Hawai'i's *Kahuna* of Torts

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During a military furlough to his home state of Massachusetts in 1951, before going overseas to Germany during the Korean War, 21-year-old Richard S. Miller sustained minor injuries in a car accident.[1] An attorney who was a family friend quickly secured for him a generous settlement of $1,500. The young Miller thought it "all very nice," but was nagged by a fundamental question, one which would eventually lead him into his future career. The question: "Why?" Why should he receive that much money for a mere bump on the head?

Throughout his thirty-seven years of teaching law, Miller never stopped asking that disarmingly simple question, prodding generations of law students, practitioners, and legislators alike to think critically about one of the most fundamental areas of common law — torts and accident compensation schemes. This tribute to Professor Emeritus Richard S. Miller can only scratch the surface of his distinguished academic career from 1972 to 1996 at the William S. Richardson School of Law, University of Hawai'i at Manoa. Nonetheless, it is highly appropriate now, given Miller's elevation to *emeritus* status last year, to pay homage to this kind, intelligent man who became Hawai'i's *kahuna*[2] of torts.

After graduating from Boston University School of Law in 1956, Miller practiced law for a few years with two fellow graduates and then with a "kingmaker" trial lawyer in Boston. During that period, however, Miller became disenchanted with "a lot of awful cases" and the lack of training. One case that made a particular impression on him involved an auto accident from which his client claimed back injuries. After settling for a "small amount," Miller and his client walked to the bank together to cash their joint check. After taking his share, the client turned to Miller and confessed that the whole

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[1] This and other personal stories about Professor Miller in this Tribute are based on personal communications. Interview with Richard S. Miller, in Honolulu, Haw. (Feb. 27, 1997). The author would like to thank Professor Miller for his gracious and affable assistance.

[2] The Hawaiian word "kahuna" means a "priest, minister, sorcerer, expert in any profession." MARY KAWENA PUKUI & SAMUEL H. ELBERT, NEW POCKET HAWAIIAN DICTIONARY 46 (1992).

case had been "a fake" and that his back was "just fine." Forty years later, Miller still seems appalled by the event, amazed by his own "innocence," and repulsed by the idea that such fraudulent cases make it through the legal system. After that experience, Miller's interest in private practice rapidly waned. His thoughts turned to teaching.

Miller decided to enter the LL.M. Program at Yale University in 1958, where his scholarship focused on the constitutional implications of the Internal Revenue Code. The next year, Miller landed an entry level position teaching civil procedure at Wayne State University in Ohio. After a "very fast" three years that he attributes to "demand and supply," Miller received tenure, based in part on his Yale tax code scholarship. Initially, Miller received what he called "one of the best starting salaries in law teaching" — $7,000 a year. Six years later, his salary had leapt to $12,000. Still unsatisfied, however, Miller demanded that the Dean give him another $2,000 raise "or else." The Dean offered $1,000. Miller quit. Looking back, Miller sheepishly concedes it was "a pretty stupid thing to do," but it was that precipitous move that led Miller toward a quarter century of torts teaching, scholarship, and community service.

Accepting the only job offered after his abrupt resignation from Wayne State, Miller landed at nearby Ohio State University Law School. Miller had no idea what subjects the Dean might ask him to teach. When queried "How about torts?," he reflected on how much he had enjoyed his first-year class with noted torts Professor Tom Lambert, and then enthusiastically replied: "Sure, I'll teach torts." Although Miller found torts much more "amorphous" than procedure, torts quickly became his passion. Miller enjoyed torts because, he says, it is "important to human dignity," and, at the same time, it is comprehensible. As he vividly puts it: "everyone understands a sock in the teeth."

Not surprisingly, Miller's story of how he made the journey from Ohio to Hawai'i is both fortuitous and humorous. While serving as the director of clinical education programs at Ohio State University Law School, he and his daughter attended a "farm party" at a friend's house. When it came to saddling up Miller and his daughter for a pleasure ride on a tired old mare and a frisky young gelding, the host incorrectly assumed that Miller could ride better than his daughter. Miller's ride on the gelding did not last long. As a result of the fall, Miller separated his left shoulder, rendering him completely unable to work.

