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COMMENTARIES

An Essay on Tort Litigation and the Media

RICHARD W. POWER*

Media, especially television, have become powerful propellants of the law explosion in the realm of torts. They put in motion forces that have been a factor in causing the tort system to spiral upward (higher awards) and outward (ever more extensive liability). Whether awards are too high and liability too extensive are matters that will not produce a consensus except among victims of injuries and their lawyers, on one hand, and among liability insurers on the other. This essay will explore the role the media have assumed and its probable effect. The writer will propose that the media have been a significant factor in infecting the system with excessive awards and unsound imposition of liability. The result is increasing disruption of the equilibrium of costs of accidents and costs of prevention and an aggravation of overcompensation of some victims and undercompensation of others.

The Media Send a Message

Television networks discovered a few years ago that medical news interests most viewers. Perhaps television reporting, feeding on itself, cultivates even wider interest. Reporting, both televised and printed, is often focused on a patient who has received a new kind of treatment. Some medical reporting involves a patient's malpractice claim; occasionally a reported medical procedure later blossoms into litigation. Such was the case with the three surviving Frastici septuplets, whose parents sued their onetime hero, the physician who prescribed a fertility drug, alleging he failed to warn the plaintiffs of the increased likelihood of multiple births and attendant risks.¹ Most televised news of medicine and tort litigation falls within the category of "soft news," which the networks have been criticized for overemphasizing.² The effects of televised reporting of medical and tort reporting are profound.

NBC's "Nightly News" recently reported a new and controversial treatment for eye cataracts,³ a practice already in wide use in India. Indicating the

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1. St. L. Post Dispatch, Oct. 18, 1985, at 7G, col. 1.

2. Washington Post, Aug. 7, 1983, Op. Ed., at C7, deploring what television critic Michael Arlen called "the institutionalization of soft news."

3. *Nightly News* (NBC television broadcast, Dec. 3, 1985).

hazards faced by Indians, the reporter said there was "no malpractice claim if something goes wrong"—no doubt an accurate statement of the realities of the Indian legal system.⁴ Still, the implication is that in the United States there is a malpractice claim if something goes wrong, a premise, at least until recently, every first year law student recognized as inaccurate. Perhaps there should be compensation for every failed medical procedure that results in out-of-pocket loss.⁵ But why stop there? Financial deprivation is not generally the cutoff for responsibility of negligently caused personal injury.

Spicy news stories may crop up, of course, anywhere in the realm of torts. The more bizarre the facts, the better, as in the widely publicized report that gave the impression in its headline and opening paragraphs that a woman had been awarded a million dollars for loss of her claimed psychic powers as a result of a CAT scan administered by defendant.⁶ Only in the fifth paragraph of the report was it revealed that the jury had been instructed that the plaintiff had failed to prove the CAT scan resulted in loss of her psychic powers.⁷ To casual newspaper readers, the story left a false impression that a plaintiff had recovered a large amount on a preposterous claim. The media apparently believe viewers and readers regard outcomes other than victory for the plaintiff as anticlimactic. Even when reported, a modest settlement, a verdict for defendant, a verdict for plaintiff being vacated or reduced, or a judgment reversed on appeal is usually given much lighter coverage than the plaintiff's complaint or original victory.

A feature of much reporting is that it fails to identify the basis for imposing liability. The public is led to believe that the occurrence of an accident is sufficient for liability of one involved in the accident. In some jurisdictions, the law may be moving toward the premise that one who suffers injury is entitled to compensation from anyone causally involved in the transaction resulting in injury regardless of the improbability that his involvement increased the likelihood of injury. Frequently in recent years, reports in the media of product liability cases have fostered the assumption that the injured party need not show the product was defective; for example, a drug manufacturer is strictly liable for harm caused the user of its product even though the drug the plaintiff consumed conformed to specifications, the manufacturer followed proper testing procedures and warned users of possible detrimental effects. The public's belief is a force moving the law to increasingly extensive liability. Product liability and malpractice cases are

4. Galanter, *Legal Torpor: Why So Little Has Happened in India after the Bhopal Tragedy*, 20 TEX. INT'L L.J. 273 (1985).

5. See O'Connell, *A "Neo No-Fault" Contract in Lieu of Tort: Preaccident Guarantee of Postaccident Settlement Offers*, 73 CALIF. L. REV. 798 (1985).

6. *Says Her Powers Vanished; "Psychic" Awarded \$988,000 in Hospital CAT-Scan Lawsuit*, L.A. Times, Mar. 30, 1986, pt. 1, at 20, col. 1; *Gets \$1 Million For Suffering; Woman Claims CAT Scan Ended Her Psychic Powers*, L.A. Times, Mar. 19, 1986, pt. 1, at 3, col. 1.

7. Four months later when the judge set aside the verdict as grossly excessive, the headlines did not indicate the failure of proof. *Claimed CAT Scan Stole Her Powers; Judge Overrules Jury's Award to Psychic*, L.A. Times, Aug. 10, 1986, pt. 1, at 20, col. 1.

following a course similar to Federal Employees Liability Act cases in the 1950s and 1960s, during which they evolved so as to impose something approaching strict liability on the railroad employer.⁸ Such a development conforms to Professor Lawrence Friedman's two superprinciples of "total justice"⁹—the public's general expectation of justice and general expectation of recompense for loss.¹⁰ Professor Friedman does not, of course, accept unequivocally the propriety of expectations of recompense.¹¹

The frequent failure of the media to identify the basis of liability, though conforming to a norm of flashy, superficial reporting, abets the casino atmosphere of tort litigation. A report in the media of an injured person's recovery often satisfies a need of the public for a champion with whom they can, if not identify, empathize. There is a David and Goliath appeal to a story of recovery by an injured person against a large corporation. Occasionally there are reports of recoveries which few viewers and readers would applaud, such as that of a man who got more than \$265,000 from a school district when he fell through a glass skylight on a school roof one night while attempting to steal some of the school's lighting fixtures, or that of a man who collected \$650,000 in an out-of-court settlement from the New York City Transit Authority when struck by a train as he jumped onto the tracks in a suicide attempt.¹² Few readers would favor a plaintiff who reportedly sued a distillery and a brewery claiming damages for defendants' failure to warn him on their products' labels that alcohol is addictive.¹³ Nor would most readers likely favor that plaintiff's claim for declaratory relief to the effect that alcoholic beverage manufacturers should put such warnings on their products,¹⁴ though they might well favor a warning that overindulgence leads to drunkenness and accidents. Sometimes the public's views of a particular ruling may not be apparent, and sometimes opinion may be sharply divided, as is likely with plaintiffs' thus far unsuccessful claims against cigarette manufacturers for causing lung cancer. But media coverage of controversial and even unappealing cases makes the reading and viewing public more litigation conscious. "If he can sue for that, I can sue for this," must be a common thought.¹⁵

8. See MALONE, PLANT & LITTLE, *THE EMPLOYMENT RELATION* 25-26 (1974).

9. L. FRIEDMAN, *TOTAL JUSTICE* (1985).

10. *Id.* at 43, 75-76.

11. *Id.*

12. *Sorry, Your Policy is Canceled*, *TIME*, Mar. 24, 1986, at 16, 20, 23.

13. *Wall St. J.*, Aug. 28, 1986, at 38, col. 4.

14. *Today* (NBC television broadcast, Sept. 17, 1986).

15. Kelley & Beyler, *Large Damage Awards and the Insurance Crisis: Causes, Effects and Cures*, 75 *ILL. B.J.* 140, 151 (1986) [hereinafter Kelley & Beyler]:

[P]ublicity over million-dollar verdicts might stir up more claims. The media reports may convince some people who have suffered similar injuries that they also have winning claims. Others may conclude that tort suits are a way to hit the jackpot. . . .

[P]rofessional advertising by lawyers probably also stirs up more claims. Television, radio, and newspaper ads educate injured persons about their rights. As the

A characteristic of television reporting is frequent repetition of a capsule statement of an event without elaboration. Reporting of court decisions is a good example: who wins, who loses, and how much, if anything, is all the public is told. As Professor Scoles observed, "[T]he all-consuming effort of the media, the public, and the [legal] profession to quantify everything frequently overshadows attention and concern for substantive quality."¹⁶ Conscientious national newspapers, news magazines, and television specials are generally exceptions to capsule reporting, but even when "60 Minutes" examines medical malpractice, there is often no attempt to explain the basis of a physician's liability, and the reporting frequently seems shamefully biased, calculated to produce outrage in the viewer. Is that why "60 Minutes" is television's most popular program? In-depth television coverage commonly fails to give a balanced view.¹⁷ While media typically present a view favorable to plaintiffs, an example of the opposite polarity was PBS's "Louis Rukeyser Looks At American Business,"¹⁸ in the course of which a panel of distinguished business executives deplored the shadow of product liability that plagues the economy with large and unwarranted recoveries. Never was there recognition that some plaintiffs have suffered serious or catastrophic injury and have meritorious claims for large sums.

