] 9 Exch. 341, 156 Eng. Rep. 145 (1854).

ever, at the time of the adoption by the Japanese court, it was a very novel idea.

The third significant change was the partial waiver of the governmental immunity. Before the war, as in England and probably other countries, the Japanese government was completely immune from liability. The court, however, developed an idea that to the extent the activities of the government were similar to the private activities for which a private person may be held liable, the government should be similarly held liable. It was the court's idea that so long as the government activity was not related to its discretionary administrative function, the government must be held liable. This discretionary function exception constituted the only area where the government retained its sovereign immunity.

There was no legislation before or during the war which significantly changed the rules of tort liability. The only exception was in the area of mining law. During the war, mining became important to provide the military with the needed natural resources. But frequently, mining adversely impacted upon agriculture. For example, rice paddies were dried out due to the water in the paddies draining into the mines. Thus, in an effort to balance the two competing interests, a mining law was amended, imposing strict liability on the mining companies for damages caused by their mining activities. As provided, however, this legislation did not limit the liability to agricultural property damages. Consequently, after the war, this law was in fact used to recover damages for personal injuries as well.

II. Post War Developments

A. Automobile Compensation Law

After the war and especially in the 1950s, tort litigation became increasingly important because of the increased industrial activities. Industrial products had to be transported on unpaved roads which lacked safety features, such as traffic signals. As a result, just five or six years after the World War, traffic accidents increased so dramatically that it was said that Japan had now entered a "traffic war." In response to this situation, the automobile compensation law was enacted in 1955. I think this was the first real tort legislation in the history of Japan. This is the first area of law I would like to now discuss. As Professor Matsumoto explained on the first day of this conference, there are two essential elements to the automobile compensation law.

The first element concerns the shift in the burden of proving negligence. For the car owner to be held liable, the victim does not have the burden to prove that the owner or the driver of the car was negligent, but only that the victim's injury was caused by the car.

The second element concerns the introduction of compulsory insurance which covers up to a certain amount of compensation payments. At the time the automobile compensation law was first enacted, the Japanese economy was still very poor. Thus, even though the law imposed strict liability, very few car owners who were so held liable could afford to pay the damages. The compulsory insurance deals with this problem and provides a minimum of relief to traffic accident victims. When a car is incidentally 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.

These two elements therefore indicate that the government and the public both desired an expansive compensation scheme in the area of traffic accidents. I should mention that initially, the maximum amount of compulsory insurance was equivalent to approximately $2300 (American dollars). That maximum has increased a hundred times, and it now stands at $230,000.

After the automobile compensation law was enacted, the court was kept very busy interpreting the new law. Despite — or perhaps, because of — the automobile compensation law, the number of traffic accidents continued to increase tremendously. The court continued to play the role of expanding the liability of the car owners. Through statutory interpretation, the court increased the amount of damages, and it developed a simple schedule of damages.

The court then was not systematic about assessing damages, but rather, depended on the judges' intuitive assessment. But through this process, the court nevertheless developed a schedule to determine what amount of damages should be allocated to pain and suffering; and it developed a system of calculation to assess the loss of earning ability, including that of children and housewives.

Throughout the "traffic war," the main concern of the legal scholars as well as the court was not to deter traffic accidents. We believed that deterrence should be left to the criminal law. The main interest, rather, was to separate moral liability from legal liability under the compensation scheme.

The main focus was thus to save the victims, the majority of whom were pedestrians rather than the affluent car owners. Accordingly, the court and the academics alike liberally construed the law to compensate

the victims. Compensation to save the victims implied fairness and justice of the system. Compensating the pedestrian also by and large meant providing income maintenance to the poor. Victim compensation was thus considered to constitute legal justice and fairness.

It was during this period that the conciliation settlement procedure became popular, because the amount of traffic litigation simply exceeded the court's capacity. As I mentioned above, the court developed a standardized form of damage assessment to cope with this situation. Except in a very difficult factual situation, the court suggested settlement applying the schedule of damages it developed. It was also during this period that the insurance companies started to settle out of court, following the development of the court decisions.

B. Medical Malpractice Law

In the 1960s, one of the most significant developments took place in the area of medical malpractice compensation. This is the second area of law I would like to discuss. During the 1960s, Japan developed a national health insurance scheme, and many people became eligible for it. As a result, many more people saw doctors, and thus many more people were injured by them.

Also during the same period, medical facilities were improved and expanded. Many small clinics became large hospitals. As a result, patients did not, or could not, have the same traditional trust relationship they used to enjoy with their doctors. It was said that when you go to a hospital, you had to wait for maybe three hours to see a doctor for three minutes. Obviously, the doctor-patient trust relationship deteriorated as a result.

Medical malpractice litigation consequently increased tremendously. As was the case in New Zealand, prior to the 1960s, no one dreamed of suing his or her own doctor. But in the 1960s, with the deteriorating doctor-patient relationship, it was not very unusual for a patient to first, distrust the doctor, and second, to decide to file a lawsuit against the doctor. In response to this increase in medical malpractice litigation, the court heightened the physician's duty of care.

As I believe Professors Leflar and Tejima will comment on medical malpractice in depth, my comment will be a short one. A Supreme Court decision of 1961[221] stated that a physician must act under the

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[221] Judgment of February 16, 1961, Supreme Court, 15 MINSHU 244.

highest duty of care, and must use the best available knowledge in medicine. Thus, the court imposed a very high duty of care upon the physicians. The physicians and the medical profession in general severely criticized this decision, stating that if they had to follow it, they simply cannot practice. Physicians noted that doing their best is not sufficient — that the court asked them to be a superman or a god. The duty thus imposed to save victims of medical malpractice seemed to exceed any ethical or moral standards set by the medical profession.

The legal scholars and lawyers, however, said that the legal standard and the medical standard need not be the same. The law primarily focused on compensation to save the victim; it did not focus upon the doctors. Although the medical profession may find the very high standard set by the court to be difficult to meet, the legal profession can justify it as an example of expanding the liability to save the victims.

C. Pollution Law

Another post-war legal development was in the area of pollution law, the third area I would now like to discuss. In the 1960s, Japan enjoyed a miraculous economic recovery and unprecedented growth. The material wealth and economic prosperity Japan enjoyed were accompanied by growing serious environmental problems with serious health consequences. It included water pollution by contaminants such as cadmium and mercury, resulting in serious mercury poisoning, as explained by Professor Matsumoto.

Air pollution caused by the petroleum industry caused asthma and bronchitis among inhabitants of industrial areas. The first case involving such pollution caused injury was filed in 1966, and several followed soon thereafter. At the beginning of the 1970s, five or six year after the first case was filed, the first district court decided in 1971[222] in favor of the victims of the *Itai-Itai* disease.

The major issues in such pollution litigation were that of causation, foreseeability, duty of care applicable to the industry (or duty as to the prevention of damages), and joint tort liability. Unfortunately, I do not have the time to explain all these issues in detail. I will therefore limit my discussion to the most serious of the problems, that of the proof of causation.

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[222] Judgment of June 30, 1971, Toyama District Court, 635 HANREI JIHŌ 21.

In order to prove causation, the victim had the extremely difficult problem of conclusively tracing the pollution back to the industry which discharged the contaminant. Moreover, with respect to asthma, which is a very common disorder, the victim had the added difficulty of attributing the cause of the disorder to the industrial activities. To overcome these problems, the epidemiological approach to proving causation was developed and applied. That meant statistical evidence was admitted by the court.

Because class actions were not, and are still not, recognized under the Japanese law, pollution litigation involved filing a mass action consisting of a large number of individual cases. The individual plaintiffs in such an action may number in the hundreds, and the suits were filed jointly against the defendant company.

Here again, the main interest of the lawyers, as well as the courts, was the full compensation of the victims. In this area as well, compensation implied fairness and justice for the poor. Only the poor resided in an industrial area in close proximity to a petroleum complex. Full compensation thus went hand in hand with the idea of fairness and justice.

With increasing industrialization of the country, lawyers and the victims of pollution developed an interest in the deterrent effect of litigation. The major industries were blamed for their irresponsibilities in not paying any serious attention to the health of the people they affected.

Neither did the government sufficiently regulate the activities of those offending industries. For example, it would sell land to the petroleum companies without warning those companies not to injure the residents in the vicinity. Therefore, in litigation, the lawyers would raise the issue of government irresponsibilities in failing to regulate the activities of the major industries, not to mention the irresponsibilities of those industries themselves. Thus, although the primary purpose of such litigation was to compensate the victims, the lawyers also set out to change the attitudes of the big businesses and the government. We refer to this type of litigation as the "policymaking litigation." I understand Professor Tanaka, who is one of the originators of the concept of policymaking litigation, will talk about this topic in detail in his presentation today.

Although these pollution cases legally were "private" lawsuits, in fact, their true function was to change the policies of the government and of the major industries. As a result of these cases, the legislature enacted the law for the compensation of pollution-related illnesses. This

law, enacted in 1974, was not an amendment to the existing rules of civil liabilities, but it provided for an independent administrative remedy. The pollution victims could thus recover damages in tort, in addition to obtaining administrative compensation under this law.

At the same time, the legislature in 1972 also amended the Clean Air Act and the Clean Water Act. The Acts as amended imposed strict liability for any injuries caused by air pollution or water pollution. The strict liability rule, however, did not apply at that time to most cases dealing with social problems. Since then, the strict liability rule has been applied only once in a pollution case. Again, I am afraid I do not have the time for further explanation.

These new laws were enacted in response to the policymaking litigation. Private litigation thus had a public impact. However, this is not to say that the legislature modified its own moral or ethical standards. Rather, it was reacting to the social outcries, only to demonstrate to the public that it was interested in responding to them. Consequently, any change in the law was limited in scope.

D. Products Liability

The fourth area I would like to discuss is products liability, an outgrowth of the changes in the Japanese industrial production system which occurred in the 1970s, namely, the advent of mass production and mass sale. I will focus particularly on cases that deal with the adverse effects of pharmaceutical products. Those cases, along with the cases dealing with food poisoning, presented one of the most serious problems of the 1970s.

One of the most famous pharmaceutical product liability litigation is the SMON cases,[223] where victims suffered nervous system damages as a result of taking the medicine. Six thousand victims seeking compensation filed suit in fifteen different district courts.

In most of these cases filed by the victims, the government was the defendant. Although the plaintiffs' ostensibly sought compensation, in fact, many claimed that they were not filing their suit against the government for want of money. Rather, they were using the legal forum to criticize the government policy regarding the regulation of the safety of the pharmaceutical products.

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[223] *See, e.g.*, Judgment of March 1, 1978, Kanazawa District Court, 879 HANREI JIHŌ 26; Judgment of August 3, 1978, Tokyo District Court, 899 HANREI JIHŌ 53; Judgment of November 14, 1978, Fukuoka District Court, 910 HANREI JIHŌ 36.

As was the case with pollution litigation, causation and foreseeability were again important legal issues. However, the most crucial legal issue was whether the government could be held liable for its own discretionary administrative decisions regarding the product safety regulations. The court in fact responded to the outcry of the people who sued the government by deciding for the people and against the government.

Throughout this period, both the people who sued the government and the academics alike raised their voices in union to change the government product safety regulations. As a result, the Pharmaceutical Act was changed in 1979 so as to require the pharmaceutical industry to submit more data regarding the safety of their products. Professor Tejima will further explain this area of the law.

The government also established in the same year an administrative compensation system to compensate the victims of the adverse effects of pharmaceutical products. This legal system of compensation operated independent of the civil tort law, and thus did not change the tort liability principles. Where the pharmaceutical industry was found not to be liable for the injury, this scheme required that the compensation to the victims be paid from a fund established with the Minister of Welfare. The scheme, though not identical, did not differ significantly from the previously established administrative compensation scheme for the pollution victims.

In most of the pharmaceutical product liability cases, the first stage of the litigation involved the determination of tort liability and the damages for injuries to the mass victims. As was the case in pollution litigation described above, the nature of the tort made establishing the requisite causation difficult. And as was the case in pollution litigation, the government conducted epidemiological studies to address the issue of causation. The data collected in those studies were used by the victims to establish tort liability on the part of the pharmaceutical industry.

In these pharmaceutical product liability cases which were decided for the victims, the significance of the epidemiological data regarding causation was apparent. Such detailed scientific data as was available in those cases, however, were not available to the victims of various other individual product liability cases. Apart from the proof of medical causation, many started to realize the necessity for a different liability principle, different rules to govern product liability — that is to say, strict liability.

Very recently, attention has been drawn to the EC Directive in the area of product liability. Because the objectives of the EC were on the

table since 1979, we were aware of the kind of legislation which would appear in the EC states. When the EC decided — or compromised — and issued the directive in 1985, we were nevertheless delighted to see that it decided to pass the national legislation for strict product liability. As George Priest noted, Japan needs to harmonize with the EC nations — that is, by passing a national legislation for strict product liability.

At about the same time, the United States businesses started to criticize the Japanese government and the industry for the mounting trade surplus. As a result, the Japanese government decided to partially open its market, and it announced its plans to deregulate the safety inspection of imported goods. The Japanese consumers are afraid that the mounting pressure from the United States makes such deregulation inevitable.

If the government does decide to deregulate the safety inspection of imported goods, it should provide for some legal remedies for injuries caused by imported goods. Victims of such injuries should be able to file a suit and obtain compensation for their injuries. Consumer groups requested that the government enact strict liability legislation to protect consumers.

Thus, there are three reasons why this area calls for a strict liability rule. First, we know how difficult it is to prove the causation element of negligence in this area. Second, there is the EC directive, and the need to harmonize with the EC nations. Third, the possible deregulation of the safety inspection of imported goods gives rise to a need for a liability rule that allows for ready compensation for injuries caused by imported goods. Consumer's and lawyer's groups have thus proposed various drafts of product liability legislation.

E. The Present Product Liability Proposal

A governmental advisory council, which I chair, is currently studying the possibility of product liability legislation. The work started nearly two years ago, and the council faces serious attacks from the industry. Many draft proposals provide for a shift in the burden of proof of causation and defect. Practically all deny the defense of development risk. These proposals thus differ considerably from the EC directive.

The industries are very afraid of having their liability expanded by product liability legislation. I think they are following the developments in products liability litigation in the United States, focusing on information which supports their position, while ignoring information which supports the position of the consumers. They thus show that industries

in the United States are going bankrupt because of such litigation. They are fearful of the possibility of both increased litigation and damages.

The industries also claim that technological innovations could be thwarted if their liability is expanded. They note, as did Professor Schwartz, that the definition of "defect" is in a practical sense inadequate. For example, a defect according to the EC directive can be known only after the fact. Therefore, they demand a more detailed definition of what constitutes a defect.

I, however, think that underlying this opposition is the desire of the Japanese industries to maintain their competitive edge against the industries of the EC nations. The industries in the United States are currently suffering the burden of product liability, and those of the EC nations are probably going to suffer a burden, if not the same. It therefore follows that with the enactment of product liability legislation in Japan, the Japanese industry too may suffer a greater burden. The question inevitably is, why follow the same path and suffer the same fate of the industries in other industrialized nations? Thus, the motivation which underlies the opposition is the fear of the future of the Japanese economy. Despite the opposition of the industry to the product liability legislation, I expect that Japan will have it soon in one form or another.

III. Conclusion

In conclusion, until today, the main thrust of the Japanese tort law and its compensation scheme was to expand the liability of the industry and the government. Their liability was expanded in fairness and justice to the poor — both the government and the industry owed that much to the public.

In some cases, tort litigation served a policy making function, to change the policy of the government and the major businesses. However, the people, and naturally the government and the industry, do not consider a comprehensive compensation scheme, such as the one adopted in New Zealand, to be feasible.

We have enacted compensation legislation in some areas. But they are sporadic, piecemeal legislation, formulated in reaction to the public needs of the time. As a result, they are frequently inconsistent in their scope of coverage and benefits. Thus, we do have compensation legislation, but from the perspective of a legal scholar, they are neither logical nor very understandable.

The public cries out for more compensation. Although it is probably true that the Japanese people do not like to litigate, that does not necessarily mean that they do not like to be compensated. Whether by legislation, negotiation and out-of-court settlement, or by litigation, the Japanese people are always concerned about receiving compensation.

Tort and Compensation in Japan: Medical Malpractice and Adverse Effects from Pharmaceuticals

Yutaka Tejima, Hiroshima University[224]

I shall present an overview of the disposition of Japanese medical malpractice cases involving the use and side-effects caused by the use of pharmaceutical drugs. Out of the many important types of injuries, I selected this topic because it involves medical malpractice as well as product liability problems, both of which are now the subject of great debate in all advanced industrial countries. Moreover, Japan has a special statute concerning drug side-effects, and has recently had a number of unfortunate cases involving AIDS infection, causally related to the use of blood product drugs. Though Japan has not experienced a "liability crisis," statistics kept by the secretariat of the Supreme Court[225] shows that the number of lawsuits for medical malpractice has been increasing steadily since the 1970s. Approximately 300 new cases are filed every year and about 1,600 cases are now at issue in various parts of the country in both appellate and district courts. Some Japanese doctors are very worried that in the near future there will be an explosion of malpractice claims such as that experienced in the United States in the 1970s and 1980s.

Under Japanese contract law and tort law, negligence is the predominant criteria in determining a doctor's liability, and the burden of proving all the elements of negligence is on the plaintiff.[226] Therefore, to make a physician legally responsible for injuries, victims of medical malpractice must prove breach of duty, which is determined

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[224] I am grateful to Robert B Leflar, Carl F. Goodman and Mark Shagena for their kind assistance and useful comment in drafting this article.

[225] MATERIALS IN RELATION TO MEDICAL MALPRACTICE CASES (Secretariat of Supreme Court (*Saikoh-Saibansho jimu-soukyoku*) ed., at 9, 1989) (written in Japanese).

[226] *See generally*, 7 DOING BUSINESS IN JAPAN (Z. Kitagawa, ed., 1990).

by a reasonable standard of care, natural causation between such breach of duty and injury, as well as damages. Unfortunately, factors such as the specialization of medicine and the "conspiracy of silence" among doctors often make it very hard for victims who are generally lay people unfamiliar with the field of medicine to prove these elements.

According to Japanese laws of evidence, expert testimony is not always necessary to determine a doctor's negligence. Nevertheless, once expert testimony is taken, such expert opinion often plays an important role in determining the result of a case. It is usually said that even for judges it is very hard to determine whether substandard practice has occurred or not. On top of all of this, there are a lot of disputed issues that must be solved not only in the medical field but also in litigation. For example, how should the judge determine the standard of care, the scope of information that must be presented to a patient, etc. Because of such factors, it takes a long time to arrive at a judgment in cases of medical malpractice compared with other tort cases. The average waiting period for a district court judgment in a medical malpractice case is between three and five years. It is not rare for it to take longer than 15 years to reach a final resolution.

In addition, because the percentage of successful malpractice cases is less than 30 percent, most potential plaintiffs are discouraged from pursuing their lawsuits. This percentage has not diminished significantly in recent times.

To be sure, many steps have been taken to reduce or resolve these problems:

1. Plaintiffs' attorneys keep in close contact with each other and work together to get and share information about important points helpful to win similar cases. The most famous example in Japan is the case of Retinopathy of Prematurity (ROP) which occurred during the 1970s and resulted in more than 300 cases being filed all over the country. More recently, the abuse of Dinoprostone has become an issue and more than 30 cases have already been filed. In addition, mass media also plays an important role in stimulating lawsuits. A recent example is the case of MRSA (methicillin-resistant staphylococcus aureus; cases of infection at hospitals).

2. The doctrine of informed consent, which states that the standard of disclosure of information is decided according to each patient's necessity and interest, not the doctor's viewpoint, has played an important role in expanding doctors' liability.

3. The loss of chance doctrine, the theory that especially in cancer cases the delay of the diagnosis or treatment deprives the patient of

the chance for a longer life, has been employed by plaintiffs with increasing frequency.

4. In cases of injection accidents, high standards for listening to a patient's medical history and condition have played a role in establishing liability.

