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> Together with the free market, tort law . . . plays in America very much the role set for it by liberal theorists who wish to minimize the collective role of the state and the legislatures. Or at least it would do so, if it were not for the paradoxical fact that so much modern American tort law has fallen under the control of a sort of proplaintiff party which seems to see its function as performing the redistributive exercises performed by legislatures in other democratic systems. That is why American tort law is in crisis . . . .[1]

On May 20, 1996, the United States Supreme Court leaped into the debate over civil justice reform by overturning an award of two million dollars in punitive damages to an Alabama doctor who discovered that his "new" BMW had been secretly repainted by the dealer after being scratched prior to delivery.[2] In reaching this ruling, the Court noted that the compensatory award had been only four thousand dollars and characterized the five hundred to one ratio between punitive damages and actual harm as "grossly excessive" and violative of due process.[3]

It is perhaps not surprising that Ira Gore's "purely economic"[4] claim could result in a multi-million dollar verdict against a defendant with "deep pockets"; nor is it surprising that the jury's initial award in *BMW of North America, Inc. v. Gore*[5] was actually four million dollars, and had been cut in half by the Alabama Supreme Court.[6] What is remarkable, even to those accustomed to the United States tort system, is

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1. P.S. Atiyah, *Tort Law and the Alternatives: Some Anglo-American Comparisons*, 1987 DUKE L.J. 1002, 1044.

2. *See* BMW of N. Am., Inc. v. Gore, 116 S. Ct. 1589 (1996).

3. *Id.* at 1598, 1602.

4. *Id.* at 1599.

5. *Id.*

6. *See id.* at 1594-95 (noting the Alabama Supreme Court's reasoning that the jury erred in basing part of Gore's award on conduct that occurred outside of Alabama).

that scarcely two weeks after the *BMW* decision, an undaunted Alabama jury ordered General Motors (GM) to pay $150 million in damages to Alex Hardy, who alleged that a defective GM door latch allowed him to be thrown from his Chevy Blazer in a crash, rendering him a paraplegic.[7] The award included $100 million in punitive damages despite Hardy's admission that he had not been wearing a seat belt at the time of the crash and the existence of a dispute as to whether Hardy had fallen asleep at the wheel after "drinking a few beers."[8] The award represents the largest verdict ever against GM.[9]

While comprehensive statistics are difficult to obtain, the consensus among domestic and international observers alike is that the American civil justice system is expensive, unpredictable, and easily bogged down.[10] For example, although tort litigation generated approximately thirty billion dollars in costs in 1985, tort victims recovered only about fifteen billion dollars.[11] Last year saw a seventeen percent rise in the national median for jury awards, including a forty percent rise in the median medical malpractice award from $356,000 in 1994 to $500,000 in 1995.[12] The American Tort Reform Association estimates that the American civil justice system as a whole generates direct and indirect costs—including lost productivity and efforts to avoid liability—of more than $200 billion per year, and that in 1992 there were twenty million lawsuits filed in state and federal courts.[13] Civil justice in America is unquestionably in need of an overhaul.

An examination of civil litigation in other nations yields two insights: first, that civil practice abroad, even in countries that share our common law tradition, differs from American civil practice in a number of ways; second, that those differences act as checks on both litigation and costs, such that these countries have not experienced most of the effects of the ongoing "litigation explosion" which plagues the American system. These

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7. *See* Hardy v. General Motors Corp., No. CV-93-56 (Ala. Cir. Ct., Lowndes County 1996); *see also* David Lawder, *GM Ordered to Pay $150 Million Damages*, WASH. POST, June 4, 1996, at C1.

8. *See Hardy*, No. CV-93-56.

9. *See* Lawder, *supra* note 7.

10. *See, e.g.*, Atiyah, *supra* note 1, at 1043-44; Thomas D. Rowe, Jr., *American Law Institute Study on Paths to a "Better Way": Litigation, Alternatives, and Accommodation: Background Paper*, 1989 DUKE L.J. 824, 854-55.