Televised news and commentary are not the only force television exerts on tort cases. The televised hospital drama is now as stereotyped as western movies had become by the beginning of World War II. Skilled, humane physicians, the white hats, administer the life-giving treatments, overcoming what seem insurmountable obstacles to the patient's recovery. In the public's mind these fictional doctors tend in time to furnish a norm with which real physicians' work is to be judged, both in and out of the courtroom. Occasionally, of course, the scriptwriters throw in a bad egg physician who is eventually exposed for the bungler he is, with appropriate retribution, or even an ill-founded malpractice claim against a white hat physician in which justice finally prevails. Skewed and misleading as televised hospital drama and media news reports may be, and much as one would welcome improvement in the media's performance, experience teaches that media respond to profits and not to criticism. Freedom of expression, as anyone knows, constitutionally insulates the media from control, nor should it be otherwise.

ads become more effective, more persons will see a lawyer and more persons will sue.

16. Scoles, *How Has Law Teaching Changed in Past 25 Years?*, 16 SYLLABUS 1, 7 (1985).

17. For example, *Nightly News* (NBC television broadcast, Feb. 2, 1987), reported on Delta Airlines' insurer's investigation into the habits and life-styles of victims of the crash in Dallas on August 2, 1985. The viewer was left with the strong impression that the insurer had acted improperly in its investigative techniques, despite the unemphasized statement of Professor Gary Schwartz of the University of California at Los Angeles to the contrary. The same anti-insurer, antifendant tilt was evident in a report by *60 Minutes* on the Delta crash investigation. (CBS television broadcast, Feb. 15, 1987).

18. KLVT (PBS television broadcast, Oct. 9, 1986, rebroadcast KETC Oct. 17, 1986).

While lawyers have frequented television drama less than doctors, television drama is a significant factor in shaping public attitudes toward lawyers. On the whole, lawyers bear a less positive image. Still, the televised image of the lawyer, sometimes a virtuous genius, sometimes an unscrupulous fixer, usually forceful, serves to make the public more litigation conscious. The currently popular "L.A. Law," perhaps inspired in part by the success of "St. Elsewhere," dealing with the vicissitudes of professional life in a Boston hospital, offers the viewing public a perception of lawyers' ingenuity, machinations, and infighting in a large, prestigious firm. The show probably exaggerates most lawyers' propensity to litigate and to threaten litigation. The stakes, financially and otherwise, are always high. "People's Court," recently rated fifth in popularity of all television shows, alerts the public to the possibility of litigation and probably reinforces Friedman's principles of total justice even when the viewer disagrees with the outcome. Though lawyers are not involved, the robed judge (a retired judge of the Los Angeles Superior Court), projects a positive, authoritative, friendly but firm image.¹⁹ The success of "People's Court" has spawned "Superior Court" and "Divorce Court." Also, a recent series of Perry Mason movies made for television was well received.

Television quiz-show giveaways, until recently confined to a largely female daytime audience, have moved to prime time or near it. Shows such as "Wheel of Fortune" accustom a large audience to sudden riches for a constant stream of contestants, microscopic as those lucky, quick-witted people may be as a percent of the population. Even advertising on television, with its frenzied or laid-back pitch for a product, may engender in the minds of the public the belief that every problem must have a remedy. Nowhere is this more evident than in the advertisements of that newcomer to television advertising, the attorney.

Big Bucks

Cases involving permanent and severe personal injury cannot but be emotionally charged. The defendant, either by a fluke of fate connected with his nonwrongful, ordinary activity, or by creating a risk in the course of lawful activity, by inadvertence, or by evil design, or by something in between, has destroyed something of the plaintiff's—his bodily or psychic integrity. How is he to accept "a diminished thing"?²⁰ The opposite ends of the broad spec-

19. In some cities, small claims filing have risen 30% to 50% since Judge Joseph Wapner opened session on the TV show in 1981. . . . On numerous occasions people say, "That's not the way Judge Wapner does it," says William Bristol, a city court judge in Rochester, N.Y. . . . Judges worry that the TV program primes people for battle, not settlement. Its announcer ends each show by saying: "Don't take the law into your own hands—take your case to court."

Clear Verdict: The People's Court Spurs Surge in Small-Claims Cases, Wall St. J., Mar. 6, 1987, at 31, col. 3.

20. "The question that he frames in all but words/Is what to make of a diminished thing."

trum of circumstance in which tort claims arise evoke antipodal responses: the incompetent surgeon or drunk driver who inflicts grievous injury on an innocent victim is at the other end from the plaintiff who claims damages for injuries which, while unpleasant and not feigned, are trivial when compared with serious and permanent physical injury. Cases involving plaintiff's arrest with erroneously suspected shoplifting in defendant's store are a good example. The case is extreme when the claim is against a defendant who did nothing wrong or who merely made a mistake that in the vicissitudes of living might be made by anyone, not the egregious error of the chronic bungler.

Even a well-founded claim takes on a different aura if the amount of damages claimed is beyond reason. While the plaintiff has thereby injected a shock element, perhaps an understandable strategy for plaintiffs, enormous claims may rightly be viewed as tainted by greed. ABC's "World News Tonight" reported that three billion dollars in claims have been filed against Lederle Laboratories,²¹ makers of polio vaccine; a 7-year-old child who will be severely crippled for life filed suit for \$75 million. The child idiosyncratically (one chance in a million) contracted polio from the vaccine, a risk that has been known for many years.²² The magnitude of the claim seems ludicrous and not functional. How much happier, if at all, would the plaintiff's life be by having an income of \$3 million a year rather than \$100,000 a year? Surely this misfortune cries out for compensation, for risk sharing, but by a compensation system patterned on accident insurance benefits or workers' compensation and funded ultimately by all those who benefit from the use of polio vaccine.²³

How many awards of \$75 million or anything approaching it can our economy afford? A 22-year-old man made paraplegic in an oil field accident was awarded more than \$64 million by a Texas federal court jury.²⁴ A 68-year-old man who claimed his legs had to be amputated as a result of taking defendant's medication, Coumadin, was awarded \$39 million by a state court jury in Chicago.²⁵ Both cases are being appealed. The *Wall Street Journal* reported that jurors said they returned larger verdicts than were warranted because they knew that amounts were often cut down by the judge or

Frost, *The Oven Bird Song*, in THE POETRY OF ROBERT FROST (1969). The poem is set out in Engel, *The Oven Bird's Song*, 18 L. & SOC. REV. 551 (1984).

21. *Insiders, Outsiders, and Personal Injuries in an American Community*, *World News Tonight* (ABC television broadcast, May 11, 1986).

22. EPSTEIN, KALVEN & GREGORY, CASES AND MATERIALS ON TORTS 698 [hereinafter EPSTEIN] (4th ed. 1984).

23. See O'Connell, *Transferring Injured Victims' Tort Rights to No-Fault Insurers: New "Sole Remedy" Approaches to Cure Liability Insurance Ills*, 1977 U. ILL. L. REV. 749. In September 1986, North Carolina limited vaccine liability to \$300,000 plus state welfare. Compensation is to be administered by the Industrial Commission, which administers workers' compensation. "The legislature hopes that the price of vaccines, up to 90% of which is for insurance, will come way down." *Wall St. J.*, Oct. 15, 1986, at 28, col. 1.

24. *Courting Disaster*, *Wall St. J.*, May 16, 1986 at 1, col. 6.

25. *Id.*

on appeal.²⁶ Is this a contemporary application of the ancient notion that the function of the jury is to correct the law? Even more extreme was the case of a worker exposed to toxic chemicals who later died of leukemia; a Texas jury awarded the plaintiffs \$107.8 million.²⁷ How could these plaintiffs possibly spend such amounts during their lifetimes? What societal benefit flows from making these horribly unfortunate people, or anyone, super-rich? Should not more of available resources be channeled to deserving yet undercompensated accident and illness victims?

The heirs of Leon Klinghoffer, the victim of the *Achille Lauro* highjacking, were reported on network television to be suing both the PLO and Chandris Lines, the cruise operator, for \$1.5 billion.²⁸ Legally strong and morally appealing as their claim for compensation is, what principle and monetary need could not be vindicated by suing for a thousandth of that? Is not the integrity of the claim, its potential to vindicate a principle, compromised by its enormity? Human life and good health are beyond price; surely no premise is worn smoother with use.

As amounts claimed and recovered increase year by year,²⁹ the public, infused with the media's reporting, becomes ever more accustomed and recep-

26. *Generous Juries*, May 29, 1986, Wall St. J., at 1, col. 1.

27. Wall St. J., Jan. 13, 1987, at 20, col. 1.

28. N.Y. Times, Nov. 28, 1985, at B7, col. 4.

29. *Generous Juries*, Wall St. J., May 29, 1986, at 1, col. 1. Kelley & Beyler, *supra* note 15, state:

Multiplying the average award by the frequency of awards yields the total that insurers will pay. But multiplying the median award by the frequency of awards does not. Thus, high averages can kill, but high medians by themselves cannot. . . .