5. Some special legislation has already been enacted in relation to medicine; i.e. the Preventive Vaccination Act[227] and the Drug Side-Effects Injuries Relief and Research Promotion Fund Act.[228]

Though these legislative acts and doctrinal or legal recommendations and actions are supposed to play a very important role, they have serious shortcomings in some respects and therefore have not yet had a sufficient effect. For example, concerning the informed consent doctrine, there is debate about how much information should be disclosed, as well as how to evaluate a doctor's breach of duty, that is, should the doctor be responsible only for pain and suffering,[229] or should compensation be given for all of the damage in relation to the breach. If we limit damages to the former, the amount of damage may become nominal. The reason that the informed consent doctrine has become very popular in Japan is not because of its possible use in general malpractice cases but because of its more narrow use in cases involving liver transplants from living donors. In reality, it is not yet popular for us to tell a cancer patient his/her true diagnosis.

On the loss of chance doctrine, high courts are apt not to admit that such damage is worth compensating.[230] Although this tendency seems to be changing, little by little, recently.[231]

The average amount awarded for damage in medical malpractice cases in Japan is about $162,000 ($1.00 = 140 Yen) and the ratio of damages awarded to the total amount of damages claimed by the

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[227] PREVENTIVE VACCINATION ACT (YŌBŌ SESSYŪ HŌ), Law No. 68 of 1948.

[228] DRUG SIDE-EFFECTS INJURIES RELIEF AND RESEARCH PROMOTION FUND ACT (IYAKUHIN HUKUSAYŌ HIGAIN KYUSAI KENKYŪ SINKŌ KIKIN HŌ), Law No. 55 of 1979.

[229] *See, e.g.*, Judgment of May 19, 1971, Tokyo District Court, 660 HANREI JIHŌ 62.

[230] *See, e.g.*, Judgment of March 28, 1977, Tokyo High Court, 355 HANREI TIMES 308; Judgment of March 15, 1983, Tokyo High Court, 1072 HANREI JIHŌ 105; Judgment of September 13, 1984, Tokyo High Court, 1133 HANREI JIHŌ 81.

[231] *See, e.g.*, Judgment of December 14, 1988, Kobe District Court, 1324 HANREI JIHŌ 91; Judgment of June 23, 1991, Tokyo District Court, 1427 HANREI JIHŌ 84. *See also* Judgment of December 26, 1986, Nagoya High Court, 1234 HANREI JIHŌ 5; Judgment of August 13, 1989, Sendai High Court, 745 HANREI TIMES 206.

plaintiff is only about 46 percent. Generally speaking, courts seem to be reluctant to expand the doctors' liability. Nevertheless, we have had a judgment as high as $2,230,000[232] and since the 1980s, judgments exceeding $715,000 have occurred frequently. Medical malpractice liability insurance began to be sold in Japan in 1963. In 1973 the Japan Medical Association contracted a new form of insurance which has a limit of $715,000 per year.

In contrast to the plaintiff, from the standpoint of doctors, once negligence is proved in the court, the defendant doctor may lose the reputation and the confidence that he managed to acquire throughout his life. In Japan, doctors must submit to the principle of free market competition. Under such circumstances, a bad reputation for professional skill or knowledge may be a big disadvantage. Furthermore, although I currently do not have any substantial evidence to indicate whether the practice of "defensive medicine" is occurring or not, a bad reputation may stimulate other lawsuits, which may lead to the undesirable situation of doctors practicing defensive medicine.

It is generally thought that the purpose of Japanese tort law is to compensate victims, not to deter accidents. But as a result of problems, as I mentioned above, many difficulties have prevented victims from receiving compensation, and the many lawsuits filed against doctors have not played any role in reducing the number of accidents or improving the standard of medical practice.

Nowadays there is no official system outside the professional circle to evaluate whether treatment given by doctors is beneficial or harmful to the patient. And even within the professional circle such evaluations are not vigorously done.

It is worth thinking about the most effective methods to regulate deterrence of substandard practice — for example, to make defensible medicine useful, I can imagine some formal agency which engages in collecting and disseminating information about the results of malpractice cases.

We have experienced serious drug side effect cases such as SMON,[233] a mass tort case involving patients who experienced serious ocular complications while taking a drug for stomach ailments. Our experience with drug side effect cases shows that a satisfactory settlement of the case for both sides is very difficult and, therefore, the settlement

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[232] Judgment of December 19, 1985, Oita District Court, 1180 HANREI JIHŌ 7.

[233] *See* KITAGAWA, *supra* note 226 at § 4.04[5].

periods can last more than 10 years. Understandably, this delay of settlement can cause social problems. The Drug Side-Effects Injuries Relief and Research Promotion Fund Act (hereinafter the Act) was enacted for the purpose of quickly aiding those who suffer injury such as disease, disablement, or death caused by the proper use of drugs (Art.1).

Here, "drug" means any of the substances which are listed in article 2 of the Pharmaceutical Affairs Laws or those substances which have been manufactured or imported under the approval of a licensed Japanese drug manufacturer based on article 12 and others.

The fund provides medical expenses, medical allowance, personal damage pension, pension for upbringing damaged children, bereaved family pensions, lump sum benefit for bereaved families, and expenses for funerals (Art. 28). To fund the system, the Act requires the manufacturers and importers of drugs to pay levies. The sum of such levies has diminished recently. If a claim is made to the Fund, the Fund makes an order to the committee to make a quick decision as to whether payment should be made.

The treatment of the Act excludes many specific types of drugs. For example, blood products and drugs for treatment of cancer are not included. The reason for such exclusion is that these drugs are considered dangerous in themselves. Therefore, the patient must assume some risk when he or she begins treatment.

From 1980 until 1991 the Act achieved the following results:[234] the total number of claims made was 2,645; the total number of claims approved was 1,878; the total number of claims rejected was 365; and the average payment was $16,048. The percentage of claims approved, therefore, was 71.3 percent of all claims filed.

The problems and shortcomings that have been pointed out in relation to the Act are as follows:

The amount of damage that can be awarded — or in other words, the limit of payment — is low compared to other tort payments. If victims want to get more money, they have to sue someone who is seen as liable.

The approval rate was not as high as originally expected. This shows the difficulty of demonstrating a natural causation between the drugs used and damage received. If extraordinary side effects

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[234] ANNUAL REPORT OF THE DRUG SIDE-EFFECTS INJURIES RELIEF AND RESEARCH PROMOTION FUND 1989, at 11 (written in Japanese).

that were never imagined occur, the Act does not cover such results. For example, in Rai-syndrome cases which result from the use of aspirin, the Act is not applicable.

From the patient's point of view, the Act excludes too many drugs. For example, the Act excludes anti-cancer drugs. However, recent progress in cancer treatment may change the situation — something that the Act saw as a matter of course.

The number of claims made is too small when compared with the estimated number of occurrences (the estimate is based on reports received from hospitals which monitor drug side effects). Some commentators say that the number of incidents believed to be occurring every year exceeds the number of claims filed by at least ten times.

The Act also states that if there is a potential defendant who might be responsible for the bad result, the fund will not give any relief (Art. 28). Such a condition may make victims hesitate to make claims to the Fund if they are also planning to sue the doctor, manufacturer, importer and so on. In addition, the Act doesn't have an immunity clause for doctors. Victims therefore have had a lot of trouble proving damages resulting from the use of these drugs since doctors are unwilling to cooperate with the committee in determining relief for these victims.

In addition, the fund doesn't disclose the name of the drugs at issue in order to protect the "privacy of the manufacturer." It may sound very strange, but similar cases often occur in many fields throughout Japan. For example, the Ministry of Health and Welfare has recently been gathering data on the survival rates of cancer patients from hospitals. But such data have not been disclosed in a manner acceptable to those in need of such treatment. According to the Ministry, the reason for non-disclosure is the protection of the privacy of hospitals.

Needless to say, if drugs are used properly, they can work well and cure diseases. But if they are not used properly, such misuse may lead to tragedy — development of a new disease, disablement, or death. As drugs are dangerous in themselves, it is necessary for doctors to compare the risks with the positive effects expected from the use of the drugs, and if the latter are estimated to be greater than the former, then the doctors may use such drugs. If doctors do not pay reasonable attention to the selection or use of drugs and if such negligence causes injury, then the doctors must be held liable to the victims of the injury.

The difference between product liability of drugs and medical malpractice for drug misuse is based on whether a doctor uses a

drug properly or not. This includes whether a doctor personally administers the drug, observes the patient carefully, informs the patient of the risk of the drug, and so forth.

When a drug is used properly but injury nonetheless occurs, then a problem of product liability is presented. On the contrary, if careless treatment results in injury, then a case of medical malpractice exists.

This distinction is clear, but in practice it isn't always clear how the incidents were caused and who should be blamed. Therefore, cases related to drug misuse have continued to be filed since the enactment of the Drug Side-Effects Injuries Relief and Research Promotion Fund Act.

From 1981 to 1991, the results of at least 44 cases were published. The percentage of patient success in these cases was 45.5 percent (20 out of 44) with an average settlement period of 10.5 years. The average compensation sum was $194,360. However, most of these cases happened before the Act was in force.

Only five cases were decided after the Act was in force. In these cases the ratio of plaintiff success was one to five (20%). Compensation was $171,000.

The data show that medical malpractice cases involving improper drug use have a high percentage of success compared with the general success rate in liability cases. Yet unexpectedly, after the enactment of the act, the percentage of success decreased.

The AIDS problem in Japan is now seen as a product liability case. AIDS is known to be transmitted through sexual intercourse or by the exchange of blood. The problem that every country in the world has confronted and is managing to cope with is the former. But in Japan the latter is a big problem because a high percentage of the infected people are hemophiliac patients. At the present time two such cases are under examination in the Tokyo and Osaka district courts.[235]

The biggest problem is the action taken by the Ministry of Health and Welfare, the manufacturer and the importer of blood products. The risk of polluted HIV infected blood being imported from the United States was known as early as 1983. It was also well known that Japan relied on the blood product materials supplied from the United States.

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[235] *See generally* 449 HOGAKU SEMINAR 46 (1992).

According to the plaintiff, though such information was known, the manufacturers and importers thought lightly of the risk and advertised the safety of the products. The Ministry of Health and Welfare also thought lightly of the risk and delayed the approval of foreign companies' heat treatment for blood products — which would have eliminated the AIDS risk — until October, 1985 in order to protect domestic industry and give it time to develop similar products. This delay of approval created a situation very different from former drug side-effect cases in Japan. Because of such a fatal delay of approval, 40 percent of all hemophiliacs in Japan were infected with the HIV virus through blood products. Many of those who were infected developed AIDS Related Complex (ARC) and AIDS and have died. In addition, many hemophiliacs who were lucky enough not to be infected with the virus were subjected to discrimination because they are looked upon in the same way as the infected people.

In 1989, the government decided to give some relief to the families of deceased hemophiliacs and those infected with the virus by applying the Act (the Drug Side-Effects Injuries Relief and Research Promotion Fund Act), even though the Act excludes blood product drugs. However, payment will only be given to those who have developed AIDS (the government has decided to change this requirement for payment effective April 1, 1993.) and the level of payment is far from satisfactory to the infected patients.

In October of 1989 patients filed claims against the manufacturer, importer, and nation, claiming $715,000 per patient. The defendants dispute their liability. I am afraid judgments will be given only after almost all of the victims are dead.

I would like to offer my point of view from the facts mentioned above:

The Japanese victim of medical malpractice is confronting many difficulties in getting relief.

It is sometimes argued that all of these problems will disappear once special statutes are enacted, such as those for drug-related injuries.

But as I mentioned above, this view is not correct and it often happens that special statutes do not work well. Nevertheless, a person who is able to satisfy the requirements of the Act is lucky compared to those who are injured through other sorts of accidents because he can get quick payment from the Fund or some other source. This situation, in turn, may give rise to another question, namely, "Is it fair to distinguish victims according to their cause of injury?"

Justice, Accidents and Compensation

Shigeaki Tanaka, Kyoto University

The summary I have distributed was prepared in Kyoto before this workshop began, and most of the topics I had intended to take up have already been discussed. However, it is difficult for me to rearrange my comments, and seen from a philosophical or jurisprudential point of view, it seems to me that the "justice" rationale in dealing with accidents has not been given due attention. So I'd like to stick to my original arrangement. I have just a slight acquaintance with tort and insurance law, so I would be glad if the Japanese participants would be kind enough to supplement or correct my comments later on.

Seen from my approach to the theory of justice and my view of the role of litigation, I believe that at least as far as present Japanese society is concerned, we cannot do away with tort litigation in order to realize the demands of justice, or in other words, to eliminate injustices in dealing with accidents; that is in spite of the fact that tort litigation has greater limits in terms of compensation and is less efficient in terms of the reduction of various kinds of accident costs, in comparison with other compensation systems such as social welfare scheme and insurance arrangements.

I would like to comment on the reasons and background why I think that this is so.

First, in order to clarify why and from what perspective I think the role of tort litigation is important, let me summarize my views on justice, law, and litigation.

Regarding justice, I take the stance of a moderate liberal, and believe that under present conditions conceptions of justice conflict with one another in dealing with socially important problems. The focus of the discussion concerning justice should therefore be organized around the so-called "negative" approach. This concentrates on the elimination of injustices, and involves procedural justice which aims at securing a fair process of consensus-formation and decision-making. The legal system also should be understood as an institu-

tionalization of the postulates of a negative approach and procedural justice. In my opinion, the legal system seems to become less and less effective as a mechanism for the coercive implementation of some aims backed by state power. Now, the main role of the legal system should be as the forum of negotiation and argumentation between the persons concerned on the problems concerned with right and duty. Therefore, the center of operation of the legal system should not be legislation and administrative regulation, but litigation, and the vitalization of litigation through the individual's initiative. This, I think, is essential for a free and fair society.

The primary function of litigation is to realize individualized corrective justice through the ex post resolution of concrete disputes. But in recent years, litigation has been utilized as an important instrument of social reform such as the realization of social justice, and the expectations placed on the policymaking function of litigation has steadily increased. In understanding the policymaking function of litigation, I'd like to emphasize not only the direct judicial law-making function (such as the recognition of new rights or the establishment of new precedents), but also the indirect impact that litigation has upon the whole process of policymaking outside the court. It should be noted that bringing an action, arguments presented in court, litigation that ends in an in- or out-of-court compromise, decisions in which plaintiff's claims are rejected, and decisions which are overruled by higher courts also have an indirect impact on public opinion, political movements, legislative and administrative bodies and so on.

In Japan, this type of policymaking litigation has been increasing since the late 1960s. A large amount of this type of litigation has been tort litigation, such as pollution cases, product liability cases, and medical malpractice cases. Recently, overlapping with these cases, actions for damages against the state or local governments have been increasing.

In the 1970s, as Professor Morishima has reported, in many cases victims of accidents could get a degree of relief through decisions or through compromise. It should also be noted that new statutory compensation schemes which supplement the traditional Civil Code tort system, such as the Compensation Act for Pollution-Related Health Injuries and the Act Concerning the Relief for Injury Caused by Side-Effects of Medicine have been established as a result of the indirect policymaking function of litigation.

However, in the 1980s, partly owing to the increase of claims for which it is inherently difficult to get a judicial remedy within the

traditional tort system, cases in which plaintiffs cannot get decisions that they expect have increased remarkably. And the courts have become less tolerant with plaintiffs who bring actions against the state or local governments. It has been said that on the whole, the trend has been for courts to retreat in policymaking cases. Again, legal responses to the demands for relief from victims of new types of accidents, including a proposal for a product liability bill were delayed, as Professor Morishima explained earlier.

These changes are closely related to changes in the political and economic conditions and in the public opinion concerning justice. That is, in Japan too, under the pressures created by constantly insufficient financing, neo-conservatives and neo-liberals increased their criticism of the so-called post-war consensus which had supported the ideals of the welfare state and social justice. The focus of the discussion of justice shifted from "who receives the redress" to "who pays for it." Or in other words, from ethics to economics.

Based upon these observations, let me make a few comments on what sort of role tort litigation should or could perform so that dealing with accidents would be fair and effective in current Japanese society.

First, we should not overlook the great difference in how the judicial systems of Japan and the United States operate. As Professor Matsumoto and Professor Morishima have pointed out, litigation in Japan requires time and money as in the U.S., but unlike the U.S., Japan is not suffering from a so-called "litigation explosion" yet. Rather, lawyers have begun to worry that the difficulty in obtaining access to the courts has a tendency to drive people away from the courts as a forum to resolve their disputes.

All the Japanese participants at this conference may agree that the compensation system in Japan would not have been improved if it were not for the vitalization of tort litigation through the initiative of accident victims. Of course it would be desirable and efficient if the victims could get sufficient compensation through voluntary compromise without resorting to the courts. Though doubts remain, a good example of this concept is automobile accident cases, as used by Professor Ramseyer in his book *Law and Economics: An Economic Analysis of Japanese Law*, where he uses auto cases to verify his hypothesis that the legal behavior of the Japanese is rational and draws the conclusion that the Japanese legal system operates efficiently. However, these automobile accident cases are the result of a fairly well organized insurance system, and are quite exceptional.

In many cases, victims have to settle for only a small amount because of the difficulty in obtaining access to the courts. Moreover, even in the case of automobile accidents, the fact is that without litigation, it has been very difficult to maximize recovery through out-of-court compromise or insurance.

Second, in terms of the reduction of injustices in dealing with accidents, when a man injured by a certain accident cannot accept it as his fate or misfortune, but feels it unjust and demands to be compensated for the loss caused by the accident for which he has no responsibility, bringing the case before the court would be an effective way to increase public attention to the demand and to dramatize this as a social and political problem. The problem is that in these claims, the demand for corrective justice is inseparably mixed with the notions of retributive justice, which is primarily the concern of criminal law and social justice, especially dealing with questions regarding the social responsibility of government or enterprise to the victims. As Professor Morishima pointed out, legal claims, that is, demands for compensation, are strongly supported by moral and political claims. This affects court decisions, I think, both in positive and negative ways. There could be cases in which it would be difficult to get a direct judicial remedy. But, even in these cases, by the above-mentioned indirect policymaking function of litigation, public opinion might be aroused, political movement might be livened up, and some response through legislation or administrative regulation to the demand to legalize the relief to victims may be taken.

The primary aim of a judicial remedy is the realization of individualized corrective justice. So, in order for the demand for the relief of victims to get judicial remedies, the defendant must be specified, and the defendant must have enough money to pay any damages ordered by the court. However, in hard cases of policymaking tort litigation, many accidents involve "structural injustice" or are mass disasters for which it is difficult to identify particular defendants who may be liable. Moreover, the amount of loss from these accidents is likely to be extremely large, and it may be impossible for a particular individual or enterprise to bear the loss alone.

One reason for the increase in the number of suits brought against the state or local governments is to overcome these difficulties. The problem is that in these actions, judges are forced to make complex and subtle judgments as to whether and how he/she should take into consideration such factors as social responsibility or financial conditions in their decisions on legal liability. Additionally, if the plaintiff

loses the case, the government tends to refer to the decision as a justification or excuse not to respond through new legislation or administrative regulation. Therefore the plaintiff who takes this legalistic strategy must be fully aware of the limitations of litigation. On the other hand, I also think it is not fair for the government to confuse legal liability with political or administrative responsibility. Government should do its best to respond to demands to relieve victims in its own way and by virtue of their own responsibility.

Third, in any case, the realization of compensatory justice through litigation has decisive and institutional limits. It is thus essential for the establishment of a fair and effective compensation system to incorporate schemes based on the social welfare principle and compulsory and voluntary insurance mechanisms, and to expand alternative dispute resolution procedures which provide easy access to it for accident victims.

The question thus is: in devising such a comprehensive compensation system, is there any role which can be performed only through tort litigation in addition to the above-mentioned roles?

First, it has been said that in order to realize litigation's goal of corrective justice, litigation must include the concept of morally blaming the conduct of the wrongdoer, so as to awaken individual responsibility, and to establish proper standards of conduct for individuals and enterprises. In Japan, this point has been emphasized by orthodox tort scholars. I basically agree with them. Although this classical function might be rather symbolic in reality, I believe that it is a kind of guardian of the internal morality of the legal system in a free and fair society. The legalization of social responsibility to cope with "structural injustice" in a way is indispensable for a fair society, but it would not be accepted widely and operate efficiently if it were not supported and framed by individual responsibility.