To break the boredom of recovery, Miller attended a conference on clinical education, where he met the then-newly appointed Dean of the University of Hawai'i School of Law, David Hood. Hood was out recruiting the school's founding faculty and struck up a conversation with Miller about an article

Miller had written on the future of legal education.[3] Hood soon offered Miller a job. Miller now recalls the rumors circulating that year at the annual American Association of Law Schools meeting; professors were joking about a law school opening up in Hawai'i and how there would be an impossibly long line for faculty applicants. Yet, there he was, with an offer to teach in paradise.

Despite his preconception that Hawai'i might just be "Miami Beach West," Miller was intrigued and accepted Hood's invitation to visit Hawai'i. Miller stepped off the plane and caught the aroma of Hawai'i's flowers. Within fifteen minutes, he had fallen in love with the place. Thanks to a frisky horse, Miller became one of the original "quarry" faculty in 1973 and the Law School has been his home ever since.

During his nearly two-and-a-half decades at the University of Hawai'i School of Law, Professor Miller's observations of, commentary on, and scholarly contributions to the torts system ranged from topics as the diverse as the negligent infliction of emotional distress, to interspousal immunity, the accident compensations schemes of New Zealand and Japan, auto insurance no-fault reform, the activism of the Hawai'i Supreme Court, and "tort law and power."

Miller's earliest major article focused on the then-developing tort called "mental distress."[4] In 1979, Miller's piece appeared as the *first* article in the *first* issue of the newly established *University of Hawai'i Law Review.* In *The Scope of Liability for Negligent Infliction of Emotional Distress: Making The "Punishment Fit the Crime,"*[5] Miller examined the potential floodgate of litigation that could be opened by the emerging claim of emotional distress and argued that a reasonable restriction on this new tort would be to limit the victim's recovery to economic losses only. Miller's approach received significant attention from academia — including favorable mention in the torts

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[3] Richard S. Miller, *The Role of the University Law School in the Evolution Scheme,* 1971 U. ILL. L.F. 1.

[4] Fortuitously for Miller, the evolution of the modern tort "negligent infliction of emotional distress" had been given new impetus by the Hawai'i Supreme Court shortly before he arrived at the William S. Richardson School of Law. In Rodrigues v. State of Hawai'i, 52 Haw. 156, 472 P.2d 509 (1970), the Hawai'i Supreme Court allowed plaintiffs to recover $2,500 for the emotional distress caused by flooding damage to their home. The Court rejected the traditional requirement that a plaintiff must show direct physical injury or illness to him or herself. *Id.* at 170-73, 472 P.2d at 519-20. The opinion caused some uproar in the legal community, and prompted Miller to ponder the limits of the Court's decision. Today, only a handful of courts have expanded the tort to the broad extent it is embraced in Hawai'i. W. PAGE KEETON ET AL., PROSSER AND KEETON ON TORTS § 54, at 364-65 (5th ed. 1984).

[5] 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).

"bible" *Prosser and Keeton on Torts*[6] — and was cited by scholars and numerous courts searching for appropriate limits on this relatively new cause of action.[7]

In the early 1970s, Miller's attention turned to another tort law revolution that had just arrived on Hawai'i's shores: the accident compensation - no-fault debate. Miller had been interested in this area since the late 1960s, when he had hosted a television show in Ohio called "Law Forum," which featured vigorous debates on the then-novel concept of no-fault compensation.

He admits that, at the time, he was "enamored" with no-fault. He speaks a bit wistfully of the social reform movement in the early 1970s, when preeminent University of California at Berkeley, Boalt Hall School of Law, Professor Stephan Reisenfeld came to Hawai'i to work with the Hawai'i Legislature to create many of the social insurance schemes (such as prepaid health insurance, workers compensation, and temporary disability insurance) that we take for granted today,

As part of this sweeping reform movement, the Legislature addressed the issue of automobile accident compensation and the problems with the traditional "pure tort" approach. In 1972, Hawai'i enacted a "modified no-fault" system that provided basic insurance coverage for injuries and property damage sustained in automobile accidents, but at the same time barred a tort suit for most victims.[8]

In the 1980s, the trial lawyers in Hawai'i convinced the Legislature to retreat and lower the barriers to tort suits. A decade later, the insurance industry fought back and successfully lobbied for even more departures from traditional tort law. As a result, in 1992, the Legislature once again raised the bars to

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[6] KEETON, *supra* note 4, § 54, at 364 (calling Miller's article a "thorough policy analysis").