Once inflation has been factored out, the median award in medical malpractice and products liability cases has remained approximately constant in recent years. On that ground, the insurers' critics sometimes argue that nothing important has happened.

This argument misuses the median statistic. It implies the insurers' payments remain constant whenever the median award remains constant. Due to skyrocketing awards at the top end, however, the average award has gone through the roof. Since the average award determines what insurers will pay, something very important has happened despite the constant median.

Id. at 148.

The RAND STUDY (1982) found that between 1960 and 1979 the average jury awards in all types of tort cases in Cook County, Illinois, "doubled even after factoring out inflation." *Id.* The average malpractice award increased "550 percent from \$32,000 for 1960-64 to \$207,000 for 1975-79 in constant 1979 dollars." *Id.* Jury Verdict Research, *Current Award Trends*, in 1 PERSONAL INJURY VALUATION HANDBOOKS (1986)), found that "the average medical malpractice award nationwide increased from \$220,018 to \$666,123, representing a real increase of 59 percent." The average product liability verdict "jumped from \$393,590 in 1975 to \$1,021,956 in 1984 for a 'real dollar' increase of 35 percent. Again, this increase is significant, but not quite as high as the Cook County increase." *Id.* at 149.

Further, Kelley and Beyler find enormous disparity in the size of verdicts depending upon whether the defendant is an individual, a corporation, or a governmental agency.

The Rand "deep pockets" study proves, however, that damage awards depend to an unconscionable extent on who has inflicted the harm. Whether the defendant is

tive to high claims and awards, just as the public is desensitized to the magnitude of government expenditures and the national debt. It was big news when a Texas state court jury awarded the plaintiff \$11 billion in *Pennzoil v. Texaco*.³⁰ The next victim of an outrage, or his attorney, may feel driven to sue for two billion or ten billion in order to make his claim newsworthy and shocking. A person called for jury duty is probably conditioned by the media to hearing about claims for enormous sums, and may for this reason be overly generous to a plaintiff even if the plaintiff's claim is meritorious. *The Wall Street Journal* reported that jurors in a suit for a large amount against a large corporation, no doubt influenced, among other ways, by plaintiff's attorney's advocacy, declared they had to think in terms of millions of dollars because the defendant corporation was accustomed to dealing with large amounts.³¹

Beautiful People: Enhancing Image and Ego by Lawsuits

Celebrity plaintiffs often sue for large amounts for defamation or some other psychic harm. One suspects that publicity is the motivation of many such suits which, for good reason, the plaintiff does not expect to lead to a significant settlement, much less to bring to trial. Frequently the plaintiff succeeds in getting publicity, which needlessly injures the tort system, flawed as it is for other reasons. Typical of publicity-grabbing claims that cumulate to taint the judicial system is one filed early in 1986 by Lana Turner and her daughter Cheryl Crane against *TV Guide* and one of its authors for more than \$100 million, claiming that the magazine falsely reported that Crane had been convicted of murder in 1958. According to plaintiffs, Crane had been absolved of blame in the victim's death. Plaintiffs each claimed \$500,000 in general and \$50 million in punitive damages.³²

An ill-founded claim or even a meritorious one for an amount far in excess of reason is not only an abuse of the judicial system but debases it in the public's view. The public comes to think that a court is no different from a casino where anyone can come in and play for high stakes, with the significant difference that if he loses, he is not out much.

One need but look to the Continent for cures. In the United States, the risks of losing are too low, both for plaintiffs and defendants. A graduated schedule of filing fees scaled to the magnitude of the claim is one way of in-

an "individual" or a "government" should not affect a compensatory damage award. But this difference in labels will treble or slash it to one-third its size. Whether defendant is an "individual" or "corporation" should be equally irrelevant. But this difference counts for even more.

Id. at 156.

30. District Court for 151st Judicial District of Texas (1985) (unreported). Although reducing punitive damages from \$3 billion to \$1 billion, the judgment was otherwise affirmed. *Texaco v. Pennzoil, Inc.* 01-86-0216-CV (Tex. Ct. App. 1st Dist. Feb. 12, 1987).

31. *Generous Juries*, May 29, 1986, *Wall St. J.*, at 1, col. 1.

32. *L.A. Times*, Apr. 11, 1986, at 2, col. 4.

creasing the risk. Plaintiffs claiming huge damages should bear in substantial measure the costs their suits generate for the system. If such a plaintiff prevails, making a substantial recovery, the filing fee could be shifted to the defendant as a cost. By filing an action a plaintiff would be compelled to put his money where his mouth is. Frivolous suits for large sums would become expensive, as they should be, and so would a defendant's continued dilatory resistance of a meritorious claim for a large amount.³³ A hefty filing fee, say \$10,000 for a suit claiming millions in damages, would inhibit capricious lawsuits while not inhibiting a meritorious claim for a vast sum. A poor person with such a claim could petition for a waiver of the filing fee upon making an appropriate showing. Another corrective, and one that promotes settlements, is to adopt as the norm, tempered by judicial discretion, the European practice of charging the losing party with the prevailing party's attorney fees.³⁴ A salutary corollary is that a plaintiff who recovers only a small fraction of his claim—say about 20 percent—is deemed the loser.

While plaintiffs Turner and Crane may be entitled to something, their claimed misfortunes seem trivial when compared to the misfortunes of those who have suffered severe personal injury. Much of the public is probably not aware that a well-known plaintiff expects to recover little or nothing and is using a lawsuit for free publicity or as a prop for a large ego. Still, not all celebrity plaintiffs are publicity seekers or those with insubstantial grievances seeking to indulge their neuroses, notwithstanding Katharine Hepburn's marvelous pinprick that bursts the huge balloon of defamation: "I don't care what they say about me as long as it isn't true." While there was doubtless a large element of vanity in her suit, the late Lillian Hellman probably felt genuinely aggrieved by allegedly defamatory remarks made by Mary McCarthy on the Dick Cavett show;³⁵ two literary Amazons are perhaps natural enemies. Most persons no doubt applauded Carol Burnett's well-publicized moment of victory when a jury returned a verdict of \$1 million against the *National Enquirer* for libel.³⁶ It appeared that plaintiff Burnett did nothing to precipitate the defendant's defamatory statements, as many celebrity plaintiffs do, and that hers was a case of a claim for a large sum wholly motivated by a desire to vindicate a principle.³⁷

33. See, e.g., *The 'American Rule' Has Outlived Its Usefulness; Adopt the 'English Rule'*, Nat'l L.J., Oct. 20, 1986, at 13, urging adoption of the English rule. In *Marek v. Chesny*, 105 S. Ct. 3012 (1985), the Court took a step in this direction in holding that a party who unreasonably rejects settlement offers is liable for attorney fees thereby incurred by the opposing party.

34. A recent Indiana rule enables a judge to charge frivolous litigators with their opponents' attorney fees. IND. R. APP. P. 15(G).

35. N.Y. Times, May 11, 1984, at C4, col. 4. Miss McCarthy said that, "Everything [Miss Hellman] writes is a lie, including *and the*." N.Y. Times, Jan. 12, 1986, at G1, col. 2.

36. The trial judge reduced the recovery, which was further reduced on appeal to \$50,000 compensatory and \$150,000 punitive damages. The recovery was reportedly donated to charity. *Burnett v. National Enquirer, Inc.*, 144 Cal. App. 3d 991, 193 Cal. Rptr. 206 (1983).

37 Most [defamation] plaintiffs lost in court. Even for those who won, the terms of judicial victory were disappointing. . . .

The Uniquely American Malaise

No country's compensation system approaches perfection. Insofar as compensation for injury in the United States depends on tort law, the system and many of its problems are unique. Only in the United States are damages for personal injury assessed by a jury. Outside the United States the media give little attention to compensation for injuries, probably because victims of accidents never recover vast sums. (In Great Britain the popular press does delight in covering defamation litigation involving a celebrity; on the Continent defamation is assimilated into criminal law.) Only in the United States is coverage by the media of injury litigation an important factor in whether plaintiffs recover and how much. I do not refer, of course, to coverage of the accident involved in *this* jury trial, but to the preconditioning of attitudes of plaintiffs and jurors by the media's typical attentions to tort litigation.

To a much greater extent than in other countries our system overcompensates and undercompensates. Its unfairness to victims by reason of inefficiency and delay is, however, a shortcoming surpassed by the handling of tort claims in Italy, for example. There, as everywhere else in the world, compensation for personal injury is minimal by American standards of tort law, unpredictable and wide-ranging as they may be. Delays in Italy are typically much longer than those even in metropolitan areas of the United States. In Italy, compensation for pain and suffering is in its infancy.³⁸ Since courts are not viewed as instruments for effectuating social change and redistribution of wealth, many losses, apart from those involving auto accidents, that are shifted in the United States are borne by the victim in Italy. If an accident results in disability, the victim is entitled to a small government pension.