Next, as regarding the function of deterrence which has been said to be an indirect effect of sanctions through compensation, at least as far as tort litigation is concerned, the deterrence function is not emphasized to the extent that it once was, probably due to the increased implementation of liability insurance systems. Of course, this deterrence function is very important for the effective operation of any compensation system.

Concerning the specific deterrent effect on the wrongdoer, criminal punishment and administrative regulation would be more effective. But, as Professor Morishima emphasized, the tort system has its own deterrence function in certain fields. And as for the general deterrence

through the market that is emphasized by the law and economics approach, this function would be taken into consideration more adequately and effectively at the stage of devising the tort law and alternative systems themselves. I wonder whether this is a proper factor to be considered by judges in individual decisions.

Again, as regards the problem of the spreading of loss and distribution of risk allocation in society as a whole, it is needless to say that it would be impossible to cope with this problem only by tort law and tort litigation. As has been reported and discussed in this workshop, we have to pay attention to other alternative systems such as various kinds of social welfare and insurance schemes and examine how to combine them in a well-balanced way. However, I will stop here because I know full well that I cannot add anything new to what has been reported and discussed in this workshop. I will consider this problem further after I return to Kyoto.

I'd like to conclude my comments by saying that at least under present Japanese conditions, whatever compensation systems are proposed or established, tort litigation is indispensable as a core mechanism for sensing the new demands to relieve accident victims, for stimulating public discourse on the proper way to respond to these victims, and finally securing the fair and effective operation of a compensation system through individual initiative.

Personal Injury Compensation Systems in Japan: Values Advanced and Values Undermined

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National peculiarities notwithstanding, universal values underlie the world's tort regimes to a significant extent. Yesterday Professor Miller outlined a useful catalogue of values that tort law can be thought of as advancing.[237] Several of these values were ignored or slighted in the recent study on enterprise responsibility published by the American Law Institute.[238] Our Japanese colleagues' presentations have brought home the importance of tort law functions that were downplayed in the ALI study — in particular, retribution and public participation in policymaking. American scholars, with their accustomed focus on the compensation and deterrent functions of tort law, must not lose sight of these values that they may consider heterodox.

This paper explores the relative emphasis placed by the Japanese tort system on the various posited goals of personal injury law. The paper begins by stressing the importance to Japan of the retributive and public participation functions of tort law. It proceeds to focus on the extent to which Japanese law fulfills the goals of compensation and deterrence in the fields of medical malpractice and certain areas of products liability. The paper concludes that although transaction costs are relatively low in Japan, and the tort system operates fairly at least among those litigants who engage it, the goals of systematic compen-

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[237] *See* Richard S. Miller, *supra* beginning at p. 626.

[238] ALI REPORTERS' STUDY, *supra* note 2. Our own "reporter" on ALI proceedings, Professor Schwartz, is guilty of no such omission. *See* Gary T. Schwartz, *The Ethics and the Economics of Tort Liability Insurance*, 75 CORNELL L. REV. 313 (1990).

sation for injury and appropriate deterrence of injury-causing activity are incompletely met.

"Heterodox" Functions of Tort Law: Retribution and Public Participation

In my view, retribution (or, put another way, vengeance) is a legitimate function of the tort system as well as the criminal law system, both in Japan and in the United States. On this point, I will respectfully differ with Professor Tanaka.[239]

I doubt that any Japanese will ever forget the images of plaintiffs' groups demonstrating outside the headquarters of the various companies responsible for mercury pollution,[240] arsenic contamination of powdered milk,[241] and other toxic tragedies.[242] The bereaved, carrying black-edged portraits of the deceased, demanded formal apologies from the presidents of the companies involved. The extraction of a formal apology is, in some sense, a form of vengeance. The act inflicts humiliation. It is a process familiar to any observer of Japanese tort litigation.[243]

The American public, too, views the tort system as a means of inflicting peaceful retribution upon wrongdoers. The fact that punitive damages are a firmly established feature of American tort law[244] leaves the point beyond dispute, even without considering the literature on

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[239] *See* Shigeaki Tanaka, *supra* beginning at p. 736.

[240] Judgment of March 20, 1973, Kumamoto District Court, 696 HANREI JIHŌ 15 (translated in JULIAN GRESSER, KŌICHIRŌ FUJIKURA & AKIO MORISHIMA, ENVIRONMENTAL LAW IN JAPAN 106 (1981)); Judgment of June 14, 1977, Tokyo High Court, 853 HANREI JIHŌ 3; Judgment of the Supreme Court, First Petty Bench, Dec. 17, 1980, 984 HANREI JIHŌ 37.

[241] Judgment of the Supreme Court, Feb. 27, 1969, 547 HANREI JIHŌ 92; Judgment of Nov. 28, 1973, Tokushima District Court, 721 HANREI JIHŌ 7. *See generally* WAGAKUNI NO SEIZŌBUTSU SEKININ HŌ [JAPANESE PRODUCT LIABILITY LAW] (AKIO TAKEUCHI, ED.) 38-39 (1990).

[242] *See, e.g.*, Akio Morishima & Malcolm Smith, *Accident Compensation Schemes in Japan: A Window on the Operation of Law in a Society*, 20 U. BRITISH COLUMBIA L. REV. 491, 492-93 (1986); Michael Reich, *Public and Private Responses to a Chemical Disaster in Japan: The Case of Kanemi Yushō*, 15 LAW IN JAPAN 102 (1982).

[243] For vivid descriptions of this process, *see* FRANK UPHAM, LAW AND SOCIAL CHANGE IN POSTWAR JAPAN 37-53 (1987); MICHAEL REICH, TOXIC POLITICS: RESPONDING TO CHEMICAL DISASTERS 17-57 (1991); AKIO MISHIMA, BITTER SEA: THE HUMAN COST OF MINAMATA DISEASE 165-78 (R.L. GAGE & S.B. MURATA TRANS. 1992).

[244] *See, e.g.*, Pacific Mutual Life Ins. Co. v. Haslip, 111 S.Ct. 1032, 1041-43 (1991); *id.* at 1047-48 (Scalia, J., concurring).

jurors' motivations in straight compensatory damage actions. I suppose that even the economists, champions of logical calculation that they are, could conceivably recognize this psychological reality by inserting a "vengeance factor" into their utility analyses. I have never detected any tendency among the practitioners of that noble science, however, to allow a retributive component to creep into their equations.

Our Japanese colleagues have also stressed the importance to their tort system of its public participation function. That function takes on added significance because political channels are less responsive to the public in Japan than in the United States.

In a system where hierarchy is the social norm, where administrative control by an elite class is a given, and where meaningful public input into the policymaking process is usually limited to a few select academics such as Professor Morishima who serve on advisory committees and (to some extent) to the mass media, ordinary citizens are essentially shut out.

The phenomenon described by Professor Matsumoto[245] 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. There are simply few other avenues for participation in the policymaking process.

Retribution and public participation are considered legitimate goals of the Japanese tort system. The extent to which these goals are actually realized, however, is problematic. The pollution cases are examples of successful fulfillment of some of those goals.[246] The subsequent judicial retreat from the activist stance of the pollution cases is of considerable significance: as Professor Tanaka pointed out,[247] defeat in political litigation entails the real political risk that the government can use the judicial outcome as justification for not responding to social needs.

Compensation and Deterrence Functions of Japanese Tort Law: Medical Malpractice

What of the other functions of the civil law system that Western scholars are more accustomed to debating, such as compensation and deterrence?

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[245] *See* Tsuneo Matsumoto, *supra* beginning at p. 577.

[246] *See, e.g.*, Upham, *supra* note 243 at 28-77.

[247] *See* Shigeaki Tanaka, *supra* note 736.

Consider first medical malpractice. As Professors Morishima and Tejima pointed out,[248] on the whole medical malpractice law in Japan is rather similar to that in the United States, at least as a matter of judicial rhetoric and doctrine.[249] Some case law suggests that the standard of care applied to doctors may be even stricter in Japan.[250]

In my view, subtle doctrinal formulations explain very little for comparative purposes. Allow me to draw your attention instead to some figures.

Professor Tejima mentioned the steady increase of medical malpractice cases in Japan.[251] In 1987 the number of cases filed in court rose to 335, an increase of not quite 40 percent from ten years earlier.[252] In addition, to assess the total number of medical claims for comparative purposes, one should add perhaps half of the 250 claims made to the extrajudicial arbitration system sponsored by the Japan Medical Association (JMA).[253] One should also count some portion — two-thirds

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[248] *See* Akio Morishima, *supra* beginning at p. 717; Yutaka Tejima, *supra* beginning at p. 728.

[249] *See, e.g.*, Ikufumi Niimi and Itsuko Matsuura, *Iryō Jiko to Minji Sekinin* [*Medical Injury and Civil Liability*], in ICHIRŌ KATŌ & AKIO MORISHIMA (EDS.), IRYŌ TO JINKEN [MEDICAL CARE AND HUMAN RIGHTS] 366-404 (1984).

[250] In a 1961 case, the Supreme Court stated that the "highest duty of care [saizen no chūi gimu]" necessary for avoiding danger is required of physicians, as professionals charged with managing human life and health. Judgment of Feb. 16, 1961, Supreme Court, 15(2) *Saikōsai Minji Hanreishū* 244. Later cases have tended to phrase the standard of care in a less exacting way, for example, as that generally prevailing in the practice of clinical medicine at the time of the incident in question. *See, e.g.*, Judgment of March 30, 1982, Supreme Court, 1039 HANREI JIHŌ 66.

[251] *See* Yutaka Tejima, *supra* beginning at p. 728.

[252] SUPREME COURT OF JAPAN, IRYŌ KAGO KANKEI MINJI SOSHŌ JIKEN SHITSUMU SHIRYŌ [MATERIALS ON CIVIL ACTIONS RELATING TO MEDICAL MALPRACTICE] 9 (1989) (TABLE 3).

The increase can be expected to continue now that the plaintiffs' malpractice bar has trained a small cadre of specialists and has set up an organization for the exchange of information and techniques. The Medical Accident Information Center [Iryō Jiko Jōhō Sentaa], formally launched in 1990, functions as a clearinghouse for plaintiffs' attorneys in malpractice cases. *See* Yoshio Katō, *Sentaa Hassoku Ichi-nen o Furikaette* [*Looking Back over the Center's First Year*], SENTAA NYŪSU No. 46, Jan. 1, 1992, at 12. Other organizations of plaintiffs' malpractice lawyers have also come into being.

[253] Ichirō Katō, Tatsuo Kuroyanagi et al., *Fuhō Kōi Seido no Higaisha Kyūsai* [*Compensation of the Injured under the Tort Law System*], 926 JURISUTO 17, 23 (1989), *citing* KŌICHI HABA, IRYŌ JIKO NO BAISHŌ IGAKU-TEKI KENKYŪ [MEDICAL RESEARCH ON COMPENSATION FOR MEDICAL ACCIDENTS] (2463 cases submitted from 1974 to 1983,

would be a generous approximation — of the 220 claims per year that Professor Tejima mentioned from the drug side effect compensation act,[254] many of which, if brought in the United States, would probably involve a malpractice claim. That gives us a rough estimate of slightly more than 600 malpractice-related claims per year in Japan.[255]

Comparisons among the per capita medical malpractice case filing rate in Japan and the rates in the United States, Canada and the United Kingdom are instructive. In the United States there are perhaps thirty claims per 100,000 people per year.[256] Rates in the United Kingdom are said to vary between six and twenty claims per 100,000 people per year, somewhat less than the Canadian rate.[257]

In Japan, a nation of 120 million people, there appear to be roughly 0.5 claims per 100,000 people per year. So the increase in medical malpractice litigation in Japan has brought the rate up close to two percent of the United States per capita claim rate.[258] Perhaps if it continues to skyrocket, it may soon hit one-tenth of the British rate.

The best illustration of the differences among societies on this score is to compare medical malpractice insurance premiums. In the United States, premiums are differentiated according to geography and medical

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averaging 246 per year).

According to an estimate given the author by Japan Medical Association personnel, the number of claims submitted each year for arbitration has not changed significantly over the past decade. Almost half of these cases are also filed in court, as Japanese civil procedure allows.

[254] Iyakuhin Fukusayō Higai Kyū sai Kenkyū Shinkō Kikin Hō [Drug Side-Effect Injury Relief and Research Promotion Fund Law], Law No. 55 of 1979.

Professor Tejima indicated there were 2,645 claims filed with the fund during the 12 years from 1980-1991, an average of 220 claims per year. *See* Yutaka Tejima, *supra* beginning at p. 728. Most of these claims would fall primarily in the products liability field if brought in the United States, but malpractice claims against the prescribing physician would also be brought in many cases.

[255] This figure does not include cases in which the patient receives a compensatory sum in settlement before any formal claim is filed.

[256] *See, e.g.*, Patricia Danzon, *The "Crisis" in Medical Malpractice: A Comparison of Trends in the United States, Canada, the United Kingdom and Australia*, *supra* note 30. *See also* Patricia Danzon, *The Frequency and Severity of Medical Malpractice Claims: New Evidence*, *supra* note 30.

[257] C. Ham, R. Dingwall, P. Fenn & D. Harris, Medical Negligence: Compensation and Accountability (1988), cited in Patricia Danzon, *The "Crisis" in Medical Malpractice: A Comparison of Trends in the United States, Canada, the United Kingdom and Australia*, *supra* note 30 at 48, 50 n.23 (1990).

[258] These comparisons exclude cases settled before any formal claim is filed.

specialization. In 1986, premiums ranged from roughly $1,900 per year in Arkansas for general practitioners doing only minor surgery,[259] to $115,000 per year for neurological surgeons in the Miami area.[260]

In Japan, by contrast, medical malpractice insurance premiums are standardized; there is no differentiation either by geography or by specialty. In 1988, a physician typically paid a total of about ¥60,000 per year,[261] which was less than US $500. Hospitals, which are defined as having 20 or more beds, typically paid ¥8,310 (US $60) per bed per year for malpractice insurance.[262]

As the Harvard Medical Practice Study has demonstrated, the vast majority of Americans injured by medical error receive no compensation for their injuries.[263] There is no good reason to believe that the extent of actual medical error is significantly greater or significantly less in Japan than in the United States, although statistics to support that assertion are difficult to obtain.

There are fewer surgeries in Japan for equivalent conditions,[264] by and large, so there is probably less unnecessary surgery. On the other

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[259] GENERAL ACCOUNTING OFFICE, MEDICAL MALPRACTICE: SIX STATE CASE STUDIES SHOW CLAIMS AND INSURANCE COSTS STILL RISE DESPITE REFORMS 16 (1986) (Table 2.2).

[260] David Nye, Donald Gifford, Bernard Webb & Marvin Dewar, *The Causes of the Medical Malpractice Crisis: An Analysis of Claims Data and Insurance Company Finances*, 76 GEO. L.J. 1495, 1502 (1988) (Table 2).

[261] Hospital-affiliated physicians paid 58,610 per year in liability insurance premiums in 1988 to buy ¥100,000,000 (US $700,000+) of coverage per incident. Yasuda Fire & Marine Ins. Co., Kinmu-i Baishō Sekinin Hoken no Go-annai [Guide to Salaried Physicians' Liability Insurance] 4 (1988). Individual practitioners who were not regular members of the Japan Medical Association could buy equivalent coverage for 60,520. YASUDA FIRE & MARINE INS. CO., ISHI BAISHŌ SEKININ HOKEN NO GO-ANNAI [GUIDE TO PHYSICIANS' LIABILITY INSURANCE] 6 (1988). The JMA provided its members with equivalent coverage at still lower rates.

[262] YASUDA FIRE & MARINE INS. CO., ISHI BAISHŌ SEKININ HOKEN NO GO-ANNAI [GUIDE TO PHYSICIANS' LIABILITY INSURANCE] 6 (1988).

[263] A. Russell Localio et al., *Relation Between Malpractice Claims and Adverse Events Due to Negligence*, 325 NEW ENGLAND J. MED. 245 (1991). *See also* Troyen A. Brennan et al., *Incidence of Adverse Events and Negligence in Hospitalized Patients*, 324 NEW ENGLAND J. MED. 370 (1991); Lucian L. Leape et al. *The Nature of Adverse Events in Hospitalized Patients*, 324 NEW ENGLAND J. MED. 377 (1991).

[264] The overall number of surgical operations per 1,000 population was 22.0 in Japan in 1984, and 91.0 in the United States in 1986. Naoki Ikegami, *Japanese Health Care: Low Cost Through Regulated Fees*, 10(3) HEALTH AFFAIRS 87, 99 (1991). In 1980, American surgeons did six times as many hysterectomies per capita, and sixty times

hand, there are more unnecessary drug prescriptions in Japan than the United States, largely because Japanese private physicians and hospitals both derive a great deal of their income from the prescription and overprescription of drugs.[265]

Moreover, until very recently Japan has not required that patients be informed of the fact that they were participating in drug trials.[266] In 1990, at last the Ministry of Health and Welfare instituted such a requirement.[267] That is to say, the rule is on the books now; the extent to which it is being followed is unclear.[268] For present purposes, the point is that what would be considered widespread violations of patients' rights in the United States have long gone unnoticed (and unlitigated) in Japan.

To summarize, only a small proportion of patients injured by medical malpractice is ever compensated in the United States. But that proportion is likely far smaller in Japan.

Some downplay the significance of this problem. After all, Japan has universal health care insurance. People who are injured by medical malpractice have their iatrogenic injuries competently treated at reasonable cost. That response ignores the fact that people who die from malpractice do not have their injuries competently treated. Moreover, to rely on the social welfare net as virtually the sole means of redressing medical malpractice injuries is to ignore the issues of compensating wage loss and pain and suffering.

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as many coronary artery bypass surgeries per capita, as Japanese physicians performed. However, Japanese physicians performed almost twice as many appendectomies. Klim McPherson, *International Differences in Medical Care Practices*, in HEALTH CARE SYSTEMS IN TRANSITION: THE SEARCH FOR EFFICIENCY, at 22, Table 3 (OECD Social Policy Studies, No. 7, 1990).

[265] *See, e.g.*, Ikegami, *supra* note 264, at 90.

[266] In this respect Japanese patients were in the same unhappy position as New Zealanders. *See* Margaret A. Vennell, *supra* beginning at p. 568.

[267] MINISTRY OF HEALTH & WELFARE, PHARMACEUTICAL AFFAIRS BUREAU NOTIFICATION NO. 874 (OCT. 2, 1989), *reprinted in English in* DRUG REGISTRATION REQUIREMENTS IN JAPAN 203-212 (YAKUJI NIPPŌ, 4TH ED. 1991). These "Good Clinical Practice" (GCP) rules became effective on October 1, 1990.

[268] The Ministry of Health and Welfare has recently begun a system of record inspections at hospitals conducting clinical drug trials, in part to determine the extent to which informed consent is obtained from patients in accordance with the new regulations. The survey will not be completed until 1993 at the earliest. *Shinyaku Rinshō Shiken ni Kensa Seido o Dōnyū* [*Inspection System for Clinical Trials of New Drugs Introduced*], ASAHI SHIMBUN, March 15, 1992.

Perhaps the picture in Japan is not quite so bleak as I have painted it. An anecdotal, but perhaps representative, example of the kind of compensation that never gets into the official statistics is the story I heard from a colleague of the physician whose misdiagnosis inconvenienced a certain patient but caused no lasting damage. The physician in question went to the patient's house, made a sincere apology and presented as a token of that sincerity an envelope containing ¥50,000 (then about US $400).

That act is unthinkable in the United States. Imagine the liability consequences! But it is probably not atypical in Japan. There exists outside our purview an informal compensation system that also may have the effect of satisfying, to some extent, the retributional values of the tort system. Nevertheless, it is unlikely that this informal system compensates more than a small minority of patients harmed by malpractice.

If tort law is not satisfactorily serving even a compensatory function in the area of medical malpractice, then one might conclude *a fortiori* that it could not possibly have any deterrent effect. Certainly there is no significant financial deterrent imposed by the level of medical malpractice insurance premiums prevalent in Japan.

This line of reasoning is not necessarily persuasive, though. As Professor Tejima suggested, perhaps physicians in Japan place an extraordinarily high reputational value on not being sued.[269] The mere publication of a report of a malpractice action can have grave implications for a community physician's standing in the competition for patients. In Japanese medical education, too, a common professorial admonition is that if the student persists in whatever diagnostic or treatment error is under discussion, the student will likely wind up in court.