11. *See* Harold J. Moskowitz & Robert B. Wallace, *Loser-Pays: A Deterrent to Frivolous Claims?*, N.Y. L.J., Mar. 7, 1996, at 2.

12. *See* Henry J. Reske, *Tort Awards Increasing: Experts Peg Rise to Decreased Publicity About Tort Reform, Profit-Driven Corporate Decision-Making*, 82 A.B.A. J. 26 (1996).

13. *See* Moskowitz & Wallace, *supra* note 11.

differences in procedure exist at every phase of a civil suit, suggesting numerous opportunities for reforming civil practice in the United States.

I. PRE-TRIAL DISCOVERY

The United States is unique in allowing broad pre-trial discovery that includes not only document production but also extensive interrogatories and pre-trial depositions, practices which are, for the most part, not permitted in civil law countries and are rather restricted in other common-law systems.[14]

The costs and delay associated with providing extensive discovery are staggering. The President's Council on Competitiveness, headed by then-Vice President Dan Quayle, concluded that discovery accounts for eighty percent of litigation costs in the United States,[15] a figure which is supported by the experience of corporate in-house counsel.[16] While in-house legal teams have attempted to control outside legal costs by increasing their own involvement in the discovery process, discovery still accounted for 37.8% of monies paid to outside legal counsel in 1994.[17]

Unlike the United States, Britain and Australia do not provide for pre-trial depositions at all;[18] Israel essentially allows pre-trial testimony only where the witness is about to leave the country or for some similarly "sufficient reason."[19] Also, in Australia, Britain, and Israel, pre-trial discovery is focused mainly on document production, which is envisioned as a cooperative undertaking in which each party submits its own list of documents that are relevant to the case and then permits its opponent to inspect any or all of the documents listed. Most Australian jurisdictions

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14. *See* ORGANISATION FOR ECON. COOPERATION AND DEV., PRODUCT LIABILITY RULES IN OECD COUNTRIES 27 (1995) [hereinafter OECD].

15. *See* PRESIDENT'S COUNCIL ON COMPETITIVENESS, AGENDA FOR CIVIL JUSTICE REFORM IN AMERICA 1-3 (1991); *see also* Alfred P. Ewert, *Is IP Litigation in the US Really Worth It?*, MANAGING INTELL. PROP., June 1995, at 27, 28.

16. *See Focus on Law Department Managers*, METROPOLITAN CORP. COUNS., July 1996, at 20 (interviewing Kathryn A. Oberly, counsel to Ernst & Young).

17. *See Total Legal Costs Were 1.23% of Median Revenues in 1994*, CORP. LEGAL TIMES, July 1995, at 27.

18. *See* MARK ARONSON & JILL HUNTER, LITIGATION: EVIDENCE AND PROCEDURE § 6.42 (5th ed. 1995) (stating that even written interrogatories are used only when obviously necessary); Letter from Andrew C. Dobson, Esq., solicitor in England, to Gerald Walpin, Esq. (June 12, 1996) [hereinafter June 12 Letter] (on file with *New York Law School Law Review*).

19. *See* Letter from Philip Mandelker, Esq., member of the Israeli Bar, to Gerald Walpin, Esq. (June 3, 1996) [hereinafter June 3 Letter] (on file with *New York Law School Law Review*).

further limit document production by requiring that the documents sought by a party be "necessary" at the stage at which they are sought and discouraging "fishing" for evidence.[20] Finally, pre-trial depositions of third-parties do not exist in Australia and Israel and are extremely limited in Britain; document discovery from non-parties is very limited in the United Kingdom and Australia and is not permitted in Israel.[21]

It is not difficult to see that allowing broad discovery, as the United States does, fosters claims by aiding plaintiffs who "otherwise would not have access to key information necessary for a successful action."[22] Interestingly, the 1993 amendments to Rule 26(a) of the Federal Rule of Civil Procedure, which were intended to expedite information exchange, resemble the procedures used in Britain and Canada; however, these amendments were not well-received by many federal courts, which were given the option not to follow the amended rule.[23] Nonetheless, limiting the circumstances under which depositions can be taken may still prove a worthwhile and feasible method of reforming pre-trial discovery.[24]

II. CLASS ACTION LITIGATION

One area in which the United States differs from other nations is in its provisions for class actions.[25] Over time, class certification has become increasingly available, so that a class need not be composed of a

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20. *See* ARONSON & HUNTER, *supra* note 18, §§ 6.11-6.12. For example, Queensland imposes a "duty" to disclose all documents that are "directly relevant to an allegation in issue." Q.S. Ct. Rules, Order 35.