A virtually nonfunctioning tort system is that of India, a system which may, however, be brought to life by the Bhopal claims. Marx said wars are the locomotives of history; public catastrophes may be the locomotives of compensation systems. At least the right to recover in India exists in theory, while in most of the Third World tort law does not exist except as it operates within the criminal law system, the criminal defendant's fate typically dependent upon a satisfactory settlement with the victim.

The uniqueness and shortcomings of the American system are elegantly expressed by Professor Ernest Weinrib of the University of Toronto:

[T]he principal object of the lawsuit for most plaintiffs is not to obtain monetary relief for financial harm. Instead, the major motivating factors are restoring reputation, correcting what plaintiffs view as falsity, and vengeance.

[U]ltimate judicial victory should not be the primary criterion for judging success, since the plaintiffs' motives in filing suit may often make that criterion largely irrelevant. Instead, plaintiffs view the lawsuit as an instrument for self-help, regardless of its judicial outcome.

Beanson, *The Libel Suit in Retrospect: What Plaintiffs Want and What Plaintiffs Get*, 74 CALIF. L. REV. 789, 791-92 (1986).

38. CERTOMA, *THE ITALIAN LEGAL SYSTEM* 368 (1985).

In . . . common-law jurisdictions [other than the United States] tort law embodies corrective justice. Its focus is the moral relation between defendant and plaintiff as doer and victim of a single harm. This requires that the defendant be treated as an equal in the relationship. . . . The law works justice between the parties at the cost of a narrower ambit of recovery than parallel American law.

This more restrictive tort system is, however, encased in a more generous and elaborate network of social welfare and insurance benefits. . . . [T]he judicial elaboration of tort law is insulated from the broader social policy pressures of accident and illness.

In contrast, tort law in the United States is less informed by the notion of doing justice between the parties. . . .

All the institutional pressures thus conspire to enlarge the range and amount of tort recovery and to throw up an expansive framework of recovery that includes strict product liability, punitive damages and the manipulation of tort doctrines and procedures to accommodate unmanageably complex claims. The inadequate network of distributive justice allows the courts to assume political and managerial functions in the inappropriate context of private law litigation.³⁹

Professor Weinrib concludes the United States system is in effect an arbitrarily imposed tax without representation of those who bear the tax.

Shortcomings of the American system have been identified and remedies prescribed, if not more than a half century ago, at least in the 1960s by the second generation of writers of no-fault compensation schemes for the auto accident victim.⁴⁰ For decades criticisms did not fall on fertile ground. With the exception of no-fault auto accident legislation in several states,⁴¹ and widespread adoption of comparative negligence statutes,⁴² legislatures have

39. Letter to the N.Y. Times, May 16, 1986, at A34, col. 3. A more prosaic statement is that of Besharov and Reuter:

[T]ort liability in the U.S. is greater than it is in other countries for five reasons: (1) U.S. substantive rules (such as strict liability in manufacturing); (2) U.S. procedural rules (such as those concerning discovery and class actions) facilitate litigation against defendants; (3) U.S. measures of damages (such as those for pain and suffering and punitive damages) increase manifold the amount of a potential judgment; (4) U.S. juries value human life and suffering more highly than do [courts] in other countries; and (5) contingent-fee arrangements, illegal everywhere else in the world, allow plaintiffs' lawyers to advance the costs of litigation.

Besharov & Reuter, *Tort Laws Hobble U.S. Business Abroad*, Wall St. J., Oct. 28, 1985, at 22, col. 3.

40. See, e.g., Conard, *The Economic Treatment of Automobile Injuries*, 63 MICH. L. REV. 279 (1964).

41. 3 HARPER, JAMES & GRAY, TORTS, § 13.8 (2d ed. 1986).

42. 4 *id.* § 22.1 n.6.

only recently responded. The effect and constitutionality of much remedial legislation is still in doubt.⁴³

Influence of the media, unlike criticism for academics, is a relatively new phenomenon. Only within the last decade have the media significantly influenced the compensation system. While we have no definitive, quantified answers as to the extent of their impact, and probably never will, one may still be persuaded that the media impress upon us the aberrational as the norm. The aberrational then gradually affects the norm, feeding the run-of-the-mine tort plaintiff's expectations of excessive recovery and of recovery when there should be none. Most jurors have been influenced, consciously or otherwise, by the media, just as the plaintiff has. The impact of media in recent years is not merely an instance of the common law's adaptation to social change.⁴⁴ Rather, media, principally television because it commands a vastly higher potential than the printed word for shaping public attitudes, have effected a rise in unrealizable expectations of the public. "Historic continuity with the past is not a duty, it is only a necessity," Holmes said.⁴⁵

Propelled by television, which tends to integrate attitudes nationally, claim consciousness seems to be spreading from the metropolis to smaller communities. Lawyers' recently acquired freedom from some restraints on advertising may well generate personal injury clients outside metropolitan areas as well as within, and may be particularly significant in class actions for product liability.

An unfavorable attitude toward litigation, however, may still prevail. In a study in the late 1970s of a small county in Illinois, tort litigation was rare. Personal injury victims did not often press negligence claims. A woman who was severely burned when coffee was spilled on her during a commercial flight accepted the airline's initial offer of medical expenses and the cost of a missed week's vacation. She disfavored a lawsuit saying, "We don't do that."⁴⁶ Another woman suffering permanent injuries because of a neighbor's negligently maintained premises, and whose brother was a lawyer, received less than her medical expenses from the neighbor's insurance but did not attempt to recover any more. Her husband said, "We were thankful that she recovered as well as she did. . . . We never considered a lawsuit there at all."⁴⁷ But examples of attitudes of seven or eight years ago may well be ancient history by now.

43. EPSTEIN, *supra* note 22, at 776.

44. Cf. Davidson, *Drastic Change is Dangerous*, 72 A.B.A. J. 36 (1986):

The genius of the common law, evolved over generations, has been its ability to grow and adapt to society's changing morality and needs. At issue is what reform [of tort law] is warranted and how it should be achieved. Urging sudden and drastic changes in substantive law and procedure challenges the validity not only of tort law but of the process by which it has been developed and applied.

45. O. HOLMES, *LEARNING AND SCIENCE*, COLLECTED LEGAL PAPERS 139 (1920).

46. Engle, *supra* note 20, at 561.

47. *Id.* at 560 n.11.

Lots of Finger-Pointing

The latest shock waves that have rippled through the compensation system have not centered around automobile accident victims,⁴⁸ though, of course, they continue to represent the largest volume of claims even with vastly increased volume of product liability and malpractice claims, types of claims that have attracted much attention from the media.⁴⁹ The automobile accident victim was the prime concern of academic lawyers from 1930 until interest in no-fault auto liability schemes waned a half century later. Forces against no-fault succeeded in preventing its further adoption in recent years following a wave of no-fault legislation beginning in Massachusetts in 1971.⁵⁰ Some legislatures enacted schemes incompatible with economically sound functioning of a no-fault system by preserving a common law tort action even for relatively minor accidents while entitling the party at fault to compensation for his injuries.

That scholarly interest has tended to shift from the automobile accident victim was evident in the *California Law Review* of May 1985, a symposium issue devoted to compensation systems and tort theory. There is consensus among contributors on one premise: the current system of redressing civil wrongs does not satisfy anyone except the plaintiffs' bar. But the infinite ranges of questions of how the system should be modified continue to produce violent and basic disagreements. The reader feels that while the discourse has been refined over the decades, the system is hardly closer to, indeed it may be farther from, a reasonably fair and efficient system than it was a generation ago. While some severities and imbalances have been rectified, such as the bar of contributory negligence, new ones have arisen, for example, the trial as consummate stagecraft,⁵¹ comparative negligence coupled with joint and several liability, and dilution of the requirement of causation in fact.⁵²

There are others to blame in addition to the plaintiffs' bar. While we may wish that the media would do better reporting on compensation matters and conscientiously assess the force they exert in publicizing the problems of the compensation system, freedom of expression is the overarching principle. The media cannot be blamed in the sense that legislatures can often be blamed for yielding to pressures from the plaintiffs' bar or insurance companies. Nor has the plaintiffs' bar been remiss in attempting to coopt the media broadcast of its righteous message that some groups, notably insurers, health care providers, and manufacturers, want to limit recoveries and to take away the right "the law" accords to sue for injuries and to have damages determined by a jury. For example, Robert Havel, president of the

48. Kelley & Beyler, *supra* note 15, at 148.

49. *Id.* at 146-47.