We are all familiar with the phenomenon of overvaluing a tiny risk of catastrophic harm. In that respect, perhaps Japanese physicians are to malpractice risks what American consumers were to Alar-treated apples.[270]

Moreover, reputational losses are not covered by liability insurance benefits. They fall directly on the physician. So to some extent, there is a sentinel effect derived simply from the existence of a medical

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[269] *See* Yutaka Tejima, *supra* beginning at p. 728.

[270] *See, e.g.*, John Atcheson, *The Department of Risk Reduction or Risky Business*, 21 ENVTL. L. 1375, 1394 (1991).

malpractice system, whether the system is functioning or not. A perception of danger, whatever the reality, can be a powerful motivator.

Central to medical quality control, however, is accountability. I will follow up on one of Professor Tejima's points[271] (perhaps at the risk of slight exaggeration) by stating boldly that formal accountability is entirely lacking in Japanese medical practice.[272]

There is, for example, no system of specialization exams. The physician declares himself (or, rarely, herself) a specialist in a particular area, starts practicing in that area and simply continues. There are no requirements for continuing medical education.[273]

Systematic risk evaluation programs and outcome-based clinical studies of treatment effectiveness are quite rare in Japan. Risk management systems and risk management specialists, now common in American hospitals, are virtually unknown in the Japanese setting.

Utilization review is virtually impossible; usable data are not even kept in any systematic fashion. Insurance claim records are jealously guarded. A study along the lines of the Harvard Medical Practice Study would be scarcely imaginable in Japan.

Peer review in an American sense is entirely foreign to Japan. The hierarchical structure of Japanese medicine requires that one not subject the members of one's own group to outside evaluation or criticism.[274] Such problems are dealt with internally. Certainly it is conceivable that a physician of questionable competence might be shuffled out of neurosurgery into general practice. But there is no institutional equivalent, for example, of American hospitals' review committees that sometimes exercise the power of suspension or revocation of hospital privileges. In fact, more than one-third of Japanese physicians practice on their own, owning their own hospitals and clinics, without admitting privileges to large hospitals.[275] These physicians practice entirely outside any accountability structure.

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[271] *See* Yutaka Tejima, *supra* beginning at p. 728.

[272] *See, e.g.*, John K. Iglehart, *Japan's Medical Care System: Part II*, 319 NEW ENGLAND J. MED. 1166, 1167 (1988) ("There are no formal mechanisms for reviewing the quality of medical care in any setting").

[273] Naoki Ikegami, *Japanese Health Care: Low Cost Through Regulated Fees*, 10(3) HEALTH AFFAIRS 87, 103-104 (1991); MARGARET POWELL & MASAHIRA ANESAKI, HEALTH CARE IN JAPAN 214 (1990).

[274] *See, e.g.*, Naoki Ikegami, *Best Medical Practice: The Case of Japan*, 4 INT'L J. HEALTH PLANNING & MGMT. 181, 191 (1989).

[275] Iglehart, *supra* note 272 at 1170.

Not least important, the Japan Medical Association disciplinary system shares with its American counterparts the quality of laxity in searching out quality control problems. The list of difficulties could go on. These facts simply illustrate that however intractable the problem of preventing medical injury by law-related means may be in the United States, it is a far more intractable problem in Japan.

Compensation and Deterrence Functions: Products Liability

A noteworthy difference between American and Japanese products liability litigation is the almost total absence in Japan of two categories of cases that occupy a large proportion of American courts' civil dockets: asbestos cases, and design and manufacturing defect cases against automobile manufacturers.

Asbestos claimants, in Japan as in the United States, may seek redress either through civil litigation or through the workers' compensation system. Regarding civil litigation, Japanese courts have seen only a handful of lawsuits, consolidating approximately 40 plaintiffs' claims.[276]

Available statistics on workers' compensation claims arising from asbestos exposure are fragmentary. Statistics for the 20-year period 1960-1979 for Osaka Prefecture, where much of the Japanese asbestos-producing and -processing industry has been concentrated, show a total of 116 asbestosis cases authorized for workers' compensation due to permanent disability.[277] As for lung cancer and mesothelioma, from 1981 through 1987 the Labor Ministry recognized a nationwide total

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[276] An action by two plaintiffs against Nihon Asbestos Co. in Tokyo District Court in 1980 resulted in a substantial settlement (by the standards of the day) of 52 million and 28 million (then US $240,000 and $130,000) in compensation for the plaintiffs' deaths. SHINGO NAKAGIRI (ED.), KANKYŌ O MAMORU; JŌHŌ O TSUKAMU [PROTECTING THE ENVIRONMENT; OBTAINING INFORMATION] 73-75 (TOKYO: DAI-ICHI SHORIN 1990). The first judgment in an asbestos case was not handed down until 1986, when 20 plaintiffs won compensation from Heiwa Sekimen and its parent Asahi Sekimen. Judgment of June 27, 1986, Nagano District Court, 1198 HANREI JIHŌ 3. Eight more plaintiffs filed suit in 1988 against Sumitomo Heavy Industries in 1988. MAINICHI DAILY NEWS, July 15, 1988. That proceeding is still ongoing. A few scattered cases in addition to these have resulted in settlements for injured plaintiffs.

[277] K. Morinaga et al., *Mortality and Survival of Workers Receiving Compensation for Asbestos in Osaka, Japan*, 2 PROCEEDINGS OF VITH INTERNATIONAL PNEUMOCONIOSIS CONFERENCE 1983 768 (ILO 1984).

of 56 cases caused by asbestos exposure.[278] Although in both data sets the numbers rise gradually over time, one can nevertheless draw the firm conclusion that in comparison with the United States experience, the absolute number of asbestos-related cases and the total amount of compensation are extremely small.

Perhaps the disparity between the volume of asbestos cases in the United States and Japan could be explained by differences between the two countries in asbestos consumption over time. If Japan was using far smaller quantities of asbestos in earlier years, then taking account of the latency periods for asbestos-related diseases, the consequent disparity in the extent of human asbestos exposure could explain the differences in subsequent claim frequencies.

To compare Japan's asbestos consumption with that of the United States, one may use Japanese asbestos import figures as a proxy for consumption figures, because Japan produces very little asbestos domestically. In the United States, asbestos consumption peaked from about 1950 to the early 1970s and then declined precipitously. In Japan asbestos imports peaked shortly after 1970 and then leveled off. In 1989 Japanese asbestos imports were almost triple United States usage. In the past few years imports have started to decline.[279]

It may therefore be the case that much of the difference in claims experience between the two countries is due to the latency factor, and that the cases simply have not started pouring in yet in Japan.[280] But

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[278] Personal communication from Mr. Isao Koga, Labor Ministry, Labor Standards Bureau, Compensation Division, May 29, 1989.

Asbestos-related cancer compensation cases are still rare enough to be considered newsworthy. *See, e.g.*, *Family to Receive Funds for Asbestos-Tied Death*, JAPAN TIMES, April 26, 1992.

[279] KANAGAWA LABOR OCCUPATIONAL HEALTH CENTER, ASUBESUTO TAISAKU O DŌ SURU KA [ASBESTOS COUNTERMEASURES: WHAT IS TO BE DONE?] 23, 64 (TOKYO: NIHON HYŌRONSHA 1988) (Charts II-2 & VI-1).

[280] Stricter government safety regulation cannot explain the small number of damage claims in Japan. United States regulatory agencies took an earlier and more stringent stance against asbestos exposure than did their Japanese counterparts. For example, the Occupational Safety and Health Administration acted in 1971 to regulate the ambient level of asbestos fibers in the workplace. Standard for Exposure to Asbestos Dust, 36 Fed. Reg. 23,207 (1971), codified at 29 C.F.R. § 1910.93a (1971). The Japanese Labor Ministry did not issue regulatory measures until 1976. Ministry of Labor Standard No. 408 (1976). The occupational exposure limit for chrysolite, the variety of asbestos most commonly imported into Japan, is 2.0 fibers per cubic centimeter in Japan, ten times higher than the 0.2f/cm3 standard set by OSHA

with the very high male smoking rates in Japan[281] and the synergistic effect between tobacco consumption and asbestos consumption in disease causation,[282] it is likely that the number of Japanese asbestos victims will dramatically increase over time, together with the amount of asbestos litigation.

Regarding automobile defects, there is virtually no litigation in Japan against automobile manufacturers.[283] Absence of defects is not the explanation; even the Japanese automakers have not yet attained a state of perfection. The National Highway Traffic Safety Administration has reported numerous recent recalls and defects in Japanese cars sold in the United States.[284]

Professor Matsumoto's presentation provided a revealing explanation.[285] The traffic accident compensation system covers injuries that might have been caused by automobile defects. A vehicle owner, to escape liability for damages that he or she has caused, must prove not only lack of fault on the owner's part but also absence of defect in the vehicle.[286] So the vehicle owner is legally responsible for injuries to others that are caused by an automobile defect, jointly with the automobile manufacturer.

The injured party can recover the standardized damage amount from the vehicle owner's insurance company. All drivers carry compulsory

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regulations. *Compare* ASUBESUTO TAISAKU, *supra* note 279, at 75, with 29 C.F.R. § 1910.1001(c)(1) (1991). In any case, neither the American nor the Japanese governments were effectively regulating asbestos exposures during the earlier years, from which exposures recent claims arose.

[281] In 1966, 84% of Japanese adult males were smokers. As of 1989, this figure had declined to 61% — still more than double the United States rate. Naoki Ikegami, *Japanese Health Care: Low Cost Through Regulated Fees*, 10(3) HEALTH AFFAIRS 87, 94 (1991).

[282] *See, e.g.*, Occupational Exposure to Asbestos, Tremolite, Anthophyllite, and Actinolite, 51 Fed. Reg. 22,612, 22,625 (1986) (Hammond and Selikoff studies).

[283] *See, e.g.*, Gary T. Schwartz, *Product Liability and Medical Malpractice in Comparative Context*, in THE LIABILITY MAZE: THE IMPACT OF LIABILITY LAW ON SAFETY AND INNOVATION 51 (Peter W. Huber & Robert E. Litan eds. 1991).

[284] *See, e.g.*, NATIONAL HIGHWAY TRAFFIC SAFETY ADMINISTRATION, SAFETY RELATED RECALL CAMPAIGNS FOR MOTOR VEHICLES AND MOTOR VEHICLE EQUIPMENT, INCLUDING TIRES 27-48 (1990) (recalls in 1990 of 1989-90 Isuzu Truck (2), 1986-87 Mazda 626, 1990 Mitsubishi Eclipse (2), 1990 Mitsubishi Precis, 1987-90 Nissan Pathfinder, 1986-88 Nissan Stanza, 1983-90 Nissan Truck, 1984 Toyota Camry and Corolla, and 1990 Toyota Celica).

[285] *See* Tsuneo Matsumoto, *supra* beginning at p. 577.

[286] Morishima & Smith, *supra* note 242 at 506.

insurance, and about 60 percent also carry optional insurance.[287] Therefore, seldom does the injured party have a strong incentive to take on the enormous burden of litigating a defect case against Toyota or Nissan.

Transaction Cost Reduction and Fairness

Other values that the Japanese civil code system treasures are transaction cost reduction and fairness, in the sense of equivalent treatment of similarly situated injured parties.

Concerning transaction costs, Professor Priest suggested that in the United States high litigation rates derive in part from the existence of the jury system.[288] Outcomes are unpredictable, so plaintiffs' and defendants' attorneys' estimates of likely outcomes tend to vary widely. As a result, settlements are often difficult to reach.

Actually, there are two components to that unpredictability. One is the probability of winning, a form of unpredictability that may or may not relate to the presence of lay jurors as fact finders. The other factor is the amount of damage, a form of unpredictability that probably is connected to the jury system.

In Japan, one of those sources of unpredictability is largely removed because of the standardized damage guidelines based on the traffic accident schedule that Professor Morishima has described.[289] Where liability of the defendant is probable, attorneys for each side know precisely how much the case is worth. Litigation is unnecessary.

Insurance companies have theoretical incentives to litigate nevertheless. One such incentive is to delay payment of benefits in order to obtain the use of the money not yet paid. Also, as Professors Ramseyer and Nakazato have pointed out, defendants have somewhat cheaper litigation costs than plaintiffs.[290] Plaintiffs have to buy legal services at what Professor Matsumoto has characterized as cartelized attorney's fee schedule rates.[291] Insurance companies and manufacturers, by con-

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[287] Takao Tanase, *The Management of Disputes: Automobile Accident Compensation in Japan*, 24 LAW & SOCIETY REV. 651, 670 (1990).

[288] *See* George L. Priest, *supra* beginning at p. 544.

[289] Morishima & Smith, *supra* note 242 at 509. *See also* Tanase, *supra* note 287, at 672-73; NAOSHI TAKASAKI, JIDŌSHA JIKO NO SEKININ TO BAISHŌ [LIABILITY AND COMPENSATION IN AUTOMOBILE ACCIDENTS] (2d ed. 1979).

[290] J. Mark Ramseyer & Minoru Nakazato, *The Rational Litigant: Settlement Amounts and Verdict Rates in Japan*, 18 J. LEGAL STUDIES 263, 274-76 (1989).

[291] *See* Tsuneo Matsumoto, *supra* beginning at p. 577.

trast, can obtain cut-rate legal services from the large corps of non-attorney legal specialists trained in law at the undergraduate level and employed by the company. This cost imbalance may also give defendants an incentive to litigate, or at least to threaten to litigate. Whether these theoretical incentives actually affect defendants' and insurers' behavior, increasing their tendency to litigate and to delay, is a question resolvable only by empirical evidence.

Concerning the goal of fairness, the standardized damage guidelines characteristic of much of Japanese tort litigation promote fairness among similarly situated litigants. However, as Professor Morishima pointed out, there is significant variation from one compensation scheme to the next.[292]

The arguments here are familiar from the workers' compensation arena. Standardized damages are appealing in curtailing the crap-shoot aspect of litigation. But such systems are also characterized by undercutting of the deterrence goal. Liability is easily calculable by a manufacturer. It becomes just another cost of doing business. In systems such as Japan's, in which there is a paucity of litigation and insurers do not adopt responsive premium rating policies, the deterrent function of tort law is undermined, and the larger part of the cost of injuries is externalized to the injured public.

Evaluating the Japanese Tort System as a Whole

Finally, I would like to address Ramseyer's and Nakazato's interesting and provocative article, "The Rational Litigant: Settlement Amounts and Verdict Rates in Japan," published three years ago in the Journal of Legal Studies.[293] They looked at the traffic accident system as "typical" of Japanese litigation[294] and concluded: "Litigation is scarce in Japan not because the system is bankrupt. It is scarce because the system works."[295]

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[292] *See* Akio Morishima, *supra* beginning at p. 717.

[293] Ramseyer & Nakazato, *supra* note 290.

[294] After making a *pro forma* disclaimer that "one cannot generalize from traffic accident disputes to all others," *id.* at 272, the authors proceed to do just that. They conclude:

> The evidence from traffic accidents . . . contradicts those revisionists who characterize the Japanese judicial system as one that does not work. The accident evidence suggests, quite to the contrary, that the system enforces legal rules amazingly well.

Id. at 290.

[295] *Id.* at 290.

I agree with Professor Tanaka that their generalization from the traffic accident system is too sweeping.[296] Traffic accidents are the exception in Japanese litigation rather than the rule. Unlike medical malpractice, and unlike drug litigation, fact issues in traffic accident cases can be readily resolved. Police reports are presumptively complete and accurate. Insurance records exist. One can identify the injured and fix liability with relative ease.

Moreover, insurance companies do not have the same incentives to litigate as obstinately over traffic accidents in Japan as they do in American jurisdictions without no-fault systems. As Professor Tanase has pointed out in a persuasive article, with reference to compulsory insurance (which is the basis for more than three-fourths of total payouts), the insurance companies are all in a risk pool that shares profits and losses evenly, giving the closely regulated industry a quasi-administrative function.[297]

So when Professor Ramseyer says "the system works," the question becomes, with reference to what goals does it work?

If one of the goals is to keep administrative costs down, the Japanese system certainly is successful. If one goal is to achieve equity in damage recoveries among the injured, Japan is relatively successful in that respect as well, at least to the extent that the injured engage the system. If a goal is to keep the development of safety standards in administrative hands and out of the reach of the courts and plaintiffs' attorneys, the system generally works very well indeed. In times past, the courts have served as a channel for public participation; that role appears to have diminished in significance.

But if the goals of systematic compensation and injury prevention are considered important, then with the possible exception of traffic accident compensation, one has to look outside the Japanese legal system for their fulfillment.

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[296] *See* Shigeaki Tanaka, *supra* beginning at p. 736.

[297] Tanase, *supra* note 287, at 668-71.

Discussion: The Japan Experience

PROFESSOR SCHWARTZ: I'd like to thank the commentators and the presenters for doing a fine job. I'd also like to address one question to you all, and then to seek clarification of a point made by Professor Leflar. I too am impressed with apology as a remedy that plays an important role in the administration of Japanese tort law. Indeed, a leading article on apology is co-authored by a U.C.L.A. colleague of mine, Arthur Rosett.[298] Yet apology seems practical only if there are no more than a limited number of tort claims for which defendants like doctors and manufacturers bear potential liability. It does not seem that apology would be similarly practical if liability were frequently imposed on doctors and manufacturers in Japan in the way that it now is in the United States. I'd like to ask the presenters to comment on the appropriateness of apology when liability becomes much more extensive.

Secondly, I'm not quite clear about what apology means in the Japanese context. In the United States, to "apologize" is to acknowledge one's clear moral guilt. My sense, however, is that apology means something different in Japanese public life. Apology is something that is done rather routinely in social encounters — in a way which no doubt involves an expression of regret that an unwanted result has occurred, but which does not really serve as an acknowledgment of guilt on behalf of the individual or firm extending the apology. Am I correct in this understanding?

PROFESSOR MORISHIMA: With respect to the feasibility of apology, it doesn't necessarily mean that the president of the company should apologize. And in the area of the quality defects, it doesn't necessarily mean that tort liability is just a contract. And if the complaint is made by the consumer, then one section of the company should specialize in apologizing to the customers.

So there are several types of apology. Companies usually have a so-called "consumer" section and they deal not only with the contractual

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[298] Hiroshi Wagatsuma & Arthur Rosett, *The Implications of Apology: Law and Culture in Japan and the United States*, 20 LAW & SOCIETY REVIEW 461 (1986).

claim but also the tort claim as well. And the reason why they can apologize for the company depends on the meaning of apology, your second point.

In Japan, apology may mean an acknowledgment by the morally guilty. But in most cases, I don't think they want to express their own moral guilt, but rather it is necessary for the company or the person who injured another to express their sincerity in dealing with the conflict. So long as they go to the victim's house, as Professor Leflar told us, and they say, "We will be very serious about the misfortune of your family, and we'd like to express great condolences," that it doesn't mean that we are morally guilty, it just expresses sympathy and a promise to deal with this matter with sincerity. So I think that may explain something concerning your question.

PROFESSOR PRIEST: Professor Morishima, is it conceivable that there would be an apology in the context of a design defect case? Let's say that a manufacturer produces some product and all of the items are defective. If the manufacturer decides that it is necessary to apologize to one injured consumer, are there implications that there should be a recall or that there should be other apologies or that there should be some reaching out to all other consumers?

Or is the apology simply a one-on-one communication? That is, if I have made something defectively, and I apologize to one consumer, can I forget everybody else or is there an implication that I must then pursue others that might be injured by the product?

PROFESSOR MORISHIMA: Yes, it would depend on the design defect. But if the defect is so apparent that the manufacturer cannot argue, in that case they may take a sincere attitude. But if the design defect, from their own viewpoint, it is not a design defect, in that case they may say that it's probably your fault, and say "we are very sorry but we are not in a position to make any adjustment or to make any payment." But even so, as a customer they may get some token of sympathy.

And with respect to automobile defects, I'd like to add to Professor Leflar's comment on the automobile defect case in Japan. Both medical malpractice and product liability cases in Japan are very few in comparison to any other industrialized nation, not to mention the United States.