[7] Professor John L. Diamond picked up Miller's idea, suggesting that it be adopted and applied also to the tort of loss of consortium. John L. Diamond, *Dillon v. Legg Revisited: Toward A Unified Theory of Compensating Bystanders and Relatives for Intangible Injuries*, 35 HASTINGS L.J. 477 (1984). Numerous courts also relied on Miller's approach. *See, e.g.*, Thing v. LaChusa, 771 P.2d 814, 825 (Cal. 1989); Vasquez-Gonzales v. Superior Court of San Diego County, 231 Cal. Rptr. 458, 460 n.2 (1987); Ochoa v. Superior Court of Santa Clara County, 703 P.2d 1, 15 (Cal. 1985); Larsen v. Pacesetter Sys., 74 Haw. 1, 43, 837 P.2d 1273, 1294 (1992); Kinard v. Augusta Sash & Door Co., 336 S.E.2d 465, 467 (S.C. 1985).

[8] Under the scheme, which was in effect for about 25 years until the 1997 Legislature's amendments (*see infra* notes 20-26 and accompanying text), tort suits were barred unless the victim's injuries (1) exceeded a "medical rehabilitative limit" ("MRL"), set most recently at $13,900, HAW. REV. STAT. § 431:10C-306(b)(2) (referring to the limit set in *id.* § 431:10C-308), (2) met any of three "verbal thresholds," which were death, serious injury by a "significant permanent loss of use of a part or function of the body," or serious injury "by permanent and serious disfigurement which results in . . . mental or emotional suffering," *id.* § 431:10C-306(b)(1)(A)-(C), or (3) exceeded the no-fault benefits, set most recently at $20,000, *id.* § 431:10C-306(b)(3) (referring to the limit set in *id.* § 431:10C-103(6)).

lawsuits, instituted a new "peer review" system,[9] and tied payments of claims to the workers' compensation payment schedule. This approach, according to Miller, "loaded up the costs" and "the plaintiffs' lawyers began to despair."[10]

For years, Miller has advocated a common-sense approach of moving back toward the tort system but with certain major caveats. Miller's primary idea, which he describes as "[a] moderate position that would preserve ample victims' rights while reducing costs significantly" is a "very simple, very uncomplicated, much less litigious system in which $20,000 of no-fault coverage is required, similar to current law."[11] He advocates a "cost tie-in" to pre-paid health care and preferred medical providers, coupled with an automatic deduction of the amount of required no fault ($20,000) from "every tort judgment or award."[12] Among other innovations, he proposes that, to enhance coverage for severely injured victims, all automobile owners would have to buy "excess" liability insurance to cover tort damages above $150,000 and below $500,000.[13] Miller estimates that this basic package would reduce premiums by 40%.[14] In particular, the automatic deduction would "discourage most *manini*[15] lawsuits but would allow significant recoveries in truly serious cases. It would also eliminate all litigation about whether a 'threshold' had been met."[16]

Armed with his new approach, during the 1996 legislative session, Miller helped repel the move by former Senators Milton Holt and Donna Ikeda to adopt "pure" no-fault. Miller calls the proposal "mean spirited and stupid"[17] because it would have drastically raised the cost of no-fault insurance, with no corresponding benefit to consumers. He called the passage of the legislation "outrageous" and wrote scathing letters to the Legislature and media.

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[9] This peer review system required "costly and much-hated" independent medical examinations and administrative hearings for any claims that the insurance companies wanted to challenge. Memorandum from Dick Miller to Persons Interested in Automobile Insurance Reform Efforts, Jan. 16, 1997, "table" at 6 (on file with author) [hereinafter Miller Memorandum].

[10] Miller Interview, *supra* note 1.

[11] Richard S. Miller, *Dump House, Senate no-fault 'reform' proposals,* HONOLULU ADVERTISER, Mar. 9, 1997, at B3.

[12] *Id. See infra* note 24 (describing automatic $5,000 deduction amendment).