50. See generally EPSTEIN, *supra* note 22, at 965-85.

51. See Eisenberg, *A Doctor on Trial*, N.Y. Times Magazine, July 20, 1986, at 26.

52. See Jacob, *Of Causation in Science and Law*, 40 BUS. LAW. 1229 (1985).

Association of Trial Lawyers of America said, "What strikes me about these proposals [for pending federal product liability legislation limiting the amount of recovery] is the total lack of compassion for terribly injured people."⁵³ The *Wall Street Journal* editorialized wryly, "He was referring to clients, not lawyers."⁵⁴ Recently manufacturers and liability insurance companies have sought to counter the efforts of the plaintiffs' bar by advertisements and inclusion of material in reports to shareholders and policyholders.⁵⁵

It would be nice if there was no substance to the strictures of the plaintiff's bar. Unfortunately, some plaintiffs, be they saintly and conciliatory or greedy and litigious, are the victims of careless or outrageous conduct of defendants and deserve high compensation for serious injury. The plaintiffs' bar justifies contingent fees as enabling plaintiffs to sue who could not pay an attorney's fee up front, a justification clouded by the typical absence of an option to pay a retainer and hourly fee and by the fact that contingent fees are considered unethical almost everywhere except in the United States.⁵⁶ Under a contingent fee arrangement plaintiffs' attorneys not infrequently have many thousands of dollars invested in a lawsuit without any assurance of reimbursement. To a large extent this situation is a monster of the attorneys' own making, raising the ante in a game where the chances of winning have improved, and as a consequence compelling the defense to incur heavier expense in preparation as well. A further effect is to concentrate the

53. Wall St. J., May 1, 1986, at 26, col. 1.

The entire tort system is under constant attack. It is imperative that we develop a long-range plan to deal with the attack, rather than react to each individual crisis as it arises. And that is just what the New York State Trial Lawyers Association has been and is doing. **BUT WE CANNOT DO IT WITHOUT YOU. YOU MUST GET PERSONALLY INVOLVED!**

YOU must carry forth the message that there is a societal benefit to a system which provides full and reasonable compensation for an innocent person from a responsible wrongdoer, and which system also serves as a deterrent to careless conduct.

Fred Queller, *President's Message*, 17 TRIAL LAW. Q. (No. 1 1985).

54. Wall St. J., May 1, 1986, at 26, col. 1.

55. The following excerpt from the second quarter 1986 report of Pfizer, a drug manufacturer, is typical:

A CRISIS IN THE TORT LAW SYSTEM PLACES AMERICANS AT RISK

The need for reform in the U.S. tort system, the legal framework for compensating personal injury, has been well documented in the media. Seldom does a day go by without a report of yet another extreme court or jury award to someone who has brought suit.

However striking, these awards divert attention from the real issue—the U.S. Court system has gone seriously awry, driving up the price of insurance and making it impossible to obtain in some cases.

The tort law crisis has cut the standard of living for Americans. A continuing crisis could damage U.S. industrial competitiveness, thus costing American jobs.

56. Comment, *Of Ethics and Economics: Contingent Percentage Fees for Legal Services*, 16 AKRON L. REV. 747, 748 (1983); Comment, *Contingent Percentage Fees: An Economic Analysis*, 515 AIR. & COM. 531, 532 (19—).

most lucrative injury cases among established, prosperous attorneys who can advance large sums for long periods. Such expenses constitute money that will not go to an injured person nor can they be justified as significantly advancing fairness in the disposition of the case, the development of legal rules, or scientific knowledge. However great an attorney's skill, patience, and efforts, an attorney's fee in the millions, one-third of a plaintiff's multimillion-dollar recovery, is scandalous.

Contingency fees applying customarily high percentages to ever increasing recoveries have resulted in legislation in many states and proposed federal legislation in product liability cases putting a cap on fees and instituting a downward sliding scale as the amount recovered increases. To believe that an attorney's efforts will slacken if, for example, his percentage of the recovery drops to 10 percent of amounts over \$500,000 is to make a cynical assessment of professional responsibility; plaintiffs' lawyers would continue to be adequately compensated. Furthermore, tempering the jackpot mentality is a needed correction, as is eliminating "overkill" in preparation for trial in big cases. Surely a sliding scale is as appropriate in personal injury litigation as it is and always has been in settlement of estates. It is commonly believed that successful personal injury plaintiffs' lawyers earn more than partners in prestigious New York law firms (who may also be overcompensated).⁵⁷

Public Expectations and Unprovable Reality

Professor Friedman finds a "superprinciple" in the public's general expectation of recompense for loss. The emergence of such expectation is suggested to him by the cases of a plaintiff who was stood up on a date and of a plaintiff who sued his parents for lack of care in rearing him, thereby turning him into a nervous wreck.⁵⁸ While obviously without merit, such suits have changed from being unthinkable a century ago to thinkable ("somebody thought of them, after all").⁵⁹ Instead of claim-consciousness gone mad and threatening the existing compensation system, flawed as it is, in Friedman's view such frivolous suits are but extreme instances of a recently evolved general expectation of justice—amusing, harmless overkill arising from a commendable public expectation. "If someone senses a wrong, she feels that there must be a remedy somewhere in the system."⁶⁰ "People file lawsuits because they have confidence in the legal system. It's something to be proud of."⁶¹

57. O'Connell, *supra* note 5, at 803.

58. L. FRIEDMAN, *supra* note 9, at 76.

59. *Id.*

60. *Id.*

61. Stewart, *Seeking Justice*, Wall St. J., May 20, 1986, at 1, col. 1 (quoting Professor Friedman). Cf. Willard, *Restore Balance to the Tort System*, 72 A.B.A. J. (July 1, 1986), at 36 "Stories of wacky lawsuits and outrageous jury awards are common. Public confidence in the fairness of our courts in civil cases is at an all-time low."

At least until recently, the great majority of individual plaintiffs who have recovered a million dollars or more have deserved it. Who would not rather have health and an unmaimed body than ten million dollars? Even now a large recovery is statistically rare, but with the cumulation of reports by the media of such recoveries, the number of which has increased substantially each year, the large recovery becomes fixed in the public mind, shaping the public's notion of the norm. Kelley and Beyler have countered those who maintain that the cost of tort liability in malpractice and product liability, including large awards, is modest when passed on to the public. While conceding that insurance costs as a percent of expenditures for health care is a modest 0.6%, they demonstrate the uneven impact of insurance costs.⁶² Fear of current tendencies toward broader liability and larger damages may be some corporate defendants' and insurers' greatest concern, rather than the present amount they spend on defending and paying large claims.⁶³ As in most market functionings, the focus is on the future.

Somebody, it seems, is always winning millions in lotteries following a public stampede to buy tickets before a big drawing. Likewise, the public is repeatedly being informed, correctly, that someone is being sued for millions and that someone has won a multimillion-dollar verdict. Are multimillion-dollar lottery winnings and tort recoveries even today statistically so improbable that they can be dismissed as unimportant? One suspects that the multimillion-dollar lottery drawing stimulates lottery ticket sales generally, just as reports in the media of large claims and large awards to plaintiffs probably have a generally elevating effect on jury verdicts and settlements whatever the size of the claim. There may be no feasible method of establishing the truth of this proposition; though it may need no demonstration.

Even now compensable injuries occupy only parts of the vast terrain where arrows of severe misfortune strike. Does the notion that someone must be responsible for a person's loss or injury represent an ill-examined response, like killing the messenger who bears bad tidings? Are the common law's long-established restrictions on loss-shifting economically sound and ultimately beneficial to the community when coordinated with other forms of compensation? Or are expanding liabilities a pressure moving us toward an accident compensation scheme more like workers' compensation than the common law? The course of the common law and statute, as everyone

62. Kelley & Beyler, *supra* note 15, at 155.

63. *Id.* at 155.

Expanding liability rules, an increased propensity to sue defendants in the commercial general liability and medical malpractice lines, and skyrocketing awards at the very top end have increased the frequency and average severity of claims in those lines. These increases and the trend they have established point to permanently higher insurance rates and reduced coverage. Indeed, the trend is so strong, and the 1985 combined ratios still are so bad, that the worst news has not yet been written.

Id.

knows, has been to embrace more and more rights for the injured, exercisable against ever-expanding categories of persons. Examples are suits for sexual harassment and the recent epidemic of employees' lawsuits against a manufacturer of the employer's equipment which injured the employee. But have not broadened liabilities and larger recoveries widened the gap between the well-compensated victim and the victim who receives little or nothing?

Under the current tort compensation system, even those human misfortunes traceable to particular events involving other persons' actions require greater compensation than can be prudently allocated from the community's wealth. A victim's recovery must be coupled with enormous costs of adjudication and settlement, including cases in which the victim receives nothing. Nor does it matter whether the party ultimately bearing the cost is a governmental entity (which always bears some of the cost of judicial administration), an insurer, a corporation, or a natural person, although there are reasons in some cases to impose liability or primary liability on one type of entity rather than another. Ultimately all costs are borne by individuals or groups of individuals, or the entire community, composed of individuals. A compensation system which spends \$2.33 or more for every dollar paid to a victim is disgracefully inefficient.⁶⁴ Can it not be said that efficiency in compensation systems is a vital part of total justice, that it is linked in practice to Friedman's two superprinciples? The more flawed the compensation system, the more inadequate the compensation for some deserving victim. Even an efficient system of a rich country cannot compensate every victim of misfortune in an amount we would give him if life were always fair.