21. *See* ARONSON & HUNTER, *supra* note 18, § 6.36 (explaining that third-party discovery is available in Federal Court, Victoria and the Northern Territory, and South Australia); STUART SIME, A PRACTICAL APPROACH TO CIVIL PROCEDURE § 22.4 (1994) (stating that third-party discovery is available in Britain in cases of personal injury or death); Letter from Andrew C. Dobson, Esq., solicitor in England, to Gerald Walpin, Esq. (Aug. 12, 1996) (on file with *New York Law School Law Review*) (explaining that third party discovery is available where the third party has "facilitated" the "wrong-doing" of a party, whether intentionally or not); Letter from David J. O'Callaghan, Esq., member of the Australian Bar, to Gerald Walpin, Esq. (Aug. 29, 1996) [hereinafter August 29 Letter] (on file with *New York Law School Law Review*) (explaining that there is no discovery of third party witnesses in Australia); June 3 Letter, *supra* note 19 (stating that there is no compulsory third-party discovery in Israel).

22. OECD, *supra* note 14, at 27.

23. *See* FED. R. CIV. P. 26(a); *Briefs: Courts Reticent About New Rules*, 12 ALTERNATIVES TO HIGH COSTS LITIG. 105 (1994) (discussing Advisory Committee intention to expedite information flow).

24. For example, depositions might be limited to cases in which a witness is likely to become "unavailable" as that term is used in Federal Rule of Evidence 804(a).

25. *See* FED. R. CIV. P. 23.

group of persons who share an identical interest. As one observer has summarized:

> The American class action permits representative parties to bring proceedings on behalf of members of a class without the prior consent of those members and irrespective of whether they are parties to the litigation. The court may award global damages without proof of damage in individual cases and the outcome is binding on all class members.[26]

In contrast, the British "test case" or "representative action" is functionally closer to consolidation.[27] Under the test case method, where a number of people share "the same interest in any proceedings," an action may be commenced "by or against any one of them"; the result obtained by one is binding on all.[28] It is noteworthy that the use of the test case has evolved as an ad hoc response to "necessity"; as yet English law contains no formal provisions for test cases.[29] Representative actions are thought to be "generally inappropriate for mass tort actions because the parties lack the requisite commonality of interest."[30]

While some Australian jurisdictions have adopted formal representative action procedures, practical experience with these procedures is limited. Australian scholars readily admit that Australia has "not yet experienced mass claims on anything like the scale elsewhere."[31] Also, although some parts of Australia have broader provisions for group action by a group sharing a "common interest," a number of Australian courts have treated the "common interest" requirement as a "same interest" requirement, thus placing "interpretive shackles" on the use of

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26. Ros Sparrow, *Corporate Friendly Europe*, INT'L COM. LITIG., Mar. 1996, at 2.

27. ARONSON & HUNTER, *supra* note 18, §§ 3.48, 3.60.

28. SIME, *supra* note 21, § 7.5.

29. *See id.*

30. Sparrow, *supra* note 26, at 2.

31. ARONSON & HUNTER, *supra* note 18, §§ 3.48-3.49. The absence of any meaningful number of mass tort cases in Australia cannot be explained away as the result of historical good fortune, that is, a lack of mass disasters that would engender litigation. First, mass torts resulting in asbestosis and silicosis have occurred, but have been processed outside of court. *See infra* p. 662. Moreover, every modern country has suffered from mass disasters—or at least from adverse incidents affecting a large number, which, given the ingenuity of lawyers and a welcome sign on the courthouse doors in this country, has resulted in the litigation explosion. There is no reason to believe that the foreign bar is any less ingenuous or unable to take advantage of a courthouse welcome sign, if it were on the doors.

these group actions.[32] The functionality of Australian representative action procedures is therefore questionable.