[13] Miller Memorandum, *supra* note 9, "table" at 2.

[14] *Id.*

[15] The Hawaiian word "manini" is used to describe something small. It literally means a "small striped surgeonfish (*Acanthurus triostegus*) very common on Hawaiian reefs." PUKUI & ELBERT, *supra* note 2, at 95.

[16] Miller Memorandum, *supra* note 9, "table" at 3.

[17] The bills would have required consumers to purchase large medical insurance policies (duplicative of employer-provided health insurance) and eliminated wage loss benefits. Miller Interview, *supra* note 1.

The day of reckoning for the Holt-Ikeda proposal arrived when the bill passed the House and landed on the desk of Governor Ben Cayetano, himself a former trial lawyer. Commenting that he had been "consulting with Miller," the Governor vetoed the bill. Without the votes to override, the 1996 Legislature's "reform" efforts stalled.

Today, Miller does not align himself with either of the warring factions in the no-fault debate. He says he is "squarely in the middle" and just "trying to come up with a decent bill."[18] While he does not agree that the cost of auto insurance in Hawai'i is excessive in light of the generally higher cost of living here, he did think that Hawai'i's current no-fault system was leading to a lot of "hanky panky,"[19] including expensive treatments, and double recovery by victims who successfully sue in tort. On the other hand, Miller thinks that a pure tort approach, where every victim's only recourse is a lawsuit, is not a good system because of the nuisance value of cases and the potential for fraud.

During the 1997 session, the Hawai'i Legislature fiercely debated two very different proposals to change the State's no-fault law. The Senate sought to move closer to pure no-fault, while the House wanted to return to a tort-based approach. Neither prospect pleased Miller,[20] however, and he persistently raised an independent voice on the issue.[21] Ultimately, the Legislature borrowed some ideas from both sides, and seemed to listen to Miller's most vociferous criticisms,[22] creating what he calls a "political document, where everyone got

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[18] *Id.*

[19] In particular, Miller points to fraudulent efforts by claimants to exceed the MRL of $13,900, which Miller calls "the driver of high insurance costs because accident victims are motivated to seek expensive therapy—whether necessary or not—in order to reach the threshold so they can sue for big bucks." Miller Memorandum, *supra* note 9, "table" at 3.

[20] Miller's otherwise calm demeanor was also piqued by another aspect of the recent debate in the Legislature over no-fault reform: the attempt by the House and Senate to restrict the free speech of insurance companies and others participating in the debate. In his capacity as Chair of the non-partisan, non-governmental Honolulu Community Media Council, a self-described "watchdog" of the local media, Miller wrote a passionate letter to the *Honolulu Advertiser* "vigorously protest[ing]" the bills. Richard S. Miller, *Auto insurance bill would curb free speech,* HONOLULU ADVERTISER, Feb. 27, 1997, at A11. Miller reminded the Legislature of constitutional fundamentals, concluding "the only appropriate remedy for false speech or wrong ideas in the political debate is more speech and more debate." *Id.*

[21] According to Miller, the Senate removed a provision prohibiting contingent fees and added an allowance of reasonable attorneys' fees for those who sue only for uncompensated economic loss. It also modified the "false statement" provision, *see supra* note 20, to make it "somewhat more clear that it was not to be applied to insurers." Communication from Richard S. Miller to the author (Mar. 30, 1997) (on file with author).

[22] As he charged in a commentary in the *Honolulu Advertiser*, some aspects of the 1997 session proposals were "excessively ungenerous and mean-spirited" as well as "unconstitutional" and "penurious." *Dump House, Senate no-fault reform proposals, supra* note 11.

a little something."[23] While the sweeping changes were aimed at achieving significant reductions in rates and in fraudulent claims,[24] Miller predicts that the gains may be short-lived. He predicts that, while rates may initially drop significantly due to the reductions in basic coverage, some insureds will end up paying more when they purchase optional coverages for damages that used to be automatically included in the no-fault benefits package, and, with the expanded ability of victims to file tort lawsuits, overall system costs may soon begin to creep back up, promoting yet another round of review by the Legislature.[25] And, in case any legislators have the mistaken impression that Miller has "retired," Miller promises that his interest and involvement in the issue "will persist."[26]

Miller's interest in no-fault also led him toward another of his primary areas of scholarship. In 1987, he traveled to New Zealand, visiting the faculty at the Victoria University of Wellington, where he focused his research on New Zealand's revolutionary national accident compensation scheme.[27] In his 1989

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[23] Interview with Richard S. Miller, in Honolulu, Haw. (Oct. 8, 1997) [hereinafter Miller Interview II].