Amounts consumed by compensation systems have increased each year as a percent of expenditures. Today they are so great and so misspent that the system inhibits socially desirable activity. Physicians, not daring to follow their better judgment, act defensively to minimize exposure to liability for malpractice, frequently incurring uneconomic costs for the patient as well as omitting procedures that on balance should be undertaken for the probable or merely possible benefit to the patient. Drug products whose benefits in the aggregate exceed their risks are withdrawn by the manufacturer, who fears product liability. Birth-control devices are removed from the market even though there is no substantial evidence that they are a hazard to health. A

64. *Id.*

This large [tort compensation] system benefits deserving victims less than it benefits the plaintiff and defense litigation industries. As a system for putting money in the deserving victims' hands, the tort system is grossly inefficient. In effect, we have a "trickle down" system in which enormous sums enter at the top and far smaller sums emerge at the bottom for deserving victims to share.

Id. at 141. Another scholar, Kalalik, concludes that in asbestos injury litigation, plaintiffs received less than 39 percent of the total costs per victim. J. KALALIK, VARIATION IN ASBESTOS LITIGATION COMPENSATION AND EXPENSE 89 (1984). Earlier studies of the allocation of the liability insurance premium dollar concluded that 44 cents got to automobile victims' pockets after paying their attorneys, 28 cents to medical malpractice victims, and 37.5 cents to product liability victims. O'Connell, *An Alternative to Abandoning Tort Liability: Elective No-Fault Insurance for Many Kinds of Injuries*, 60 MINN. L. REV. 501, 504-11 (1976).

two-year-old child obtained a settlement of \$1.5 million from the Chicago Park District as the result of falling through an opening at the top of a playground slide nine feet above the ground.⁶⁵ The Park District thereafter set about removing playground equipment from parks. School districts restrict student field trips and athletic programs because of fear of catastrophic accidental injury to students for which the school district would be liable. Liability insurance has become unaffordable or unavailable. Publicity given by the media heightens the sense of crisis.

Professor Friedman would surely not dispute that some losses should not be shifted unless the victim protects himself by insurance, as when one's house is destroyed by a fire of unknown origin. Professor Conard made the shrewd observation years ago that no one insures himself against pain and suffering. Why then, he asks, should one be forced to buy such coverage for the benefit of the third parties?⁶⁶ There is, however, a difference in pain caused by someone else's "fault," which Professor Conard was willing to overlook. Because resources for compensation of injuries that should be compensable are finite, and inadequate if measured against the ideal, the compensation system must be efficient and fair. Efficiency, an elusive goal in compensation systems, demands that settlement costs be as low as possible; fairness demands that as few people as possible be undercompensated and overcompensated. To restate the classic position, the burden and quantum of compensation should be allocated so as to reduce accidental injuries to the optimal level. Workers' compensation systems should furnish an incentive for employers to reduce the cost of accidents to this level; so also in theory does common law liability for negligence.

Liability Insurance: Cause or Cure?

The censurable practices of liability insurance companies may have aggravated the present strains on the system. There comes to mind no neat way to disprove the plaintiffs' bar's claim that the insurance industry is putting up a squall to soak business enterprise, and ultimately the consumer, with high premiums to generate high profits.⁶⁷ However, the claim is inherently

65. *Sorry, Your Policy is Cancelled*, *supra* note 12, at 16, 24.

66. Conard, *Insurance Rates and Regulation*, 15 U. MICH. L. QUAD NOTES 14 (1970).

67. Robert Habush, president of the Association of Trial Lawyers of America said, "Tort reform is just whipping up hysteria by the insurance companies to get things they've always wanted. They want to minimize their risk and increase their profits." *The Tort Reform Quagmire*, FORBES, Aug. 11, 1986, at 76, 79.

The current insurance crisis has prompted renewed and more vocal pleas for "tort reform." But the popular causes so prominently identified in the media—the so-called litigation explosion and impending bankruptcy of the tort system—are cruel hoaxes. Analysis shows that there is no tort litigation explosion and that the tort system is financially sound and fundamentally necessary to our democratic society.

The real cause of the insurance crisis lies not in the tort system but rather in the industry's own mismanagement and imprudent underwriting practices. What is needed is more effective control over the industry by state regulators.

implausible because such a motive on the part of insurers seems inconsistent with their epidemic cancellations of coverage. One would think insurance companies would want to sell as much coverage as they can profitably write. Profit does not necessarily make insurance too costly to be attractive to the insured.

Insurers are blamed for scrambling for premium income during the early 1980s. Premiums were invested at high rates of interest then prevailing without regard to the probable volume of future claims, which later ballooned to an amount substantially exceeding premiums paid and investment income. Thereafter, insurers drastically increased premiums or canceled liability coverage on types of risks that had proved unprofitable or that could not be predicted. Since expanding liability of insureds creates unknowable risks, insurers take no chances. Kelley and Beyler observe that:

Admittedly, some insurers may be overreacting to [the unpredictability of liability and losses]. But the insurers' reasonable response to any charge that makes tort law and insurance law seem less predictable is to increase both the reserves they set aside and the premiums they charge. In any field looking like it might go the way the asbestos and pollution fields have gone, any prudent insurer will limit coverage, switch to claims-made policies or withdraw from the field.⁶⁸

Arguments over levels of profit and loss of liability insurers will likely be inconclusive and futile. The earnings of successful plaintiff personal-injury lawyers, on the other hand, can be substantiated well enough to support the premise that many of them—those made super-rich by contingency fees—are overcompensated. The free market has not operated in setting contingency fees, the levels of which were recently criticized by Chief Justice Burger.⁶⁹ Likewise, if the free market does not operate in liability insurance pricing and if insurance companies engage in abusive practices, state regulatory agencies should take corrective action.

Liability and casualty insurance has undergone great change in the last decades, prior to which, by creating a fund from premiums paid by a large number of insureds, it served as a shield against statistically unlikely losses, especially catastrophic losses. Insurance costs have roughly paralleled health care costs in taking an ever-increasing share of enterprises' and consumers' dollars. When insurance was a modest add-on expense, a sharing of risks of statistically improbable disasters, it had a different function from, for example, much health insurance today, which is to a large extent the spreading of routine health care costs. Such insurance may provide no protection from medical disaster because of the insurance policy's low maximum coverage.

Stewart, *The "Tort Reform" Hoax*, 22 TRIAL 89 (July 1986). Kelley & Beyler, *supra* note 15, at 144, demonstrates that lower interest rates after 1984 can account only for a modest increase in insurance premiums.

68. Kelley & Beyler, *supra* note 15, at 150.

69. N.Y. Times, Aug. 12, 1986, at A20, col. 5.

One promising innovation is Professor O'Connell's insurance scheme now operating in some public school systems nationwide. For a modest premium, a school district can adequately protect its students financially from disaster caused by athletic injury, including life-long benefits for incapacitation, but free of delay, high settlement and adjudication costs, uncertainty, over-compensation, and undercompensation—all the evils of the tort system. Such insurance schemes, Professor O'Connell suggested years ago, can be adapted to product liability, malpractice, and liability of health care facilities: the consumer can buy and pay for the amount of protection he wants.⁷⁰

Juries and Judges and the Media

Juries and trial judges may often be faulted for being overgenerous to plaintiffs, whatever the merits of their claims. While fault may be too strong a term to apply to the juror's bias, it may be appropriately applied to some trial judges. Some appellate judges incur a heavier blame for being too deferential in letting stand trial courts' judgments on verdicts in favor of plaintiffs when plaintiff's proof was insufficient, plaintiff's theory unsupported, or the award excessive, and occasionally in reversing a trial court's judgment in favor of defendant. So saying, I would surely be remiss in failing to note that juries and judges both of trial and appellate courts decide a vast number of tort cases correctly even today.

Perhaps juries, as the voice of the countryside, are telling us that society wants compensation because an accident injured the plaintiff and the defendant "caused" it; that, as Professor Friedman says, there is an expectation of compensation. But most of the public also wants large military expenditures and generous social security benefits, but does not want to pay for them with higher taxes. Politicians shroud from public view and understanding the reality that government funds for projects the public wants must be taken from people by taxes or by the politically more palatable means of increasing the public debt. An evolution analogous to the expectation of compensation has occurred in social security, which originated, or at least was presented to the public, as but a supplement to an individual's savings program for retirement. In 1984 social security benefits constituted more than 50 percent of the income of 62 percent of those over age sixty-five receiving such benefits.⁷¹

Though recoveries are small by American standards, strict liability in auto accident and many other accident cases has been the legal norm on the Continent for more than a half century. While something approaching strict liability has been the de facto norm in the United States in auto accident cases, ever broader liability has been the course of the law for decades in product liability cases, in contrast with the slower course of product liability law on the Continent. If the public wants liability as to all accidents and misfortunes

70. O'Connell. *supra* note 5, at 914.

71. 46 SOCIAL SEC. BULL. 8 (June 1986).