After the war, there were only about 140 product liability judgments. And out of those 140, a little less than 20 cases were automobile cases. And for the American academics, 15 or 20 cases are practically nothing, but for us, it's not so. It may not be a substantial number, but the

reason why the automobile defect cases are not so well publicized is that the damage is covered by automobile insurance.

But automobile insurance covers the damage to the third party, but it cannot cover the injury to the vehicle owner, the driver. So if the driver was injured and he thinks this could be because of a defect in his automobile, he could file a claim against the manufacturer.

In the late 1960s, there were many cases not filed but discussed. Most cases did not reach the court, primarily due to the fact that plaintiffs did not have good expert witnesses. Practically all the experts on automobile technology are on the side of the automobile manufacturers.

And very few cases are filed before the court. With one exception, all the claims were denied relief by the court on the ground that there was no proof of a defect, or of a causal relationship between the defect and the accident.

So the reason we don't have many automobile defect cases is because of the lack of the expert. And we have a large book written in Japanese in which plaintiff's lawyers complain about judges' attitudes. The judges relied heavily on the expert opinion from the manufacturers, but they didn't hear the layman lawyer's technological explanation. So they wrote a book and made an appeal to the public.

PROFESSOR VENNELL: I just thought I'd make an observation that I think in New Zealand there is a real desire on the part of either the injured victim or, if the injured victim is killed, their family, to have some acknowledgment that something has gone wrong. And a lot of people go to the media simply because there has been no public acknowledgment. There's also, I think, a feeling that people want retribution.

I recall one case where a 14-year-old girl, who actually went to school with my daughter, was killed. She had been going home from school. I think she'd gone on the bus. She had to travel some distance. And she got off the bus and her mother's car was parked on the other side of the road.

And just as she was getting into her mother's car, a very drunk driver came down the road, collided with something else, bits of cars flew in the air, and this girl was killed by the falling debris from the driver's car. Eventually this driver was prosecuted for dangerous driving causing death. He pleaded guilty, so there was no real trial. There was merely a sentence and he'd already, I think, served some time in jail. So he was only sentenced to nine months' jail, most of which had already been served.

And he apparently sat in the dock in the court, while he was being sentenced, chewing gum and left fairly nonchalantly. And the parents were very upset about this.

They would have liked to have sued. In fact, there was some publicity. They would have liked to have brought an action for exemplary damages — punitive damages. But in New Zealand those damages die with the victim. They're regarded as personal damages. I don't know what's the situation in the United States with punitive damages. This situation added to the grief that there was no public acknowledgment.

And there is anecdotal evidence that because there is no tortfeasor and if the claim is taking a long time to process in the Accident Compensation Corporation, that people turn their anger and grief against the corporation. You know, the claims officers, who appear cold-faced, suffer from a lot of abuse. And I think this is the reason people want the public acknowledgment that the thing could have been prevented, that it shouldn't have happened.

PROFESSOR KLAR: I found both the presentations and commentaries on Japanese law very interesting because although I would assume that Japanese society and Canadian society are culturally very different, their laws and the views expressed concerning them are very familiar.

Professor Morishima's description of post-war Japanese tort law, based on the Civil Code is similar to the Canadian common law treatment of the same issues; for example, proximate cause, governmental liability, and the dichotomy drawn between the discretionary and operational aspects of governmental activities. Even the reverse onus which requires the owner and driver of a motor vehicle involved in a car accident to disprove fault has its counterpart in most Canadian provinces.

The pollution cases are also similar. The problem of pollution litigation in Canada involves similar issues of proof of causation and foreseeability. Canadian tort law as well does not use class actions in the same way as does the American legal system.

Professor Tejima's comment concerning the plaintiff's attempt to use the loss of a chance of avoiding an injury, in relation to the cancer, is also interesting. The Supreme Court of Canada has recently dealt with this matter, and has rejected the argument.[299] As well, the doctrine of full informed consent is also part of the Canadian tort law. Professor

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[299] *See* Laferriere v. Lawson (1991), 78 D.L.R. (4th) 609 (S.C.C.).

Tanaka's views on the "justice" values in Japanese tort law also closely reflect my views in terms of Canadian law.

PROFESSOR MILLER: Professor Morishima, why don't the liability insurers, who have to pay on behalf of an owner because of a defect in the automobile, require the owner to bring on their behalf a suit for indemnity against the manufacturer?

PROFESSOR MORISHIMA: When the Automobile Accident Compensation Act was enacted in 1955, no one knew if product liability litigation was feasible. And the main interest of the legislator was that some of the accidents might be caused by maintenance of the automobile. Then after we came to know about product liability litigation, many people suspected this was bad legislation.

But the insurance companies, even though they knew that they could file suit against the manufacturer, they were also good at cost-benefit analysis. They knew that to get the good expert and the good plaintiff's lawyer costs a lot of money. So insurance companies often would not file suit because it simply was not worth the costs involved.

PROFESSOR MCKENNA: Just commenting on what Professor Schwartz was mentioning about the apology, I think that it's pretty clear that because statements made by defendants in American tort actions can be used as evidence against them at the time of trial, it's a major disincentive for a defendant to make any type of statement that can even be construed as close to an apology.

And, so, therefore, I have a question of the Japanese presenters: First, the kind of apologies or statements of regret made by Japanese individuals or corporations, can they be used as evidence at the time of tort actions?

Second, in reference to Professor Matsumoto's comment regarding the rather informal, perhaps, dispute resolution or mediation or negotiations used in the medical malpractice case, based on my limited experience with Japan and Japanese cases, I understand that such types of nonjudicial and even informal dispute resolution takes place all the time, specifically in auto accidents.

I understand that at least if there's no personal injury involved, many times people will just try to negotiate the amount of damages right on the street. Or if that doesn't work, sometimes they'll get a third party involved to try to resolve the amount of damages. And sometimes the third party involved may not be a very reputable type of person that is used to approach the defendant and tries to extract some type of settlement.

But I'm wondering to what extent in personal injury type cases, if there is personal injury, is there any other payment other than what's required under the insurance scheme? Do sometimes defendants make additional payments informally to the plaintiff?

PROFESSOR MORISHIMA: I'll respond to the first question. I don't know whether the apology is used as evidence. But there are various cases in which the money paid at the time of apology is not considered as part of the damages.

So from this fact, even though the plaintiff's lawyer produces this kind of evidence, courts have said that this has nothing to do with liability. So even though you pay, say, 100,000 yen when the car owner appeared at the funeral or the hospital, then you cannot say that this money is part of the damages.

So I think that from the beginning, plaintiff's lawyers have not thought that this kind of apology can be used as evidence. Of course, sometimes the apology may relate to the acceptance or the acknowledgment of moral liability. But in the ordinary case, it has nothing to do with the acknowledgment of liability.

PROFESSOR SHIMAZU: Since I was practicing myself for a while, I have an interesting thing to report.

This is not a tort case but a criminal case. But sometime the fact that the accused does not apologize works against his interest. If the judge finds him very stubborn and not ready to do something to compensate his wrong-doing, he won't give the defendant probation.

And this also applies to Professor McKenna's third question, I watched one case where the defendant paid 1,000,000 yen out of her own pocket to the plaintiff in addition to the insurer's money. She got probation. The personal payment had some effect, I think.

PROFESSOR MORISHIMA: Since I'm a civil law lawyer, I am also familiar with what Professor Shimazu has said. Often before the lawyers negotiate civil compensation, the defendant often pays so-called "condolence money." Usually this amount of money is excluded from liability insurance coverage. And the reason is that the process of the criminal case is much quicker than the civil cases or civil claim against the insurance company.

So to get probation or a lighter criminal sentence, you need to get the injured party to petition the court. So for that purpose I think criminal defendants pay additional personal money.

PROFESSOR MILLER: To conclude this session, I just would like to emphasize what Professor Matsumoto said yesterday about the

Japanese system: that there are some very significant differences from the Canadian system.

The law may be similar. But you must remember that in Japan it costs a fortune to bring a tort action because of filing fees, which are related to the amount of the damages claimed, and attorney's fees, some of which have to be paid up front.

Secondly, there aren't that many litigating lawyers, *bengoshi*, who can take a case to trial. Of the 50,000 or so who take the bar examination every year, only 400 or 500 are actually admitted to the Judicial Training and Research Institute. Graduation from this two-year institute is a condition for admission to the bar. Thus, there are only about 13,000 or 14,000 lawyers in all of Japan who can try the law suits for a population of more than 120 million people.

Finally, the Japanese judiciary is largely a product of the Liberal Democratic Party (LDP). Since there is no jury to determine the size of verdicts, the judges, who are products of appointment by the LDP and, in fact, whose movement around the system may be affected by the LDP, can get together and decide at what levels to set damages.

Those three very important features of the Japanese system seem to have a profound effect on how the entire system functions.[300]

PROFESSOR MORISHIMA: That's true. The supreme court justices are appointed by the cabinet, but the lower court judges are nominated by the Supreme Court. So that could be true that in a direct way, the LDP controls the appointment of judges. But the appointment of lower judges is strictly within the Supreme Court administration. But the Supreme Court is governed by the cabinet, and the cabinet is governed by the LDP.

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[300] *See, generally, 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); *reprinted in Japanese in* HIROSHIMA L.J., 17 HIROSHIMA HOGAKU, No. 1, 115 (July 1988) (Prof. Keizo Yamamoto, trans.); *reprinted with minor editorial revisions*, as *Apples vs. Persimmons: The Legal Profession in Japan and the United States*, 39 J. LEGAL ED. 27 (1989).

Synthesis and Prospects—Concluding Remarks by the Participants

PROFESSOR PRIEST: I attempted yesterday to claim that there was a consensus or something resembling a consensus among all of the participants of this conference. To describe the consensus, I set forth my own proposals. (Laughter). That didn't seem to work.

But it does seem to me that the discussion today, in particular, the very illuminating set of presentations and comments this morning from the faculty from Japan, suggest that I was wrong in claiming to discover consensus.

I have learned a great deal from each of the presentations this morning which I thought were quite excellent. And I am very glad that they are going to be published and made available to not only to a broader audience but also so that I may study them more carefully. I have benefitted greatly from hearing the comments orally, but it is always better to have them in print.

It does seem to me that the corrective justice approach of the Japanese system was ignored in my claim of a consensus yesterday. I believe that there is a strong similarity between American law and Canadian law. Both legal systems view the law as an opportunity for social engineering in which the objective of tort law is to place prices on activities in the Calabresian and Posnerian sense.

Surely from our discussion today of the importance of apology and of the broader extent of relationships between tortfeasors and victims in Japanese society, one should not think that the Japanese commitment is to a tort law like American or Canadian tort law. The New Zealand approach is different still.

I think that in American law today, corrective justice characteristics are quite limited. There are still some scholars who emphasize the importance of corrective justice. My colleague Jules Coleman is one of the most prominent.

But I think that it is very hard to find in reading modern United States opinions that corrective justice is very important in directing those decisions or generating the conclusions that are reached. Often-

times, there is some language or rhetoric in the opinion that alludes to some corrective justice concern — the concern for allowing a victim to be compensated by a particular tortfeasor and the like.

But I think that the determining course of doctrine in the United States since Roger Traynor, has been a type of functional, utilitarian, social engineering approach that I have loosely described as an economic approach: an attempt to use the legal system to set prices on different activities and to also provide compensation. In the United States, it has been believed that the tort system can be an important source of general social compensation.

The New Zealand approach appears very similar to the U.S. approach in ambition. That is, it is a social engineering approach. Here are ideals. Here are goals and objectives. We're going to adopt the mechanisms appropriate to achieve them.

The principal differences between the New Zealand and U.S. approaches, however, deal with the mechanisms adopted to achieve those goals. I believe that the pricing system of the New Zealand plan — placing levies on employers and on the general work force, then on the rest of the population for non-work related injuries — is extremely crude. In the first pages of this document that has most generously been made available to us called "A Fairer Scheme," it points out that employers pay 70 percent of the levies and yet work-related injuries comprise only 40 percent of total costs.

That is a very substantial tax that is placed on employment relationships. And it is surprising to me that the employers and employees together are willing to have that tax burden placed upon their enterprises.

In the United States, it is entirely different, perhaps because of the influence of Calabresi and Posner and the broader influence of the Realist view of tort law as an instrument of social policy, that of Fleming James and William Douglas and the like.

That type of crude pricing characteristic of New Zealand could not survive in the United States and has not survived. Judges in the United States now aspire to a very careful and almost perfect sense of pricing; that is to price particular activities and particular employers or particular government agencies with the precise costs that their activities are imposing on the society so to achieve the goal of precise cost internalization.

Though I am suggesting that there are similarities between New Zealand and the United States in terms of approach, of course, the ultimate differences are very substantial. And it may be more mislead-

ing than helpful to emphasize the similarity between New Zealand and the United States in viewing tort law and compensation as instruments of social policy, since the basic values and ideals that motivate the systems are so radically different.

It is very clear from Geoffrey Palmer's statement — and, of course, we have all known it from studying the New Zealand plan in the past — that the New Zealand plan is motivated chiefly by a great humanitarianism, a humanitarianism that engulfs or disregards these more precise questions of cost internalization that dominate the United States system.

I think to put it in terms of collectivism versus individualism is a bit too strong. But it is surely true that the underlying motivation of the New Zealand plan is to provide compensation for everyone, while a clear implication of the United States approach is that many people will go uncompensated by the tort system because they are not the appropriate instruments for cost internalization.

Nevertheless, I do think that there is a consensus among all three approaches rejecting the course of development of the United States since the 1970s through the 1980s and, to some extent, continuing in the 1990s, of continually expanding tort law, viewing tort law as the single instrument for achieving deterrence, corrective justice, and compensation. That, I believe, is rejected by all, at least, by the three Americans here, also by the Japanese in their defense of their system and surely by those from New Zealand who support their system or who support some type of modified system, perhaps with more or less elements of tort in it.

In that regard, again, I believe that this conference has been tremendously important in showing those links and identifying those similarities.

PROFESSOR KLAR: From my perspective it seems that, at this point in time, the abolition of tort law in its entirety is not achievable and, for most people, not desirable. There is still a strong ideological commitment to fault-based compensation which just simply has not gone away over the years. There has been some shift towards a more conservative political environment in which tort law reform is not going to find fertile ground. As well, the economic recession of the past half decade certainly is a strong disincentive to the implementation of major social insurance or social welfare programs. For these reasons, tort law is as secure today as it has ever been in many respects.

I recall going to a conference in 1976 and listening to Professor Jeffrey O'Connell speak. He came up with an expression which has

stuck with me since, the concept of a "parade of miseries." The idea was that there are a lot of different causes, and that proponents of reform have to strike when the iron is hot. If one's turn comes, but the reform does not occur, the cause goes back down to the bottom of the list. It might take a long time for that cause to work its way back up to the top of the political agenda.

I think that in the mid-70s Jeffrey O'Connell felt that the time had come for major tort law reform. He talked about the tort law system in quite colorful terms as an empire which had long decayed from within, which was about to tumble under its own unsupported weight.

I think that the time has passed for major tort reform. Since the mid-70s, the proposals for tort reform have become more modest. I think Professor O'Connell's proposals for "choice no-fault" reflect this.

I have followed the New Zealand system since its inception, and despite the apparent commitment to it by New Zealanders as well as by others, there have been growing difficulties with it. We have heard in this conference, from both Professors Palmer and Vennell, certain criticisms with the system.

In the past twenty years, writing in tort law seems to have been focused on either substantive tort law issues, or the abolition of tort. This has left a much smaller group who have actually concentrated on reform of the tort process, so that problems with the tort process, such as its costs, and delays, can be tackled. There have been some people doing this, but, to a large extent, it has come from the practicing bar or the judiciary, and not the academics.

In terms of the compensation side of things, the major problems with North American society are not those of accident compensation at all but basic problems in the social fabric of society. Issues such as health care, education, poverty, and race relations, impact more on the lives of everyday citizens, than whether or not compensation for car accidents ought to be claimed through the tort system, which is largely routine at any event, or from some other bureaucracy. It may be, in fact, that the problems of accident compensation really derive from these other problems. That is, the reason so much pressure is put on accident compensation as a solution is because there is such inadequate social services available.

The other thing that I would like to remark upon is the obvious inadequacy of empirical evidence to support the assertions which are made about accident compensation or tort compensation. It is quite incredible that we are still debating whether tort law deters or not even though we have jurisdictions which have abolished tort law, and which can be more scientifically studied.

We also make statements about the public's values, regarding notions of community responsibility, individual responsibility and fault, without much in the way of empirical study. Serious tort reform should be based on empirical data rather than on unsupported assertions of fact, or statements of opinion. This is another direction that academia can take in terms of better understanding the topic.

PROFESSOR VENNELL: Well, I am certainly at a loss because we have been given a lot of food for thought over the last three days. First when one thinks about the New Zealand accident compensation scheme, there are several points that are quite important. One point that I think was quite important to Woodhouse was that he had a philosophy, and his philosophy was community responsibility. Now, in the various proposals that have been made to change the scheme, I don't think there's ever been a true philosophy. I doubt whether there has really ever been any real acceptance in New Zealand of the notion of community responsibility, and I think that comes out in the complaints from the employers about the 70 percent of costs that they have had to bear.

If there was a general community philosophy that community responsibility was a good end and a good value in itself, then I don't think the employers really would have objected, because they would have felt that they were presumably doing good for their employees, both at home and at work, in covering them for their accidents. So where there is such a view, as there is in some other countries, you will get that built into an employment package, that people will be covered for health insurance and so on by their employers. But I don't think there's ever been that philosophy in New Zealand, that there should be community responsibility. It's never been accepted that that is a good end in itself. So the Woodhouse ideal never received public support. Almost since the scheme first came into force there has been constant griping about the costs of the scheme by one group or another. I don't think society as a whole in New Zealand has ever really got away from the thought that the scheme is costly. And, in fact, tort has some advantages which have not been recognized in New Zealand. And that goes back to the original Woodhouse proposals.

I think that Woodhouse dismissed any value in the tort system without any empirical evidence about the values of the tort system. You know, he didn't analyze the tort system. He decided that the tort of negligence was inefficient. But he, in fact, had no economic or any other evidence to show that the tort of negligence was inefficient. He didn't really address other forms of tort liability which resulted in

personal injury, such as assault and battery. He just dismissed tort, in particular, negligence out of hand.

And with the absence of any analysis of the value of the tort system, and the reasons for removing tort liability, I think one's bound to have difficulties because you've got rid of something that you don't know whether it was really of value or not.

If one is going to have a compensation system, then one needs to examine the values of the tort system and try and harness the ones that are worth having and not harness the ones that aren't worth having. And that's where I personally think the Scandinavian systems, which are more specific systems, you know, rather than our generic system, may be more effective. They're more closely allied to insurance than our system has been — although the new system will be more insurance-based in its concepts. The Scandinavian systems focus on particular causes of accident and deal with the specific causes of accident in different ways, depending on what's needed for that particular type of accident. There are separate workers' compensation, automobile, medical and pharmaceutical schemes, all funded on an enterprise basis and operated by a consortium of private insurers. And I think that this approach is actually more efficient than the New Zealand system.

I think that the Scandinavian systems are not perfect by any manner of means, but I think that it is far better to have specific schemes rather than a generic scheme of our particular kind.

One of the other things that I've always thought was important is that one has to get the administration right if you're going to have a successful scheme. Our scheme has essentially been a workers' compensation scheme and an automobile compensation scheme as well.

Other accidents came into the scheme by chance rather than design, and there was no study made of the incidents of accidents. There may not have been enough evidence available at the time (in 1967) because, outside work-related accidents and automobile accidents, there was very little claims consciousness in New Zealand.

The lack of evidence and information about accidents was exacerbated by the administration of the Accident Compensation Corporation. There wasn't exactly a refusal to keep statistics. (I've been on the board for five years — my term finished at the end of December — but prior to that I was on the Board of Directors for five years). And I think at almost every board meeting — we met once a month — I would ask what statistics were being kept, or might be kept, about other facets of accident (for example, medical accidents) and some of the senior management just seemed to have an in-built feeling that

getting the information to build a data base was in the "too-hard" basket: "Well," I was told, "it was impossible to keep statistics." They had, I think, a rather narrow view of the intelligence of the New Zealand population because it was said on many occasions, that if you made the form too complicated, people would be unable to fill it in. All this sort of twaddle. There didn't seem to be the will to collect statistical information except in those areas where it had been traditionally gathered or where it was fairly easy to get it. These were mainly situations where it was clear that personal injury by accident had occurred. But even with the statistics that have been kept, they've never really, I think, focussed on the real cause and incidents of accidents. You've all been given a photocopy of the Annual Report. Examples of this can be found in the Annual Report on page 58. There you will see statistics about the environment and result of injury. It goes through the work, the number of work accidents or injuries, the number of non-work, home, farm, road or street, industrial place, commercial or service location, school, place of recreation or sports, et cetera, accidents. This bare list shows how many accidents were fatal and how many were non-fatal. Well, that, in my view, really doesn't tell you anything that's particularly useful.