[24] The primary amendments adopted during the 1997 session, which become fully effective in January 1998, included: (1) renaming and reducing the "no-fault" benefits limit of $20,000 with a "personal injury protection" ("PIP") benefits limit of $10,000, which is further restricted to coverage "comparable" to that available under prepaid health care plans, HAW. REV. STAT. § 431:10C-A(a)-(c); (2) eliminating the MRL and instead allowing tort lawsuits if the claim meets any of the three verbal threshholds (*see supra* note 8) or the PIP benefits equal or exceed $5,000, *id.* § 431:10C-306(b)(4); (3) instituting a "covered loss deductible" from $5,000 up to "the amount of personal injury protection benefits incurred, whichever is greater," up to the $10,000 PIP limit, which will be deducted from any insured's recovery in a lawsuit (by judgment, arbitration or settlement) for bodily injuries, *id.* § 431:10C-C; (4) requiring a mandatory rate reduction from all insurance companies by January 1, 1998 of 20-35% on basic minimum coverage policies, *id.* Act 251, § 62, 19th Leg., Reg. Sess. (1997) *reprinted in* 1997 Haw. Sess. Laws 902, and giving new authority to the Insurance Commissioner to order future rate reductions, HAW. REV. STAT. § 431:10C-D; (5) creating new criminal penalties for the submission of fraudulent claims, *id.* § 431:10C-I; and (6) making changes in the coverage limits, including reducing the minimum basic limit for liability coverage from $25,000 to $20,000, *id.* § 431:10C-301(b)(1), and making coverage for wage loss, death benefits, funeral expenses, and alternative treatments optional. *Id.* § 431:10C-302(a)(4), (5) & (10).

Of these amendments, the "covered loss deductible" idea was uniquely Miller's. However, while Miller is "gratified" that the Legislature adopted the concept, the $5,000-$10,000 deduction is only half of the $20,000 deduction proposed by Miller, and he questions if it will be effective at this level. However, he is hopeful the Legislature will expand on the concept in the future. Miller Interview II, *supra* note 23.

[25] *Id.*

[26] *Id.*

[27] While in New Zealand, Miller's interests also wandered to another of his beloved subjects —Japanese law. He published *Apples v. 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). Two years earlier, Miller had secured a major grant from the

article, *The Future of New Zealand's Accident Compensation Scheme*[28] Miller examined that country's comprehensive no-fault approach to accident compensation, adopted in 1972. As Miller explained, New Zealanders had given up their common law right to sue in tort in exchange for "substantial benefits including virtually complete medical and rehabilitative expenses, substantial wage replacement for earners whether they are injured on or off the job, and payment of some noneconomic losses."[29]

After a thorough examination of the scheme, and the backlash against it in late 1986 and in 1987, Miller recommended that certain aspects of tort law be reintroduced into the New Zealand approach. Despite some criticism by the New Zealand Law Commission,[30] this change was, in Miller's view, a "necessary device to improve accident prevention and to preserve and perhaps to extend an effective and compassionate compensation scheme of which New Zealand can be very proud."[31] Ultimately, he concluded that, while the New Zealand approach may have dangerously reduced the deterrence value provided by the tort system, the compensation component was worthy of consideration in the United States.[32] Three years later, Miller revisited subsequent changes to the New Zealand scheme.[33] He concluded: "Notwithstanding the confusion of principles and the weakness of deterrence, it is likely that, as to most of its features, the New Zealand scheme as amended will become even more attractive as a substitute for the tort system than the former Act."[34]

Befitting the experience and wisdom gained from nearly four decades in the field,[35] Miller's most recent article may indeed be what he calls "his best

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United States Information Agency for a faculty exchange between the William S. Richardson School of Law and the Hiroshima University Faculty of Law. That grant funded a visit by Miller to Hiroshima University in 1986, as well as many other visits by faculty from each school. In 1990, he and Professor Hiroyuki Hata of the Hiroshima University Faculty of Law were jointly named "Lawyer of the Year" by the Japan-Hawai'i Lawyers Association.