A recently enacted class action provision in Israel presents intriguing possibilities. A recent amendment to the Israeli Banking (Customer Services) Law contains a clause, which allows class actions for violation of that law and permits a court to consider the benefits and detriments to the public that may result from allowing a class action to proceed against a defendant financial institution.[33] This cost-benefit analysis was added to the Banking Law in view of the strong public interest in the stability of the banks.[34] Such an analysis might easily be applied in other contexts where there is a demonstrable public interest in the stability of the targeted industry. Class actions in Israel are generally limited in that the availability of class certification and the requirements for proceeding as a class vary according to the specific statutory context.[35] By contrast, Rule 23 of the Federal Rules of Civil Procedure provides a uniform standard for class actions in this country.

III. THE CIVIL JURY TRIAL

Unlike the United States, Australia and Britain do not employ juries in most types of civil cases.[36] In Canada, civil juries are very rarely requested and, in any civil trial before a jury, the court retains the discretion to dismiss the jury "at any stage of the proceedings . . . based upon the complexity of the issues."[37] Furthermore, the jury system does not even exist in Israel.[38] In fact, among countries in the Organization

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32. *See* ARONSON & HUNTER, *supra* note 18, §§ 3.52-3.59.

33. *See* Letter from Philip Mandelker, Esq., member of the Israeli Bar, to Gerald Walpin, Esq. (May 6, 1996) (on file with *New York Law School Law Review*).

34. *See* June 3 Letter, *supra* note 19.

35. *See id.*

36. *See* Michael Tilbury & Harold Luntz, *Punitive Damages in Australian Law*, 17 LOY. L.A. INT'L & COMP. L.J. 769, 775-76 (1995) (explaining that most civil trials in Australia do not involve juries); Letter from David J. O'Callaghan, Esq., member of the Australian Bar, to Gerald Walpin, Esq. (Aug. 13, 1996) [hereinafter August 13 Letter] (on file with *New York Law School Law Review*); August 29 Letter, *supra* note 21 (both letters stating that while right to a jury trial exists for tort and contract actions, its use for contract actions is either non-existent or extremely limited); June 12 Letter, *supra* note 18 (explaining that in Britain civil juries are used only in defamation and fraud cases).

37. Bruce A. Thomas, Q.C., & Lawrence G. Theall, *Product Liability and Innovation: A Canadian Perspective*, 21 CAN.—U.S. L.J. 313, 314-15 (1995).

38. *See* June 3 Letter, *supra* note 19.

for Economic Cooperation and Development, only the United States and Ireland provide for jury trial of personal injury claims.[39]

> The arguments against the use of civil juries are familiar: Trial by judge is just not the same thing as trial by jury. Judges give reasons for their decisions, juries do not; judges cannot openly discard or flout the law, juries can; judges at least attempt to put aside prejudice and emotion, juries often do not. Nobody can doubt that jury trial is a less rule-governed and less predictable mode of trial than judge trial.[40]

Moreover, although "appellate courts may reluctantly encroach on the decision of the jury" by employing remittitur, in most cases damage awards are upheld according to "what juries typically do" rather than according to ideas of what juries *should* do.[41] "Sympathy verdicts," together with allowances for high attorney fees, "extraordinarily high" awards for pain and suffering, multiple damages resulting from the collateral benefit rule, and punitive damages, exact a considerable toll on the American civil justice system.[42]

Of course, the Seventh Amendment and most state constitutions permit liability in most civil cases to be decided by a jury.[43] Also, the Supreme Court has ruled that a court may not substitute its own assessment of compensatory damages for that of a jury.[44] However, the Constitution does not clearly preclude a scheme in which liability and compensatory damages would be determined by a jury and punitive damages assessed by a judge. The Fourth Circuit has ruled that because the "proper measure" of punitive damages in a tort action "is a function of law[,] not of facts found by a jury," punitive damages are not constitutionally required to be

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39. *See* OECD, *supra* note 14, at 25. "The impact of juries is not limited to the United States. In Ireland, which also has jury civil trials, the average damages are six times greater than in England, where judges award damages." *Id.* at 26.