“caused” by another, such may well evolve as the law in some form of compensation system since the pressure of popular preference is usually stronger than positive law, and therefore typically influences evolution of positive legal regimes and rules. What, then, of the claimant who accidentally injures himself? Or the victims of nonoccupational disease?

In New Zealand a comprehensive scheme for compensation for accidental personal injury and occupational disease has been in place for a decade. Such a system can function only if it is limited to the elements of compensation recognized in workers' compensation systems. Lavishly calculated damages for pain and suffering, for future costs of health care, and extravagantly measured future earnings cannot be accommodated. As the certainty of compensation increases, the rationale for a tort action and for contingent fees weakens except in the case of intentional or otherwise outrageous torts. It cannot be assumed a New Zealand-type scheme would be economically feasible or even desirable in the United States. The New Zealand experience, even if judged successful, is not necessarily an indication, let alone an assurance, that the New Zealand theory and practice is workable in such a pluralistic, debt-burdened society as the United States.⁷² A universal accident compensation scheme was rejected even in Australia.⁷³

Media Coverage of Liability Insurance

Recently the media have concentrated on what they aptly call the insurance crisis;⁷⁴ for the moment the crisis has ended, but the problems remain.⁷⁵ While the media often mention factors that have caused insurance to become unavailable or vastly more expensive, the focus is usually on the effects of not having insurance: closed parks and swimming pools, especially in small communities for which self-insurance is not a possibility; skyrocketing insurance costs for businesses, often combined with a sharply reduced coverage; or operation of an enterprise, public or private, without liability insurance. These developments are frightening for any but the most venturesome entrepreneur of a small or medium-sized business. Even a big business can be wiped out by tort liability as was Johns-Manville for asbestos-related illnesses, and as A. H. Robins may be for Dalkon Shield-related injuries.⁷⁶

In the recent barrage of attention by the media, the plaintiffs' bar and the judicial system have not frequently been subjected to criticism by the media.

72. Brown, *Deterrence in Tort and No-Fault: The New Zealand Experience*, 73 CALIF. L. REV. 976 (1985).

73. See Palmer, *Accident Compensation in New Zealand: The First Two Years*, 25 AM. J. COMP. L. 1 (1977).

74. See, e.g., *Sorry, Your Policy is Cancelled*, *supra* note 12; *Business Struggling To Adapt as Insurance Crisis Spreads*, Wall St. J., Jan. 21, 1986, at 37, col. 1; *The Insurance Squeeze*, St. L. Post Dispatch, Oct. 28, 1985, at 1, col. 1 (series).

75. *Liability Rates Flattening Out as Crisis Eases*, N.Y. Times, Feb. 9, 1987, § 1, at 1.

76. See Couric, *The A.H. Robins Saga*, 72 A.B.A. J. 56 (1986).

However, the viewer or reader is often left with the impression that insurance companies are not playing fair and that the government should step in.⁷⁷ Such was the case in May 1986, when all insurance companies writing medical malpractice insurance in West Virginia announced they would no longer offer coverage in that state. The linkage of increased insurance costs with increased numbers of claims and larger settlements, reflecting ultimately the disposition of cases by appellate courts, is not sufficiently emphasized to have impact on many viewers. The public, which includes jurors, will in time come to understand the links between the individual's pocketbook, insurance costs, and compensation for injuries. The public will understand that overgenerous awards, even against large corporations, are passed on in higher prices, just as in motor accident cases it is common belief that jurors know, though they are not told by the court, that it is the defendant's insurance company which will bear the verdict for the plaintiff. Today many juries may realize that the size of verdicts for plaintiffs in auto accident cases, having impact on the size of settlements, affects the cost of liability insurance bought by the motoring public. In automobile cases the linkage is much clearer than, for example, in a product liability case in which no juror makes frequent use of the type of product manufactured by the defendant.

The realization by the public that damage awards are passed on by the corporate defendant seems especially important in the realm of punitive damages, for which liability insurance is not available in some states because of public policy. The plaintiff is permitted to show the large corporate defendant's wealth of billions of dollars without mention of the reality that such a defendant's exposure to liability may be a thousand times that of a small business with 1/1000th the assets. This is an unsound extension of the law of punitive damages as it relates to natural persons. In cases in which a corporation's liability is vicarious in the sense that the censurably acting employees are not the higher management, whose acts may be assimilated to the acts of the corporation itself, it is doubtful that punitive damages should ever be awarded.

A recent example of the probable result of showing a corporate defendant's wealth was a judgment entered by a United States District Court in Colorado on a verdict of \$19 million against Sears, Roebuck in favor of a dismissed store manager whom the jury found to have been discriminated against because of age in violation of Colorado law.⁷⁸ Upholding the verdict, including \$5 million for pain, suffering, and humiliation, and \$10 million for exemplary damages, Judge Kane said, "I am simply not imperious enough to

77. Kelley & Beyler, *supra* note 15, at 155:

Perhaps the best evidence of the social impact of higher insurance rates are the reports of individual cases we read in newspapers and magazines. These social effects explain why people are upset by the insurance crisis. They don't like the higher prices for some important goods and services. They don't like the limits on their freedom of choice imposed by producers and providers getting out of certain areas. They don't like to see small businesses disadvantaged.

78. *Rawson v. Sears, Roebuck & Co.*, 615 F. Supp. 1546 (D. Colo. 1985).

say that this jury did not know what it was doing. . . . On the basis of conflicting and sometimes unexplained evidence, this jury found in favor of an individual and against a vast corporate enterprise."⁷⁹ But imperiousness better describes the actual disposition of the case: is it not imperious for a judge in effect to command members of the public, Sears customers, to buy a lottery ticket that will make some lucky (or unlucky) person super-rich? Beyond that, common sense shouts to us that, whatever the blameworthiness of Sears, \$19 million is far too much.⁸⁰

Media as a Force for Excessive Liabilities

Under a tort system, costs of some injuries should not be shifted to a party involved in the occurrence causing injury because to do so is to induce uneconomic costs of prevention, a premise seldom treated by the media. The premise is thus not evident to many jurors conditioned by the media to large awards who see themselves, as most members of the public do, as potential plaintiffs rather than defendants.

The fact of the accident is tending more and more to permit an inference of the insufficiency of the defendant's provision for the plaintiff's safety; *res ipsa* gone mad. If, however, the plaintiff was assaulted after dark in the defendant supermarket's parking lot when the lighting system was not functioning properly, there may be no difficulty in finding negligence and that lack of adequate lighting was the proximate cause of the assault. Virtually all supermarket customers are willing to share the cost of dependable lighting in the parking lot, an efficient, cheap deterrent to assault, accidents, and car theft. Causation is much in doubt, however, in an action against the manufacturer of a power lawnmower in which plaintiff, the user, alleges he suffered a heart attack as a result of being required to pull too hard on the cord to start the machine. Unless there is a fair preponderance of evidence that the machine was negligently designed, there is no causal link.

79. *Id.* at 1553.

80. Does Judge Weinfeld sound imperious in *Brink's, Inc. v. City of New York*, 546 F. Supp. 403, 414 (1982), when he granted defendant *Brink's, Inc.*, a new trial unless plaintiff, the City of New York, agreed to a reduction of punitive damages from \$5 million to \$1.5 million in a case involving the city's claim for loss of parking meter revenue through dishonesty of *Brink's* employees of which *Brink's* executives had knowledge? He said:

This was not a case of products liability involving an injurious or poisonous drug . . . that has been widely distributed, or a vehicle with a dangerously defective mechanism that has been installed in thousands of cars with their potentiality for death or lifetime crippling effects; nor is it a libel suit reflecting elements of personal ill will or hostility and oftentimes with the prospect of repetition as a part of a business policy or fraudulent conduct. In such instances there is justification for imposition of substantial punitive damage awards. Here in contrast, the immediate impact of wrongful conduct was upon the City . . . and there is little prospect that repetitive conduct will occur and injure others. . . . The resulting injury, assuming repetitive conduct, is to property—the loss of money, not death or severe personal injury.

If an essential purpose of punitive damages is its deterrent force, these are factors that may properly be considered in assessing the amount of the fine.

True it is that when an accident injures *me*, I am no longer able to view it objectively; there swells within me an urge for vengeance. "Justice" requires compensation because my injury, my festering loss, was not my "fault." It must, it may seem to follow, be someone else's fault. The "someone else" should be made to pay. Further, says columnist Ellen Goodman, "We are less accepting today of accidents, frailties, even 'acts of God,' because we depend less on nature and more on technology."⁸¹ According to a recent survey by Professor Susan Sibley, a sociologist,⁸² plaintiffs typically stated that they were not concerned with recovery of money, but rather with what they viewed as vindication of principle in making defendants pay. This expressed motivation for litigation is suspect, and in fact it seems that vindication of principle and monetary recovery are at least at a subconscious level firmly bonded in most plaintiffs' minds. Talk is cheap; it is easy for a plaintiff to say his interest is only in principle even when monetary recovery is his main concern. Only if plaintiff donates any recovery in excess of out-of-pocket loss and expenses to charity need we take seriously his talk of principle as his only interest.