[28] Richard S. Miller, *The Future of New Zealand's Accident Compensation Scheme,* 11 U. HAW. L. REV. 1 (1989) [hereinafter *The Future*].

[29] *Id.* at 4.

[30] The Commission, in fact, took the somewhat extraordinary step of formally replying to Miller's proposal the next year. *See* 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).

[31] *The Future, supra* note 28, at 73.

[32] *Id.* at 79-80.

[33] Richard S. Miller, *An Analysis and Critique of the 1992 Changes to New Zealand's Accident Compensation Scheme,* 52 MD. L. REV. 1070 (1993).

[34] *Id.* at 1091.

[35] Notably, in recognition of his contributions to the field, Miller was invited to join (and did join) the prestigious American Law Institute in 1992.

piece."[36] In *Tort Law and Power: A Policy-Oriented Analysis*,[37] Miller recalls a memorable story told by his torts professor Tom Lambert about an injured bird in the hands of a small boy. "[T]he lesson was that the bird's life, a symbol for what is good, was in the boy's hands, just as the future was in our hands."[38] For Miller, the metaphor was about life and power. Taking a deliberate step back from the details of the torts process and toward political theory, Miller proceeds to examine the larger picture of the social utility of the torts system. In particular, he analyzes the relationship between the torts system and "power," especially between plaintiffs and defendants, and he inquires whether the present scheme delivers "justice." As Miller explains:

> Furnishing decisional power to accident victims does not merely permit them to counter corporate abuses of power but gives them a voice in decisions that affect their values, with regard to both accidental injuries already sustained and future accidents that may be deterred. This voice is important irrespective of the existence of adversaries who are in a strong power position. On the whole our current system appears to provide such a voice.[39]

After contrasting the American system to that of Japan, New Zealand, and England, he concludes:

> Thus, with regard to providing effective power to accident victims, the American system of tort liability appears, at first glance, to be the most effective source of countervailing power, not unsuitable in a nation that takes prides itself [in] giving the individual citizen a voice in her or his destiny.[40]

While admittedly "impressionistic," Miller's "power" article is a bold, valuable, and timely contribution both to the vigorous national debate about the promise

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[36] Two years earlier, in 1992, Miller had published a comprehensive review of the influence of the modern Hawai'i Supreme Court on tort law in this state, focusing on the question of whether the torch of activism lit by Chief Justice William S. Richardson had been picked up by his successor Chief Justice Herman T.F. Lum. Richard S. Miller and Geoffrey K.S. Komeya, *Tort and Insurance "Reform" in a Common Law Court*, 14 U. HAW. L. REV. 55 (1992).

> [W]ith regard to those areas of tort law of primary concern to those seeking 'tort and insurance reform' in Hawaii . . . the pro-plaintiff tort revolution has all but come to an end. While pro-recovery doctrines adopted during the Richardson years have not been overturned, rights of victims and insureds have been kept within narrow bounds, and opportunities to expand recovery have generally been rejected. On the other hand, with regard to products liability, . . . the court has continued and indeed expanded upon the Richardson Court's liberal tendencies.

Id. at 66 (footnote omitted).

[37] Richard S. Miller, *Tort Law and Power: A Policy-Oriented Analysis*, 28 SUFFOLK U. L. REV. 1069 (1994).

[38] *Id.*

[39] *Id.* at 1094.

[40] *Id.* at 1097 (footnote omitted).

and pitfalls of the tort system and to the venerable body of theoretical works on tort law.

To over one thousand law students, to the legal community in Honolulu and across the country, and to the Hawai'i Legislature, Richard S. Miller has truly earned the mantle of a *kahuna.* A respected and cherished scholar, teacher, and community leader, his contributions range far beyond that touched upon in this brief tribute. Perhaps most importantly, Miller has done it all by staying grounded in fundamentals and maintaining his sense of humor. As students over the decades were somberly reminded by a framed print hung carefully on his office wall: "A tort is not a piece of cake."