And then on page 66, it tells you the age and sex of the victim. Well, you don't know what, which sex was doing, at which particular time. All you know is that males between 15 and 19 had the highest number of motor vehicle injuries, but you're not told whether they're the drivers. So I don't think that really means anything.

Females in that same age group are less likely to be injured, but maybe the females weren't driving. But you're not told whether they were injured in the car that was causing the accident, because the scheme doesn't focus on cause. So as far as prevention is concerned the statistical information is not particularly useful.

There's no statistical information about medical misadventure at all. I've given a lot of papers about medical misadventure and the only information I have is about the claims which have gone to the Appeal Tribunal because it's possible to get the decisions of the Appeal Tribunal. One of the managers who was in charge of all that sort of thing said to me, "Oh, a medical accident's no different from any other accident. We just classify them as an accident."

And then, you can see, somewhere here in the statistics in the Annual Report, how many people have injured various specified parts of the body, including, for example, their thumb. Well, you don't know whether their thumb's been cut off inadvertently in the operating

theater or whether it's been cut off by a machine in the factory. Or maybe it was injured in a rugby game. So, you know, knowing about thumbs doesn't tell you very much.

The excuse that's given for this is that the cause is irrelevant because it's a no-fault scheme. Well, even with the cause, I actually take issue with the way the statistics are drawn up. For example on page 72, the ten most common causes of accident are listed; these are non-work accidents in the home. Among some of the events listed as causes are tripping or stumbling, slipping, lifting, stretching, strain, other loss of balance, struck by a person or animal — well, that actually does tell you something — struck by a hand-held implement, collision with object. I feel that most of these are in fact secondary causes, that is cause of injury. But what I would like to know here is what the cause of the accident is.

If a person's struck by a hand-held implement, I would like to know whether this is a circular saw that they're chopping wood with and whether the circular saw that they're chopping wood with is a safe circular saw, or what. The last one listed is "something giving way under foot." Well, I'd like to know whether that's a ladder that's got a step on it that hasn't been built strongly enough or whether it's a step that breaks, or exactly what. Perhaps a manhole gave way.

So I think there's a real problem when you have no focus on the cause of the accident because then you have a lack of interest in prevention. Because if you don't know the cause, the real cause of accidents, then you cannot prevent accidents. And in the administration of the scheme, that is, I think, one of the big problems that there is a lack of interest in prevention.

In the Annual Report you will see the funding on research listed. There are two programs of financial grants and assistance for research and practical systems of injury prevention. And that may dry up with the new government because present board members perhaps don't have quite the commitment to fund research into prevention as has been apparent in the past. That again may relate to the perception that the scheme has been costly. So it's very difficult to get real preventative programs in action if you don't know what the real causes of the accident are.

The scheme as devised by Woodhouse, and as it has functioned ever since, concentrated on compensation rather than on distributive justice. You've all been handed out the paper entitled "A Fairer Scheme," and I think when you analyze that, you will, perhaps, see that it may be a fairer scheme in relation to the funding. I'm not sure that it is,

but I don't think you will find that it's a fairer scheme in relation to any notions of distributive justice.

I think too, that the courts, perhaps, have felt concerned in New Zealand, and, for that reason, have undoubtedly widened the concept of "personal injury by accident." Tort law outside personal injury has been in a state of dynamic growth in New Zealand in the period since the scheme came into force. That has occurred in other parts of the British Commonwealth too. But tort certainly has not died in New Zealand. In some ways tort may be even more dynamic in New Zealand than it is in other parts of the Commonwealth simply because there has been no personal injury litigation. This may have given the courts a certain freedom and enabled them to concentrate on the nature of tort liability, its relationship with contract and equity, and the nature of damages as a remedy in tort.

It may have enabled both the courts and the legal profession to analyze the nature of damages. I think our judges have analyzed damages questions to a greater extent, perhaps, than the judiciary in other parts of the British Commonwealth.

The New Zealand judiciary has had a very close look at the nature of exemplary damages, punitive damages, and the purposes for which you can use exemplary damages. And I think that has been, really, an answer to the fact that they saw people not receiving distributive justice through the compensation system. So they interpreted the legislation, I think, rightly, so as to recognize that claims for exemplary damages were not barred by the accident compensation legislation.

All the same, I have one colleague at my university, a legal philosopher, with whom I have had many a heated argument over the correct interpretation of the legislation and whether or not claims for exemplary damages are barred by the legislation. He thinks that the courts have been quite wrong in their interpretation. But, in my opinion, they've been right in recognizing that awards of punitive damages were not barred.

There are other developments in New Zealand too. There have been a number of New Zealand people who have gone outside the scheme and joined, particularly in the United States, class actions in respect to product liability and for pharmaceutical claims.

There have been a lot of problems in New Zealand with industrial diseases. We've had problems with asbestosis claims. And the courts have been prepared to allow those claims, if those injured can get sufficient evidence to show that the cause of action arose, that the exposure to the condition arose before 1974. The courts have recognized

limitations on cover for medical misadventure and the new bill, before Parliament in New Zealand at the moment, recognizes limitations for medical misadventure.

The new bill also recognizes that you may need to have the disciplinary process, in relation to medical misadventure, tied into the scheme (section 5 (10)). This had always been resisted in the past because it was said that was reintroducing fault into the scheme.

Given the climate and the approach which the courts have taken, there's also a strong possibility that the courts will interpret the scheme narrowly so as to allow claims in tort in some circumstances, if there is room to interpret the legislation in such a way. Thank you very much.

PROFESSOR LEFLAR: I want to make just one point in response to George Priest, and I think he will forgive me if I take one of his comments simply as a means of making a more general and, perhaps, rather tendentious point about the methodology of legal scholarship.

George, I was pleased to hear, recognizes that "corrective" (and perhaps retributive) justice play a significant role in Japanese civil law. Unlike me, he feels that they do not play much of a role in American tort law. He said that "in reading opinions," one finds that these features in United States tort law are quite limited.

The excessive reading of opinions is, to my mind, the bane of legal academics. I would much prefer, instead, to see the results of the operation of the system: what jurors in fact do; the effect their judgments in fact have on settlements; and the effect that those judgments and settlements in fact have on people's risk-creating behavior.

Punitive damage verdicts constitute one example of the "corrective" and "retributive" functions of tort law. Punitive damages in the United States have been exaggerated by many, especially by tort reform advocates within the United States and, as Professor Morishima pointed out, by tort reform opponents in Japan. In fact, most punitive damage verdicts occur not in products cases and personal injury cases, but rather in business tort cases.[301]

However, there is an exception to that general rule and that is the asbestos cases. You cannot ignore them; they are a not insignificant

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[301] *See, e.g.*, AMERICAN BAR ASSOCIATION, PUNITIVE DAMAGES: A CONSTRUCTIVE EXAMINATION (REPORT OF THE SPECIAL COMMITTEE ON PUNITIVE DAMAGES, ABA SECTION ON LITIGATION) 17 (1986).

part of recent American tort litigation. And some may say that the asbestos cases are a mess, but there they are.

George Priest suggested that judges in the United States aspire to a careful, almost precise sense of pricing to achieve cost internalization as a goal. The asbestos cases provide a clear counter-example. I am not saying that Priest is wrong, necessarily, but just that we should be skeptical about his assertion. Perhaps it is more a statement of aspiration than one of fact. I would simply suggest that we keep our eyes clearly focused on what the legal system does, rather than on what judges say.

PROFESSOR MATSUMOTO: With regard to the deterrence aspect, we discussed in this morning's session that in Japan full compensation plus an apology is needed in order to satisfy the feelings of the injured. If the wrongdoer would like to have the dispute be decided before the court, he does not have to meet the injured party personally. But, if he favors a settlement outside the court, and usually he does, even if he is fully insured by liability insurance, he must go and meet the injured party in the hospital once or twice or more. In this respect, the tort system in Japan, even with accompanying liability insurance and talented employees of the insurance company who will negotiate with the injured in place of the wrongdoer, keeps to some extent the direct relationship between the wrongdoer and the injured that the pure compensation system would cut down. That would really be an undesirable process for the potential wrongdoers. But the wrongdoer needs the letter written by the injured requesting the mitigation of penalties imposed on the defendant wrongdoer, in case he is tried at the criminal court. The injured would not agree to write such a letter until he feels satisfied more or less with the amount paid as damages and the form of apology shown by the wrongdoer.

When people talk about deterrence, whether specific or general, that term usually implicates an economic reasoning that the deterrence mechanism will be realized in the market mechanism. But I think, at least in Japan, not only the market mechanism, but such a troublesome settlement process might work as a deterrence device. You may say that this feature might represent simply the irrationality still existing in Japanese society, especially from the law and economics point of view. Yes, it is as irrational as the lottery of tort dominating in the U.S. Although we may admit the deterrence effect of tort in a psychological sense to some extent, it is applicable only to personal liability. It does not make sense in cases of enterprise liability. With regard to enterprise liability, tort law in Japan is not as well developed as is

feared by businesses in the United States. I believe a greater possibility of enterprise liability is needed in the area of personal injury caused by defective products. I think it is the common law's merit that it allows and encourages the citizens to take part in the process of implementing the law. On the other hand, the civil law which was introduced into Japan from Europe about 100 years ago still tends to discourage it. Unfortunately, we lack those mechanisms such as jury trial and punitive damages, which would enable the exercise of citizens' power. Tort is one, but it is a very small chance for us to join in that process.

Proper compensation is of course essential in accident law, but tort is still indispensable for the purpose of effectuating the deterrence of accidents through the participation of individuals who are the potentially injured. Thank you.

MR. KOJIMA: I'd like to conclude very briefly.

To those who belong to insurance companies, the products liability area will be an attractive new market for insurance when products liability is introduced in Japan in the future. But given the severe and oppressive experience in the United States, insurance companies must take pains not to lose money. As I mentioned yesterday, liability insurance is not a system of charity. It should be made on the sound basis where risks can be classified clearly. Insurance should be used as a method of mutual assistance. It is one alternative way to compensate. And we have to decide what the respective responsibility among government enterprises, individuals and insurance companies will be.

PROFESSOR TEJIMA: I have had an excellent time these three days, and I'd like to thank everyone participating in this workshop. I must say that over the course of this conference I have seen varying degrees of conviction in the rightness of domestic systems. Each country is eager to form a better society. But this morning's argument about apology is very symbolic. I think it is necessary to argue much more about what is a better society. Thank you.

PROFESSOR SHIMAZU: Thank you very much. I also have to thank you all like Professor Tejima did. Since philosophy is my main concern, I was impressed with how all the participants discuss, agree and argue. Because the Japanese are famous — or rather, notorious — for their poor discussion abilities, this conference was a good opportunity for me to learn. I guess this is the way teachers and students discuss in American law schools. This is very different from what is going on in Japanese law schools.

In my remarks, I wanted to point out that there must be some misfortune left behind in any good system of compensation. As a

Buddist or Chinese proverb says, "we cannot escape from four sufferings: life, age, disease and death." We — or society — cannot essentially solve these problms, and they are left behind for each individual to face personally. So we should not pretend as if we were omnipotent. We can only do what we can do. This is the very simple point that I wanted to bring out in my talks.

Next, I was thinking while I was listening to the discussions here, that the dichotomy between collectivism and individualism is too simplistic. But it is important when we speak of legal reform because we can revise legal rules either by deliberate collective decisions or by accumulated court decisions. But those decisions are relatively simple ones that we can formulate in a few sentences.

But the social order itself is more complicated. It cannot be equalized with these decisions or norms expressed in those sentences because it is a factual order whose detail could reach any level of complication to surpass our capacity to understand and describe it. Yet it is maintained somehow by the decisions of individuals. So there must be something which tells each what to do, how to do it, and what not to do. And this is something that is going on in all our minds, to be sure.

What could this be? First of all, of course, there are some rational considerations, which are comprised of two factors: One is the consideration of legal sanctions. We don't want to get punished, so we do this and that. The other is the economic consideration of gains and losses. In order to maximize gain and avoid loss, we behave in a certain way.

But other than these two, there must be something else. And I wanted to call the rest "morals," which do exert a force on human behavior but cannot be called "rational" considerations in a strict sense. The word "moral" is usually used in a narrower sense to include religion and the like. To be sure, religious faith is one of these factors, but at the same time, we can't call "economic" or "legal" such considerations as the relationship one has with one's friends or one's honor, shame or saving face, and so on. So these factors are included in the term "moral" for my purposes.

Those factors which control human behavior to bring about a complex social order as a whole consist of these three: the legal, the economic and the moral. If we seek to maintain social order, we should thus try to harmonize all of these factors. The so-called "moral-hazard" is thus a situation in which this harmony between the three factors is destroyed.

It is therefore very important to strive to revise our legal rules. For through such rules, we give individuals adequate information about the limits of their liberties and to tell them what they should do and not do in order to enjoy their free domain. This should be the main point to consider when we revise our rules.

Once again, we cannot believe that we are omnipotent. For example, under the socialist formula, where individuals "work very nice, but has turned out to be obviously false when applied in reality. But can we maintain the latter half of the fomula in some attenuated way? We can surely maintain some part of the edeal as the so-called "safety net" of social welfare, and to that extent we are still chasing this ideal. But how far can — or should — tort law carry out the same ideal? I believe this is both a philosophical and legal question for us to face squarely.

PROFESSOR MORISHIMA: First, I'd like to congratulate our organizers, Professor Miller and Professor Morigiwa, for this successful workshop. The main focus of the discussions for the past three days has been the function of the various compensation systems. The first function should be the compensation, the compensatory function. With respect to the compensatory function, I think we reached a consensus.

But it is too early to say we reached full consensus with respect to that compensatory function. The tort system has various problems with securing compensation. That's the reason why various other compensation schemes have been proposed.

And with respect to the other compensation schemes such as the New Zealand scheme and the scheme proposed by Professor Sugarman, Professor Palmer said that the New Zealand compensation scheme was meant to compensate as broad a spectrum as possible. But when we compensate the people as broadly as possible with some financial limit on the whole nation, the system might undercompensate the people. But when it comes to tort, the court decides how much should be paid to the victims, on a case-by-case basis.

But under the administrative compensation scheme, a collective decision has been made as to how much should be paid to what items. And so in that sense, even the compensation schemes, administrative compensation schemes, though they claim to pay primary attention to the compensation, still there are problems. So when we talk about the compensation scheme, we should discuss to what extent this compensation scheme covers the possible injury.

And, secondly, the administrative compensation scheme has some problems which the tort system does not have, namely, moral hazards.

There are two different types of moral hazards. One is the moral hazard of the injurers. It depends on what types of administrative compensation are available. For example, if the New Zealand type of compensation scheme generates this type of moral hazard, the risk of externalization of the costs probably would be very significant. And, of course, we have workers' compensation and automobile compensation schemes which raise money out of the automobile activities and working activities and so forth. But still the degree of externalization is very large.

When it comes to the compensation scheme for the particular causes such as the Swedish medical or pharmaceutical compensation case, in that case the degree of externalization could be narrower than that of the general case. Still, we have to be careful how much externalization could occur.

The other type of moral hazard is the moral hazard of the injured. When the injured are dealt with equally, that is good. But since they are treated equally, morally inequitable situations arise, such as the prisoner who received compensation for injuries arising from his own escaping activities. This is another moral hazard.

The second function is deterrence. I don't need to mention that deterrence is at the core of the issues that we discussed over the last three days. With respect to the tort system, the difference can be derived from the economic internalization of costs. And also as the Japanese participant told you, the tort system may provide the moral deterrent effect because the injurer does not want to be morally blamed so they apologize or they have to pay full amount of damage.

But when I hear the discussion here, person by person, as to the extent deterrence affects the tort system, it varies. So my opinion is that since the most important function of a compensation scheme is to compensate the victims, a deterrent effect is desirable but not supreme. But even if the deterrent effect is not very effective, we still should have the compensation scheme if the compensatory function is met by a compensation scheme.

So although we have not come to a solution, at least we exchanged opinions and we have explored the problems. I do think, however, that the approach we've taken at this conference could produce a better solution, and I hope in the near future we'll have a similar — or maybe even a better — workshop. Thank you.

PROFESSOR SUGARMAN: I want to offer some concluding remarks on the connection between tort law and the social safety net. Let us assume you live in a society with an adequate social safety net.

Say, for example, you have the New Zealand system of the past twenty years. Although I don't consider it fully adequate because it doesn't cover sickness in the way I would like, within its realm let's stipulate that its benefit structure is sufficient. Let us then think about what additional functions there might be for a system of civil justice for personal injury.

One might be to provide victims with additional compensation. High earners could have all their income replaced. In other words, we could run the system for the benefit of the rich. I do not find that very attractive, however, especially because those are the people who usually arrange for their own disability insurance anyway and hence probably have their high earnings already protected.

What about providing extra money to victims for intangibles, for the offense of being wronged, for the pain and suffering they endure, and so on? In addition to compensation, having a civil justice system make these awards could serve other social objectives as well, such as providing education, punishment, and satisfaction.

My belief is that, in practice, legal systems throughout the world do not very well serve those goals. Symbolically, in law school classrooms, they may work exquisitely well. But not in the real world, and especially not in the U.S.[302]

As for the educating function of tort law in particular, I am reminded of the bumper stickers you see on California cars that say, "Hit me. I need the money." Indeed, it is now claimed by the insurance companies that around 20 percent of auto insurance premiums in California are attributable to fraud: staged accidents that never existed, exaggerated claims, people deliberately creating accidents and then claiming benefits, etc.

Another function of a civil justice system might be to provide a mechanism for the social safety net provider(s) to be reimbursed by the insurers of the injurers — what might be called the subrogation function. I am not in favor of that either, and I note that the recent study for the American Law Institute agrees with me.[303] Indeed, as that study reports, several U.S. states have in the past few years reversed to so-called "collateral sources" rule so as make social insurance payments primary and tort recovery secondary.

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[302] SUGARMAN, *supra* note 24, at 55-63.

[303] ALI REPORTERS' STUDY, *supra* note 2 at 161-182.

For those who are keen about social cost accounting, I recommend pursuing that objective through the initial funding of the social safety net, rather than through individualized litigation. For example, I understand that the New Zealand government is talking about awarding "no claims bonuses" to motorists who do not make claims against the system. That would be a way of re-allocating the funding of the New Zealand social safety net without using litigation.

So, too, enterprises could be made to pay differential sums into the system based upon the dangerousness of their activities. I understand that in New Zealand there are not very many large employers, so that individual firm experience rating may not be sensible.

But in Japan, Canada, and the United States in large sectors of the economy there are large enterprises who could be asked to make differential payments on an actuarially sound basis. Indeed, back in 1967 Professor Ison made just this suggestion — funding the social net with charges based on risk creation.[304]

This does not mean that I would entirely eliminate tort law for personal injury. Rather I would reserve it for the relatively few people who are seriously injured by grave wrongdoing. In short, we should concentrate our attention on those cases where punishment is really warranted, where defendants would not be insured and would bear the sting of the judgment. To be sure, I am not very happy with the way juries in the U.S. are permitted to award punitive damages today. Indeed, I have proposed giving this job to the trial judge.[305]

Now, of course, we do not have an adequate social safety net in the United States today; nor do I think a truly desirable net is available in any of the countries represented at this conference. So, a key question is how might we get there.

One thing standing in the way, I think, is a lack of solidarity caused by some people already having advantages that others do not. For example, we have in the United States a very generous safety net for people like me who work for large employers. But this privatization of the safety net through a system of employee benefits makes people in my position all to uninterested in making sure other people have these benefits too.