The plaintiffs' bar is quick to assert a practical justification for principle, that public good flows from successful personal injury claims, which result in making products, premises, and the environment safer. It does not address the question of whether such improvements may be purchased at too high a price. In some cases, such as an excessively stringent liability on land occupiers to protect invitees from personal injury or theft perpetrated by trespassers, imposition of liability operates merely to shift the identity of victims from one group of persons to another and, thus, does not operate as a deterrent to wrongdoing for society as a whole.

If the lawnmower-heart attack victim's suit comes to trial, plaintiff will likely produce as an expert witness a physician who will testify that the stress of pulling the cord to start the machine could bring on a heart attack; an engineer will testify that the machine was not designed to start as easily as it could have been. Such now-perfunctory testimony should, one may well argue, be insufficient to get to the jury. The causal link has not been sufficiently established. To impose liability is to add unjustifiably to the price of the lawnmower.

In a more unusual case, the plaintiff's daughter was shot and killed by her New York state trooper boyfriend, who then committed suicide. The plaintiff sued the state of New York, claiming insufficient screening in making a determination as to whether an applicant was sufficiently emotionally stable to be issued firearms.⁸³ Again, the plaintiff can undoubtedly marshal some evidence which, she urges, tends to show that procedures were insufficient, and some evidence that the wrongdoer would have been found unsuitable to

81. Goodman, *Not What They Bargained For*, St. L. Post Dispatch, Oct. 18, 1985, at 7G, col. 1.

82. Sibley, *Seeking Justice*, Wall St. J., May 20, 1986, at 18, col. 2.

83. *Id.* at 1, col. 1.

be issued a gun if proper procedures had been followed. Fairly appraised, the evidence may not show negligence; after the fact, it is always possible to point to things the defendant could and, therefore, should have done which might have averted the harm.

Less unusual are cases against psychotherapists brought by relatives of patients who become violent. In a Michigan case,⁸⁴ which is in the process of becoming a *cause celebre* on appeal to the Michigan Supreme Court, the court of appeals affirmed a jury award of \$500,000 for the plaintiff whose sister had been shot to death in a scuffle with her son (the patient and the plaintiff's nephew). The nephew had sought and obtained release from a mental hospital he had voluntarily entered two weeks previously. The defendant psychiatrist approved the release, believing the patient had no history predictive of violent behavior (prediction of violent behavior is often impossible). The jury was permitted to find the defendant failed to exercise reasonable professional skill in permitting the release of the patient. The testimony of plaintiff's psychiatrist witness was held to support a finding that the patient's history foretold substantial risk of some sort of violent behavior to a psychiatrist exercising reasonable professional skill and called for a warning to the patient's mother, the victim of the shooting. In the era of the professional medical expert witness, that such testimony could be adduced is not surprising.

If the trial judge errs in sending such cases to the jury, it is up to the appellate court to reverse verdicts in favor of the plaintiff, who has failed to make a *prima facie* case. Every week this takes more mettle, as the atmosphere becomes intoxicated by the heady wine of a remedy for every injury. Starting the lawnmower was merely the occasion, the immediate inducement, not the cause or a cause, in the legal sense, of the heart attack. To impose liability is like holding a physician liable for any negative results of his treatment, or an attorney liable for malpractice because he lost his client's case. A milestone may have been reached when a jury awarded \$10 million in compensatory and punitive damages to a plaintiff who claimed he was stricken by a heart attack as a result of an antitrust suit maliciously brought against him by the defendant.⁸⁵ It is hardly surprising that the media report these exotic cases, which in turn engender more such cases as potential plaintiffs are conditioned by them.

The trial judge sits as a thirteenth juror, it is said. He should be bolder in ruling that plaintiff's proof is insufficient to get to the jury even though this is made more difficult by reason of the public's conditioning by the media. The "safe" course, however, is to submit the case to the jury, and then if a verdict in favor of the plaintiff survives appeal, that is the end of the matter, whereas if the trial judge is reversed after having withheld the case from the jury, there must be a new trial. The trial judge is no doubt more popular

84. *Davis v. Lhim*, 124 Mich. App. 291, 335 N.W.2d 481 (1983); *More Psychotherapists Held Liable for the Actions of Violent Patients*, Wall St. J., Mar. 2, 1987, at 31, col. 5.

85. L.A. Times, Jan. 30, 1987, at 1, col. 1.

following this easier course, even when his personal view is strong that the plaintiff has not made a prima facie case. Maybe the jury will find for defendant; maybe the parties will settle. It has proved unrealistic to expect a trial judge to resist the trend to favor plaintiffs. He or she feels pressure from the plaintiffs' bar and pressure generated by reports of recoveries for injuries in the media, which, in conditioning public expectations, have conditioned jurors. Often the trial judge is looking toward reelection. As the trend to favor plaintiffs gains momentum, the harder it becomes to buck. The judge who does so is a pariah facing the wrath and political power of a wealthy plaintiffs' bar. Gone are the days when the county judge ranked just below God in the community and suffered no doubts about his authoritative image.

Appellate judges and all federal judges are different from state trial judges. The former have power. Unlike most state trial judges, they are not, or need not be, subject to political pressure. While it may be an unrealistic expectation of many state trial judges, state appellate and federal judges must have the courage to be unpopular with the plaintiffs' bar, to be called brutal and inhuman by it, its disappointed clients, and the formidable organizations and institutions, most notably legislatures, upon which the plaintiffs' bar has influence. A judge may, of course, be free of or impervious to political pressure of the plaintiffs' bar and of media, but be intellectually satisfied that jury determinations that some of his brethren consider unsupportably favorable to plaintiffs should be allowed to stand. He or she may, for example, view compensation systems primarily as vehicles for loss-spreading or for redistribution of wealth, or he may believe, like Judge Kane, that jury determinations are to be respected within broadest limits. Case by case, it is impossible to demonstrate that costs of prevention imposed on those whose activity creates risks similar to those of this particular defendant would exceed the reasonably measured costs of harms thereby prevented. It is only when the radiations of more extensive liability are felt in insurance costs, unavailability of insurance, and curtailed activities that an imbalance becomes apparent.

Personal injury law will continue to need the fine tuning of case law even if much tort law is displaced by a comprehensive, formulaic compensation system, which the media would probably ignore. Workers' compensation cases continue to generate much appellate litigation which serves to illustrate that legislated formulae for compensation of personal injuries would inevitably produce occasional inequitable results and will require continuing surveillance by courts and legislatures.

Conclusion

Intuitively one suspects that all misfortunes that should, in a richer, peaceful world be subject to compensation by the legal system, exceed the amount of money that society can optimally spend on compensation of victims. If the compensation system is out of control, its excesses bear the seeds of its cure. The system will in time be corrected. Babies will continue to be born regardless of obstetricians turning to some other less risk-laden area of

medicine. Swimming pools may close and high school field trips may be suspended for a time. At some point there will come general realization that these activities are essential, though they, like most human activity, cannot be made risk-free. The common law set out to reach equilibrium between the cost of accidents, realistically assessed, and the cost of prevention. Some way an equilibrium will be restored.

In May 1986, a United States court of appeals overturned a widely publicized district court judgment of \$1.2 million in favor of widows of fishermen suing under the Suits in Admiralty Act, the fishermen having been lost at sea because of a negligently made weather forecast of the National Atmospheric and Weather Service.⁸⁶ In addition, there are scores of lung cancer cases, some highly publicized, but none to date in which liability has been imposed on a cigarette manufacturer.⁸⁷ Lawsuits against churches and clergy seeking to impose liability for counseling or lack of counseling allegedly resulting in tragedy such as plaintiff's child's suicide received attention from the media,⁸⁸ to date no such case has gone to a jury. Is it possible that the plaintiffs' bar is overplaying its hand, thereby hastening a reaction that will bring basic changes in the scope and operation of the common law tort system of the United States?

Erring appellate courts sooner or later will see the fallacy of responding to pressures of the plaintiffs' bar and of public opinion generated by the media, and of trying to remake life into a riskless affair by expanding tort liability. Excessive and improper awards are not only harmful to the economy but harmful in that they result ultimately in denying adequate compensation to some injured person who has a good claim and who needs the money.

86. *Brown v. United States*, 790 F.2d 199 (1st Cir. 1986).

87. *See, e.g.*, cases cited at 14 *Prod. Safety & Liab. Rptr.* (BNA) 25 (1985).

88. *See Clergy Malpractice—The Prayer for Relief*, *Nat'l L.J.*, Mar. 4, 1985, at 1; *Christian Sci. Monitor*, June 13, 1985, (Ideas), at 25.