By the same token, were there no tort system, the people who now benefit from the U.S. tort system might be powerful voices in favor of

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[304] TERRENCE G. ISON, THE FORENSIC LOTTERY (1967).

[305] SUGARMAN, *supra* note 24, at 160-162.

a broader social safety net. But with the tort system, they are in a sense bought off.

Another thing standing in the way of a better overall social safety net is the way issues gain political attention. All the time now our societies are confronted by events, both man-made and natural, that demonstrate to us that the existing safety net is insufficient, events to which the tort system, at least on traditional grounds, is inapplicable.

Yet with all of the media attention given to these events there is a great instinct to try to do something for the victims on an ad hoc basis. Even if no one else is morally responsible for their harm, their innocence pulls on our conscience.

One solution is to abandon the fault principle and impose strict tort liability on the enterprise whose activities seem most closely connected to the harm. Sometimes we pretend there was negligence by allowing the legal system to find there was a failure to warn when in fact it is unreasonable to believe that the defendant knew or should have known of the danger — a danger only made vivid through hindsight.

Alternatively, we adopt special kinds of compensation arrangements, such as the schemes for the unexpected side effects of drugs that various countries have adopted and the vaccine-damaged children programs enacted in many places. The international convention on commercial airplane crashes works in the same way. Any special arrangements are made for victims of earthquakes, hurricane and firestorms. In short, we invent special solutions for various visibly identified clauses of the disabled. But apart from their visibility, it is by no means clear that these classes of the disabled are especially deserving.

Will we get around to the rest? Who can say. One hope lies, I think, in the recent growth in many countries of a broad disability rights movement. This movement is now concentrating most on issues such as employee discrimination, public access, and the provision of personal assistants so as to facilitate independent living. But some parts of the movement are working on a general improvement in the social safety net, a campaign that I anticipate will gain further attention as time goes by.

PROFESSOR TANAKA: First of all, I'd like to express my appreciation to all of you for giving me such a good opportunity to study the theoretical and practical problems involved in personal injury accidents. I have learned a lot from the stimulating reports and discussions.

My specialty is not personal injury law, but legal philosophy and sociology. In connection with the analysis of general issues about justice,

law, and litigation, I have a keen interest in various functions of tort litigation in modern Japanese society. I have confined by comments this morning to this topic. I believe that it would be valid to say that not only in Japanese society, but also in many other societies, tort litigation is an essential institution for the victims of personal injuries, in spite of the institutional limitations which were pointed out in this workshop.

However, I am well aware that it would be too narrow and partial to discuss the problem of dealing with personal injury accidents only on the judicial or even the legal level. So in my comment, I suggested that the trend of courts to retreat in policymaking litigation is caused partly by over-expectation placed on litigation and that it is necessary to make a comprehensive study of tort law and litigation together with various alternative and complementary arrangements. Generally speaking, in coping with personal injury accidents, though it is essentially important to relieve the injured victims in some way, what is more important and desirable would be to prevent the accidents themselves and to devise a fair mechanism to distribute unavoidable risks and losses. How to deal with personal injury is not just a legal problem but also a problem of public policymaking and institutional design in which various factors (philosophical, ethical, political, economic, cultural and social) compete with and complicate one another. I noticed this as I prepared for this workshop, and the various reports and discussions of this workshop reinforced this understanding. I feel happy that I could obtain some important clues and hints in order to advance my research.

I'm now participating in a comparative research project on the tendency of legalization/delegalization and the reorganization of public/private sectors in coping with the problems of so-called "social justice." It is clear that the problem of personal injury accidents offers a very interesting case study for this research. In this connection, I'd like to give my impressions of this workshop, albeit briefly.

I found that the five models offered by Professor Sugarman, that is, the libertarian, conservative, liberal, collective and socialist models are very useful for the comparative studies of the institutional framework in dealing with personal injury, though I don't agree with his proposal. My stance, which I have called a moderate liberal one, may be classified as a mixed stance of the conservative and liberal models in Professor Sugarman's categorization. However, my stance does not mean to exclude the possibility of utilizing other models in dealing with certain types of accidents. Rather, my opinion is that because new types of

accidents occur one after another, it seems to be very difficult to design and to have accepted any uniform and comprehensive compensation scheme which doesn't differentiate among the causes, forms and sizes of accidents. It would be better to take a safer way to deal with each type of accident in a piecemeal way, taking their respective characteristics into consideration.

Before the discussion on choosing among institutional alternatives in dealing with accidents, there is the problem of whether a certain accident is disposed of as a misfortune, and therefore as a purely personal matter, or is recognized as a problem of justice and right which demands some kind of social response. The sense of justice and equity (more correctly, of injustice and inequity) which prevails among the public at large plays a decisive role in the identification of the nature of an accident. Though the core of this sense might be common throughout the world, the ways in, and the corresponding intensity with which this sense is expressed differ considerably in each nation. The difference in the meaning and the function of the apology between the U.S. and Japan, which was discussed in this workshop, would be a very interesting topic.

Even after a certain accident is identified as one that requires some kind of social response, it would be very difficult to choose the most appropriate among various institutional alternatives. Of course, not only the typical legalistic approach such as tort law and litigation, but also other institutional arrangements such as social welfare schemes and insurance systems should be included among these institutional candidates. In devising the institutional arrangement that aims to overcome the limitations of the legalistic approach which is centered around judicial remedy, we often observe conflict or tension between the public law approach which prefers legislative or administrative regulations on the one hand, and the delegalization approach which prefers alternative dispute resolutions or market-oriented incentives on the other. Most of the key issues in comparative analysis on the merits and demerits of the tort system and other alternatives have been pointed out by the reports and discussion in this workshop. But it would be a very difficult task to devise a well-balanced and feasible institutional system which fits the characteristics of each type of accident under each nation's cultural background.

In my opinion, the economic cost-benefit analysis seems to have been unduly emphasized both in international comparisons of legal systems, and in domestic discussions about the merits and demerits of each institutional device. This tendency is due to the fact that the

economic scale is easy to use as a common standard and that international competition of economic activities among nations is very severe. Again, we must admit frankly that the formation of some kind of consensus about the proper aims and ways of dealing with personal injury accidents is not so easy, for political ideologies and interests concerning this problem compete and are most complicated. Though we should not treat these economic and political aspects of the problem lightly, we should pay due attention to ethical values such as the conservation of the environment and the vindication of human rights, which are not appropriate to leave to the economic calculus or political bargaining. I believe that one of the important roles of jurists, especially legal philosophers, is to stimulate public attention to this aspect of the problem, and if possible to show a certain framework and guideline which could guide the economic and political discussion. Thank you.

PROFESSOR SCHWARTZ: This splendid program began on Sunday. I happened to be one of the first speakers. In that initial presentation, I was somewhat limited by the role assigned me — which was to discuss the ALI Reporters' Study. The invitation from our hosts to offer concluding remarks gives me a chance to go somewhat beyond that role.

In discussing the ALI Reporters' Study, I indicated that in considering a deterrence rationale for tort liability, the Study assumed that the tort system provides enough deterrence to make that rationale appropriate. I agree with this conclusion. Having said that, I can indicate that I also agree with Rob Leflar that for deterrence purposes we should probably sectorize tort law.[306] Deterrence may work out in one way in auto, in a different way in malpractice, and in a third way in products liability.

While I therefore favor looking at tort law from the viewpoint of deterrence, I also support reviewing it from the perspective of fairness or corrective justice. As I understand the Anglo-American tort tradition, fairness is a major part of that tradition. Similarly, it is a major part of the public's own understanding of tort. As Jules Coleman has suggested, a fairness approach may be implicit in the basic structure of the tort lawsuit.[307]

In considering a fairness rationale for tort liability, the ALI Reporters' Study identified a number of realistic objections to that ra-

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[306] I will be expanding on this point in Schwartz, *supra* note 8.

[307] *See* Jules L. Coleman, *The Structure of Tort Law*, 92 YALE L.J. 1233 (1988).

tionale. Having done so, the Study decided that it is appropriate to abandon that rationale. In my view, this was an overreaction to those problems — as genuine as the problems might be. Even if tort law is far from perfect as a mechanism for achieving fairness, so long as it is partially successful its fairness advantages should not be overlooked.

In this regard, I am again impressed by the good fortune of the negligence liability standard. That standard has the capacity to do a reasonably good job of delivering whatever measure of deterrence tort law would like to deliver. Likewise, holding liable the party or firm that has behaved in a negligent or unreasonable way seems to be roughly what a fairness rationale for tort law has in mind. To be sure, as for both deterrence and fairness, there can be arguments on behalf of strict liability. But as I suggested yesterday, these arguments tend to be debatable, or only pertinent to a limited range of cases. By adhering to a negligence rationale, tort law can avoid the need to choose between a fairness rationale and a deterrence rationale. The negligence standard may provide a happy coalition for fairness values and deterrence values.

Let me now go on to make a point that I haven't made before. I regard modern tort law as being considerably closer to standards of negligence (or unreasonableness) than is suggested by observers like George Priest. While I, like George, believe that modern tort law in a number of ways has gone somewhat too far, I am nevertheless inclined to interpret modern tort law in a considerably more sympathetic way than it is interpreted by scholars like George. I can add that an article of mine elaborating on my interpretation will be published later this year.[308]

Let me now make a further point that expands on something that George's comments hinted at. Modern tort law began in the early 1960s, and has witnessed a dynamic growth in tort liability along a whole bunch of fronts. The phenomenon of modern tort law has been much discussed by mainland scholars, including the three of us who are present at this conference.

As I see things, however, the modern era of tort liability probably ended at some point in the early 1980s. Between the early 1960s and the early 1980s, in almost every year there was some bombshell of a judicial opinion — some landmark opinion establishing a major new

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[308] Gary T. Schwartz, *The Beginning and the Possible End of the Rise of Modern American Tort Law*, 26 GA. L. REV. 601 (1992).

theory of liability on behalf of injured plaintiffs. At some point in the early 1980s, however, these bombshells stopped exploding. One is hard-pressed to identify landmark extensions of liability since the early 1980s of the sort that had become almost routine during the two previous decades. Moreover, since the early 1980s courts have frequently — not always, but still frequently — resisted proposals for expanded liability. Moreover, courts have conservatively interpreted certain existing liability rules, and — at least on some occasions — have overruled pro-liability precedents. For example, early this year the Fifth Circuit repudiated the presumption of causation that it had previously endorsed for failure-to-warn cases[309] And just a few weeks ago, the Maryland Court of Appeals overruled a whole series of state precedents by way of narrowing the standards for the award of punitive damages and heightening the procedural burden of proof the plaintiff needs to carry in order to show that punitive damages are appropriate.[310]

Two years ago, Jim Henderson and Ted Eisenberg wrote an article describing a "Quiet Revolution in Products Liability."[311] Even George has published a recent article suggesting the emergence of a "counter-revolution" in American products liability.[312] As it happens, I regard language such as this as much too strong. I'm happier talking about "stabilization and consolidation" rather than "quiet revolution" and "counterrevolution." But at the same time, I see that stabilization occurring throughout tort law, not just in products liability. Why it is that American courts have moved from a modern period of expanding liability into a post-modern period of stabilized liability is an interesting question — the answer to which is by no means clear. I discuss several possible answers in my new article.[313]

In any event, let me now return to the question of basic tort criteria. I have identified deterrence and fairness rationales for tort law that lead me to support the retention of some version of a tort regime. But as I implied on Sunday, I don't really see tort law as properly aiming at a more general goal of victim compensation. This is a goal that can only be pursued by a variety of private insurance arrangements, as

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[309] Thomas v. Hoffman-La Roche, Inc., 949 F.2d 806 (5th Cir. 1992).

[310] Owens-Illinois, Inc. v. Zenobia, 601 A.2d 633 (Md. 1992).

[311] James A. Henderson & Theodore Eisenberg, *The Quiet Revolution in Products Liability: An Empirical Study of Legal Change*, 37 UCLA L. REV. 479 (1990).

[312] George L. Priest, *The Modern Irony of Civil Law: A Memoir of Strict Products Liability in the United States*, 9 TEL AVIV U. STUD. IN L. 93, 120 (1989).

[313] Schwartz, *supra* note 308 at 683-99.

well as social welfare programs. And that last observation encourages me to discuss which social welfare programs American society is likely to adopt.

Let me approach this question in a particular way. As most of you know, America is the only major industrialized nation in the world that does not have some general program for national health. Still, programs of this sort are now being vividly debated in the United States. And it seems to me likely that my country will adopt some version of a national health program during the next decade. I say this partly because, as I assess the political debate, there seems to be a consensus that the lack of insurance is a serious social problem. Something like 10 percent or more of the American population is without health insurance, and another 10 percent may be very significantly underinsured. As I listen to the public discussion — to Republican and Democratic candidates alike — I don't hear anybody defending that result. No one is claiming that it is a good thing — or even an acceptable thing — that more than 10 percent of the American population is essentially without health insurance. What seems to have developed is a consensus that such a lack of insurance is wrong. What is therefore being debated — between the political parties, and within each individual party — is what the best way is to solve the problem of uninsurance and move in the direction of a national health insurance program.

Of course, to observe that most people believe the problem should be solved is not to concede that the problem will in fact be solved during the next decade. There are enormously difficult policy issues involved in figuring out whether America should adopt an English version of national health insurance, a Canadian version, or some system of managed competition that would extend the coverage of current health insurance. These are not only vexing issues of policy here, but political hot potatoes as well. For example, whatever the advantages of the English approach, the opposition to that approach by the American medical profession makes it almost certain that the English approach will not be adopted in the United States. Given all these vexing questions of policy and politics, I acknowledge that it will take many years for America to adopt a program of national health insurance. Still, given my own perception that a consensus on behalf of such a program has by now developed, my related perception is that such an adoption is likely to happen.

Having said this much, let me now make a more general point. If America does adopt a program of national health insurance, it is

essential that we incorporate into that program appropriate elements of cost control. In my interchange with Geoffrey yesterday, I suggested that there might be some dynamic of the claims process in America that would make it difficult for us to extrapolate from New Zealand to America. Geoffrey seemed generally to agree with this suggestion.

On that claims process, let me provide you with some numbers that I've recently compiled.[314] Medicare is the American program of health insurance for the elderly. The first full year of Medicare was 1967. In that year, its cost was $4 billion. Yet by 1992, the cost of Medicare had grown to $112 billion. Now, the $4 billion would have gone up to perhaps $16 billion on account of inflation between 1967 and 1992. But the additional increase concerns elements of the internal dynamics of the Medicare program that were poorly understood when the program was launched in the mid-1960s. In America, there is also a program called Social Security Disability Insurance that provides substantial benefits to those who are totally disabled for a considerable period of time. Between 1970 and 1977, the cost of SSDI went up from $3 billion to $12 billion. Of course, some of this increase was due to inflation. Yet even taking inflation into account, the cost of the program in real dollars increased by 150 percent during that seven-year period.

The relevant problem here is that once programs are set in motion, it becomes very difficult to adopt modifications that lower the benefits that people are already receiving. "Entitlement" programs are deemed to be politically sacrosanct. In fact, an effort to reform SSDI was initiated by President Carter in 1980. A somewhat different version of that program was then implemented by the Reagan administration during the 1980s. But all hell then broke loose — in terms of both political controversy and judicial review.

In short, once programs are in place, the nature of both American politics and the American legal culture makes it extremely difficult to modify those programs in order to achieve goals of cost control. It is therefore essential that intelligent provisions for cost control be incorporated into those programs from the outset. Now having said this, I can add that it's an uncertain question whether tort lawyers have any special skills in figuring out the appropriate structure of an intelligent program. It might be that the questions involved are beyond the professional competence of torts professors as such.[315]

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[314] *See* Schwartz, *supra* note 308 at 692-93.

[315] In a future article, I hope to consider the topic of torts scholars and compensation programs.

As I understand Steve's set of proposals, he tends to assume that a national health program is already in place. He then discusses what the United States should do next by way of protecting disabled workers against various forms of wage loss. It's not so much that I agree or disagree with this dimension of Steve's proposal. It's rather that I regard the proposal as somewhat premature. The job of developing and securing the adoption of a national health insurance program is a task that is quite large enough to preoccupy us during the next decade. Only when that program is in place — when we know what shape it has assumed and what its operation is beginning to look like — only then will we be able realistically to express any views about what the next expansion of the American welfare state should be.

Thank You.

PROFESSOR MILLER: I think we have to assume that the elimination of tort law is unlikely, and I join with those of you that share that view. I just don't see the politics of it in the next 25 years ending tort law.

Part of the reason for that is the reason that I have difficulty with Professor Sugarman's proposals and that is the costs question that Professor Schwartz raised. If you look at the New Zealand plan or read that part of my article which talks about the costs over time of the New Zealand plan, not only have those costs been skyrocketing, but even after the pay-as-you-go plan was introduced and the fully-funded system was dropped, the costs continued to rise rapidly.[316] And that is for a system which only covers accidents, which externalizes many of the medical costs, which largely denies compensation for loss of earning capacity to nonearners, and which does not cover illness.[317]

Thus the costs of actually having a comprehensive system in New Zealand, or in the United States, or anywhere else, it seems to me, are extraordinarily high, notwithstanding claims to the contrary from New Zealand and considerable evidence that the relative cost of ad-

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[316] Richard S. Miller, *The Future of New Zealand's Accident Compensation Scheme*, 11 U. HAW. L. REV. 1, 25-34 (1989).

[317] I believe that there may be about ten time more illness incapacity than incapacity caused by accident.

The Royal Commission on Social Policy, in urging that incapacity by illness and incapacity by accident be treated more similarly, recommended that the high rates of earning-related compensation be reduced two years after the accident to "a generous flat rate benefit." THE ROYAL COMMISSION ON SOCIAL POLICY, WORKING PAPERS ON INCOME MAINTENANCE & TAXATION 33 (1988).

ministration may be very low. And those high costs are going to prevent most industrial countries from going in that direction, particularly since other needs, such as those in the poverty area or in the health care system, may have a higher priority.

And if we're going to continue to have a tort system, I think George Priest's distinction between ordinary negligence liability and liability based on loss-shifting or insurance purposes may be suggestive: If we use a simple negligence approach — if your unreasonable conduct causes harm, you pay — then traditional tort damages may be justified on efficiency grounds. If, on the other hand, we are not using a negligence approach, but instead are really trying to shift losses in a sort of insurance scheme, as may be the case under some strict product liability formulae, then, as a practical thing to do, awards should perhaps be limited to those economic benefits that would be purchased in a real insurance system — economic losses — rather than expansive traditional tort damages.

Now, it seems to me that that distinction also suggests some possibilities that go beyond where George may be taking us, and I will describe them in a moment. But in order to make them work, because they do involve tort reform, I think we need a reasonably principled foundation. As you know, there has been much so-called tort reform, but for the most part it's been sporadic, unplanned, uncoordinated, and even irrational: a damages cap here, a little reduction in the collateral benefits rule there, a little less joint and several liability, etc. etc. A few years ago, Professor Matsumoto and I wrote an article surveying tort reform in the United States which was published in Japan. If I recall correctly, there was no principled connection between the various reforms. If there were a common denominator it was to reduce damages and discourage or eliminate tort actions.[318]

And as you may have gathered from my earlier comments, I worry a little bit about trying to reform tort law sensibly without considering the effects on important values that deserve recognition. If the ALI study has suggested we stop talking about fairness, therefore, that's a serious mistake. Economic efficiency as a goal may appeal to a small, perhaps elite, segment of the United States, but it is not something that catches the public eye, particularly, or the public heart. If, in

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[318] Tsuneo Matsumoto & Richard S. Miller, *The Movement for Reform of the Tort System in the United States*, Part 1, 621 HANREI TIMES 15-34 (Jan. 15, 1987); Part 2, 622 HANREI TIMES 30-42 (Feb. 1, 1987).

addition to efficiency, we can incorporate the ideas of fairness, rectitude, respect, well-being and other values we discussed into our proposed system, then we may have something that is likely to get some support from the public and the politicians. Then we can say: This is a fair system. This is a system that deters wrongdoers. This is a system that is economically efficient. This is a system that can send a message to people about how to act or how not to act, that can perform an educational function. This is a system that does provide well-being to accident victims. This is a system that does reduce moral hazard.

And how can we do that?

It seems to me, — and this has American roots — that we have to go back to some earlier ideas which are accessible to us if we choose to use them. I'm thinking, for example, about Holmes in *The Common Law* talking about the reason why an objective test for negligence was necessary:

> [W]hen men live in society, a certain average of conduct, a sacrifice of individual peculiarities going beyond a certain point, is necessary to the general welfare. If, for instance, a man is born hasty and awkward, is always having accidents and hurting himself and his neighbors, no doubt his congenital defects will be allowed for in the courts of Heaven, but his slips are no less troublesome to his neighbors than if they sprang from guilty neglect. His neighbors accordingly require him, at his proper peril, to come up to their standard, and the courts which they establish decline to take his personal equation into account.[319]

Now, that's not moral fault, that's social fault or something else. In other words, Holmes was saying, "We're going to hold that person liable even though that person couldn't meet this standard."

And why? The principal reason was to protect members of society. A second important reason was that the administrative machinery of the courts cannot handle or would find it difficult to handle a system which tried nicely to ferret out moral blameworthiness.

Now, if you come forward to 1926 and if you read a famous article by Professor Edgerton in the Harvard Law Review,[320] you will find that he asked whether a plaintiff in negligence case should have to prove subjective carelessness, a negligent mental state, in order to

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[319] OLIVER WENDELL HOLMES, THE COMMON LAW (1881). This quotation was briefly paraphrased but not included verbatim in the original proceedings.

[320] Edgerton, *Negligence, Inadvertence and Indifference: The Relation of Mental States to Negligence*, 39 HARV. L. REV. 849 (1926).

recover? And he finally concluded: No, we ought to use an objective test.

Now, it seems to me that part of the effect of holding some people to standards they cannot meet and not insisting on proof of moral blameworthiness is that we are bringing in today many, many more cases in which liability will be imposed than would have been the case in 1881 when *The Common Law* was written or in 1926, when Professor Edgerton wrote his article. Today, of course, we have far more complex machinery and procedures, we have much higher speeds at which our vehicles move, and many more of our so-called benefits of science and technology are also sources of considerable danger. In consequence, actors don't have the opportunity to make nice, thoughtful, moral decisions about whether and how to act or not to act.

There are — I call them in class — "cold-sweat incidents" that happen all the time. You're driving down the highway, start to pull into the right lane and suddenly realize that you forgot to check your blind spot, and someone is in the right lane, in the blind spot. If you are lucky, an accident is narrowly averted. You didn't do it because you were morally blameworthy, you did it perhaps because you were wool-gathering — you're human, and you cannot avoid doing that sort of thing once in while.

That has all too often happened to me. Perhaps I'm an exception, but I usually get a large number of raised hands of law students who agree that they, too, cannot avoid causing cold sweat incidents once in a while, as much as they would like to.

And yet, it is absolutely clear to me that if those incidents happen and if they result in accidents, the actors will be deemed negligent under our system and all of the large damages for economic and non-economic losses that negligence permits will also follow.

How about medical malpractice? We hold the physician to the customary standards for her specialty in the medical profession. The doctor is operating and, inadvertently, it happens: the knife slips and serious injury occurs. Malpractice? Pretty clearly that will be deemed malpractice and the surgeon will be required to pay.[321] Is it a defense that such errors are committed by surgeons a certain percentage of the

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[321] *Cf.*, Walters v. Hitchcock, 697 P.2d 847 (Kan. 1985) (In surgically removing diseased areas of plaintiff's thyroid gland, defendant surgeon removed part of her esophagus, causing substantial damage to plaintiff. Verdict of $2,000,000 upheld on appeal)

time or that the error was inadvertent? No, it's not a defense. The physician will likely have to pay the full panoply of damages.

The law does not take into account the fact that the medical malpractice situation may be totally unlike any other situation that one can think of: a physician dealing with many patients in the course of a week may have to make 100 or 200 acts or decisions, any one of which, if wrong, could cause serious harm or death. The level of risk for that profession is arguably higher than for any others; happily, much higher than for lawyers. And many of those decisions are not morally wrong decisions, they are perhaps Edgerton's type of fault. They are inadvertent medical errors or mistakes.

So what should we do about that? It seems to me that there are some possibilities. But first let me describe another situation, that of a defective product, a manufacturing defect — to make it simple.

The plaintiff in the *Cronin* case,[322] driving a truck, stops suddenly and a bread rack comes forward because there's a defective piece of metal holding the tray in place. The bread rack hits the plaintiff on the back of the neck and does serious damage to him. There is liability. I don't think anyone questions that. And defendant manufacturer of the tray must pay damages. What damages are those? They are the same full panoply of damages for economic and non-economic losses that defendant would pay if there had been morally wrongful conduct.

Why do we require full damages, including pain and suffering? Because of the notion that a wrongdoer who has caused injury should restore the innocent victim, insofar as money will do so, to the position in which he was before the accident? But why do we disregard collateral sources? Because, once again, the defendant is supposed to be a wrongdoer. That's the only justification for telling the defendant, "You are going to pay the whole thing even though as to some of these items plaintiff has suffered no actual loss."

Now, it seems to me that in terms of fairness, in terms of proportionality, that's overkill. And it's also grossly unfair to the defendants — the driver, the physician, and the manufacturer described above — who are making these mistakes.

What would be more fair? I would argue that, with respect to mistakes, if you can identify a pure mistake but cannot prove some kind of subjective moral fault, that the person who made the mistake ought to pay for the injury produced by that mistake. But what should

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[322] Cronin v. J.B.E. Olson Corp., 501 P.2d 1153 (Cal. 1972).

that person, in fairness, pay? It seems to me a good argument could be made that, at the least, that person should pay enough so that the injured party avoids any economic loss as a result of the error.[323]

And how much is that? Well, to the extent that the injured party has collateral sources, they should not be duplicated by damages. To the extent the collateral sources don't make up the difference, then, arguably, the defendant should pay the lost wages that are not paid, that are lost and not recaptured through sick pay or disability income plans; the medical expenses not covered by existing health plans; the deductibles; and maybe something for past premiums paid and for attorney's fees. That sounds fair to me. If your mere mistake, or to use the New Zealand term, misadventure, causes me serious injury, that's enough.

Now, what do I do if defendant is morally at fault? First, make me prove it. If I can prove, perhaps by clear and convincing evidence (because we don't want every case to slip into this category,) that defendant was guilty of subjective fault of some sort or other — that, unlike Holmes' hasty and awkward man, (1) the defendant was capable of avoiding the error that injured plaintiff but (2) failed to do so by virtue of carelessness or perhaps recklessness rather than unavoidable human error — then plaintiff gets the full panoply of common law damages — full compensation and perhaps even punitive damages. Otherwise, keep economic damages down to compensate only for actual economic losses.

Now, let's turn to products liability. If you read — as I've had my students do year after year and as I do fairly frequently —Justice Traynor's concurring opinion in *Escola vs. Coca-Cola Bottling Co.*,[324] where he talks about the policies of strict liability, it seems to me he includes deterrence, includes risk spreading, but he also includes elements of fairness. It isn't fair that a consumer, who has little opportunity to check out the quality of these goods, should be saddled with loss. Thus there is an element of fairness, of justice, in there: The

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[323] I would also allow a reasonable but limited amount for solace in the event of serious pain, disfigurement, loss of bodily function, or shortening of life. This suggestion was not included in the original proceedings of the Workshop.

The author of this comment has also recommended limiting damages to actual economic losses in the context of negligent infliction of emotional distress. Richard S. Miller, *The Scope of Liability for Negligent Infliction of Emotional Distress: "Making the Punishment Fit the Crime,"* 1 U. HAW. L. REV. 1 (1979).

[324] 150 P.2d 436, 442 (Cal. 1944).

manufacturer's mistake which produced a defect in the product caused my injury. But, if I don't have to prove that the manufacturer was at fault, then what should I get?

I found it very interesting that in a Tennessee Law Review article that he wrote some years after *Escola*, Justice Traynor (who is perhaps the father of strict products liability in the United States) stated that if strict liability, which he referred to as enterprise liability, is adopted, "consideration might well be given to establishing curbs on such inflationary damages as those for pain and suffering. Otherwise," he added, "the cost of assured compensation could become prohibitive."[325] This it seems to me is also a justification, along with justice concerns, for keeping damages limited in regard to injury-producing conduct that is not proven to be morally blameworthy, along the lines I've suggested above.

What I am suggesting may seem to be a little elaborate, and of course it needs considerable fleshing out. We may expect that we will make some tort lawyers very unhappy if we propose it. The plaintiff's bar clearly prefers the system the way it is.

But this is a system that, it seems to me, you can at least stand on and say, look, it makes sense from the point of view of both fairness and deterrence. We're not totally externalizing, we're imposing economic costs on accident causers. We are trying to improve the well-being of the injured victim. We are dealing with rectitude, in the sense that if someone is really at fault, then we're imposing levels of compensatory damages that tend to punish, and the remedy might also include punitive damages. Damages in the case of non-subjective fault, however, are proportional to the conduct that caused them, but not excessive.

It's a system that might work. It might even work in medical malpractice: You have a medical accident. Call it a mishap or a misadventure. You don't have to prove fault. All you have to prove is a mistake. Many physicians faced with a fairer system in terms of both the stigma and the damages might very well admit the mistake and offer to pay.

Economic losses over and above collateral sources in cases of mistake. Is that fair? I believe so. Why don't we do something like that? It seems to me that's the kind of reform that might stick. It is one that

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[325] Roger Traynor, *The Ways and Meanings of Defective Products and Strict Liability*, 32 TENN. L. REV. 363, 376 (1965).

I would feel comfortable arguing for in front of the legislature. The adoption of such a scheme would, perhaps, free up some money to expand other social programs that are needed.

I have the germ of another suggestion that might make the tort insurance system more fair and perhaps less forbidding to those, like the New Zealanders, who have forsaken it. The burden of proof — a "preponderance of the evidence" or the "balance of probabilities" is so weak in the ordinary tort case, that if you consider what the scholars who work in probabilistic causation are telling us about proof,[326] there's a possibility that some plaintiffs are receiving full damages in cases where, mathematically, they have not in fact satisfied even the minimal burden of proof. This is because the "product rule" says that if in order to win your case you have more than one thing to prove, each one of which is wholly independent of the other, and if you prove each one to a certain percentage, then the likelihood that all have really been proved is the product of each of the percentages.

Thus, if plaintiff, to win, must prove (1) that defendant was driving and (2) that the speed of his car exceeded the speed limit, and if plaintiff can only prove each of these separate facts by a probability of 60 percent, then we are told that the probability that both facts are true is calculated by multiplying the two probabilities together — only 36 percent. Arguably, 36 percent might not satisfy the burden of proof in a civil case.[327]

And it has long occurred to me that if the jury finds for plaintiff in cases like these, and if the plaintiff gets the full measure of tort damages, then we may be overcompensating plaintiffs. Now, on the other hand, the more than 50 percent requirement may also undercompensate a lot of people who fall below it. Perhaps the law should be adjusted to take account of such probability problems.

But my answer is non-mathematical. I call it "discounting for doubt." It is to tell juries, explicitly, that if they are doubtful about the outcome of the case, they may reduce — they do anyway sometimes,

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[326] *See, e.g.*, Richard Lempert, *The New Evidence Scholarship: Analyzing the Process of Proof*, 66 B.U. L.REV. 451, 450-54 (1986) and Dale A. Nance, *A Comment on the Supposed Paradoxes of A Mathematical Interpretation of the Logic of Trials*, 66 B.U. L.REV. 947 (1986). *See generally* Symposium: *Probability and Inference in the Law of Evidence*, 66 B.U. L.REV. 377 (1986).

[327] *See* Dale A. Nance, *supra* note 326 at 947.

This paragraph was changed from that in the original proceedings in order to provide a more simple illustration.

but not necessarily because they're supposed to — the damages to take account of those doubts. "Ladies and gentlemen of the jury, if you think the proofs don't establish to your full satisfaction that the defendant's negligence caused plaintiff's injuries, then you may reduce the damages accordingly to reflect the degree of your doubts." I might even be willing to instruct the jury on the product rule and, if that were done, to tell the jury that plaintiff might recover even if the degree of doubt exceeded 50 percent.

Thus, I think there are ways of making the negligence system more fair and economically more efficient. None of our systems, I must say, work very well. From what I've heard today, the Japanese system isn't working that well because it leaves out a number of people who are seriously injured and who might have claims under other nation's legal systems. And as I have argued, the New Zealand scheme isn't working well because it has absolutely no deterrence built into it and may be too costly.

But I think we may take a little solace because perhaps the only kind of human systems that really work well are those that are built for purposes of destruction — well, two examples that quickly come to mind is the United States military during the Gulf War and the ovens in the German concentration camps. We may have to accept the reality that other human institutions with more constructive objectives don't work perfectly. We just have to do the best we can to make them work better. And what I have suggested is that we pay attention to important values and try to tailor our systems better to achieve well-considered goals. Then maybe they'll work very well indeed. Thank you.

PROFESSOR MORIGIWA: Professor Tejima had said that we would need an ideal of what is a better society in order to actually decide on any issue that has public policy significance. The issue that we are talking about, though it hasn't been quite identified, is definitely an issue that has consequences for the public at large. Therefore I would first like to point out one consideration we should keep in mind concerning the ideal of a society when discussing the issues.

When we think of the public — the term "public" usually denotes the nation that you live in. When we think on a larger scale, we think in terms of international relations, or relations among nations. But we realize, on the other hand, that this is the age of globalization, highlighted by global environment issues, where national effort by itself cannot solve many of the issues. And why discuss tort compensation solely in the national context, in an age when thinking just in such

terms might well be no longer quite sufficient? I would like to say that when we make public decisions in the future we ought to think not only in terms of national interest but also in terms of those out of the scene, on a global scale, with the usually conflicting interests of those beyond the border in mind. Only then should we start thinking about what the national, internal public policy should be. This view ought to apply to tort reform issues as long as it is a public policy issue, though obviously to a much lesser degree compared to global environmental issues.

In other words, I'm trying to take seriously the often quoted slogan, "Think globally, act locally." I think that we need new community values, community values that will be valid or accepted in one particular nation, not only because it is fair for its citizens, but also because it would be fair and acceptable to fellow human beings, regarded on a global and transgenerational scale.

Secondly, Lewis Klar has impressed me with his comments many times. This afternoon he has pointed out that the tort or compensation problem in itself is not the big issue in any of the industrialized countries, but it is important nevertheless because all the serious issues asking for remedies do have effects on the system. And that is exactly the way I have felt the issue to be. It is not because this issue demands priority, but because other pressing problems cannot be resolved in the abstract, with disregard to this issue.

Although I am a philosopher of law, I am quite tired of thinking in terms just of principles, abstract principles, and how they relate to each other conceptually. Many a philosopher in the history of philosophy have said that truth, or God, resides in the details. I would like to say that the solution to the pressing issues, often argued in abstract terms of justice and fairness, should be argued in the context of the workings of an actual institution, in the details of how they work in reality.

Concerning this aspect, I believe tort scholarship and work in compensation schemes has one of the best traditions in academic scholarship. Having said that, I would like to go on and give my interpretation of the title of our workshop, "Beyond Compensation."

Compensation, of course, is important. But as I had pointed out, that does not mean that deterrence should always be second to compensation. A safer society is better than a less safe society with a stronger safety net. Less victims are better than more well-cared-for victims.

And by this, I don't intend to neglect, by any means, the existence of actual and potential victims, those who are ill-fortuned. Rather, I

think we should see things from the point of view of the ill-fortuned, and then think about how we could design and manage the institutions that are actually allocating and redistributing resources as well as risks so that there would be alleviation of suffering.

I do not like the term "social engineering," because of its manipulative connotation and its psychological association with social technocracy. Rather, in redistributing risks, as the Japanese participants have stressed, individual initiative, participation by the greater public in public policymaking is essential. In doing this, we are putting the issue in the context of politics and economics, manifesting our intention on the borders of law's empire.

I believe giving serious thought to and discussing the design and the implementation of important institutions having to do with the redistribution of risks and resources is one of the more important and pressing things that we need to do, if we want to put content into slogans such as "citizens' participation" and others I have mentioned previously.

People who are in the legal profession, happily, are not the main stay of technocracy; nor can they really call themselves social engineers. But nor are they laymen. Because they are in this intermediate position in the structure of society, all the more I think those in the profession have the obligation to facilitate a greater participation in public policymaking of as many of the population as possible.

This is important because building a mutually agreed-upon and cooperatively-built system of rules has the beneficial effect not only of actually redistributing resources and risks in the way we would want, but also builds a new object to which we can pledge our allegiance to. I believe allegiance to the product of a cooperative venture would have the possibility of becoming one of the new community values that we can all share. Freedom in the context of the 21st century and on, I think, would involve that sort of a venture: the building of systems and values those with conflicting interests can share. The element of autonomy would remain important in this mode, while the element of freedom as license recedes. Further, the rules built would not necessarily be confined to those of a nation state. It can be participation in the building of, and of being observant of rules on a global scale.

Because what I'm saying is verging on the realm of the bombastic, all the more attention to the details of the actual working of a system in a society for redistributing, consciously, risks and resources is important. Truth, I think, does reside in the details. I must say that I am very happy that so much attention has been given to the globally

applicable issue of deterrence and other issues that I regard, from what I've just claimed, as amenable to my viewpoint.

I should go into the actual details and explain their significance from the philosopher's point of view. But, of course, I cannot do this at this time. In fact, I think such a venture could only be done with the cooperation of law professors and legal philosophers as well as insurance persons, discussing how the systems of law, insurance, tax and social security can do this.

But just one little remark as a philosopher. The terms "corrective justice" and "retributive justice," I think, was used more or less interchangeably in this workshop and as many of you realize, the uses may be distinguished.

As Dick Miller has emphasized, when the wrongdoer, the tortfeasor, has to pay back only the actual losses that were suffered by the victim, we are talking about corrective justice. This would overlap with the Kantian notion of 'retribution.' However, when we go on further and talk about punitive or exemplary damages, satisfying our primitive desire for vengeance, then we are talking solely of retributive justice. If there is an issue for tort, if we discuss fairness in tort, we should be discussing, among other things, which of these that we want.

My understanding is that tort should go toward corrective justice, except in special cases where it is more rational, at least, to go for retribution as well. Do we really have a case for corrective justice, or are we being hypocrites and hiding our desire for vengeance in the cloak of corrective justice? I will just pose the question for the moment and go back to the issue of prevention to reemphasize what Professor Morishima has said about deterrence.

Tort in itself probably can only be a supplementary method of attaining deterrence. There would have to be administrative means, regulatory means, to attain deterrence and promote safety. Ideas to that effect Professor Sugarman has given and, I am sure, will be giving more to us in the future.

There would also have to be a more sophisticated operation of the market system to attain deterrence, and going from the general to the specific, as many of the participants have pointed out, is one direction that we must keep in mind when we do that.

I'd like to point out the significance of that way of thought. I think we are saying that the mode of redistribution of risk and resources, even if we have collective goals, need not be collective. On the one hand we can use administrative collective means, regulatory means, to attain individualistic goals. But on the other hand, we can use the

market system in attaining collective goals. The market mode of redistribution does not leave out the possibility of setting or reorienting collective goals by changing the rules of transaction that occur in the market. And isn't that exactly what we, as law professors, as lawyers, are expected to cooperate in, when interpreting the law?

Issues in accident law actually had to do with, if not consciously — and probably consciously — the designing of rules and the imagining of how their operation, if they change, would be like. These, of course, have only indirectly to do with the market. However, along with rules of contract and company law that do deal directly with market transaction, these do form a system of rules which promote prevention of accidents. These rules, at the same time, may form part of the body of rules one may pledge allegiance to.

I have given my interpretation of what it is to go "beyond compensation," and hope to have shown how this involves the self-understanding of what we are generally doing when discussing issues of this nature. I am sorry that I cannot go into the content itself, except by saying that the welfare state inspiration, though admirable, has its negative aspects of being nationalistic, and in that sense, selfish, given the international or global context; that the obligation of the state in the allocation and the redistribution of risks and resources would have to be thought not only internally, in terms of the nation, but internationally as well, if not globally. As for actually viewing the content, I would hope there would be future occasions to do this with ample time and resources and, of course, less risk.

Thank you very much.