40. Patrick S. Atiyah, *Lawyers and Rules: Some Anglo-American Comparisons*, 37 SW. L.J. 545, 555 (1983).

41. Atiyah, *supra* note 1, at 1024.

42. *Id.* at 1021-25; *see also infra* Part VI for a discussion of punitive damages.

43. *See* U.S. CONST. amend. VII.

> In Suits at common law, where the value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved, and no fact tried by a jury, shall be otherwise re-examined in any Court of the United States, than according to the rules of the common law.

Id.

44. *See* Kennon v. Gilmer, 131 U.S. 22 (1889).

assessed by a jury.[45] At the state level, Connecticut, Kansas, and Ohio have each passed statutes implementing this bifurcated system with respect to punitive damages.[46] As one commentator noted, "[a]lmost no one thinks it remarkable, let alone unconstitutional, that in criminal cases juries decide guilt or innocence and judges then take sole charge of sentencing."[47]

To the extent that punitive damage awards do much to escalate the cost of civil justice in America, a compromise between the status quo and the jury-free system employed by other countries may improve our system considerably. It is important, however, to consider supplementing this bifurcated scheme with detailed statutory standards for judges to follow in awarding punitive damages; otherwise, unguided judicial discretion in damage assessment could well offset the benefits of removing damage awards from the civil jury.[48]

IV. ATTORNEY FEES: DISCOURAGING FRIVOLOUS CLAIMS

One feature of the American civil justice system that is frequently blamed for the "litigation explosion" is the contingent attorney fee agreement. The contingent fee agreement represents a truly unique effort to increase a plaintiff's access to justice by creating "a risk-bearing co-venturer in the person of the lawyer who will not get paid in case of defeat."[49] While the development of freely negotiated contingency fees in this country was aided by the influence of the laissez-faire doctrine,[50] Commonwealth nations historically prohibited contingency agreements, in part through the use of the common-law torts of champerty and maintenance.[51]

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45. Shamblin's Ready Mix, Inc. v. Eaton Corp., 873 F.2d 736, 742 (4th Cir. 1989). Currently the Fourth Circuit is the only federal Court of Appeals to have directly addressed the issue.

46. *See* CONN. GEN. STAT. ANN. § 52-240(b) (West 1990) (finding of damages); KAN. STAT. ANN. § 60-3702 (1989) (all civil actions); OHIO REV. CODE ANN. § 2315.21(C) (Banks-Baldwin 1990).

47. David Bernstein, *Learning from the Commonwealth*, 25 CIV. JUST. MEMO 1 (1996).

48. *See* Alan Howard Scheiner, *Judicial Assessment of Punitive Damages, the Seventh Amendment, and the Politics of Jury Power*, 91 COLUM. L. REV. 142, 180, 222 (1991).

49. Rowe, Jr., *supra* note 10, at 851-52.

50. *See* John F. Vargo, *The American Rule on Attorney Fee Allocation: The Injured Person's Access to Justice*, 42 AM. U. L. REV. 1567, 1575 (1993).

51. *See* Tilbury & Luntz, *supra* note 36, at 771.

Though the use of such torts has fallen off, Commonwealth nations still prefer to increase access to the system through legal aid and limits on attorneys' fees rather than through contingency arrangements.[52] In the United Kingdom, for example, contingency agreements are prohibited by section 28.8 of the Code of Conduct for the Bar of England and Wales.[53] While in Australia, an agreement between a lawyer and client to share in a recovery is statutorily unenforceable.[54] Although Israel allows lawyers and clients to make contingency agreements in tort and commercial litigation, "maintenance" arrangements are prohibited by the Code of Ethics.[55] Around the world, contingent fee agreements are viewed as adding to the incidence of frivolous litigation and, correspondingly, the cost of liability insurance.[56]

Traditionally, other civil justice systems, particularly those in the Commonwealth, have required parties to compensate their attorneys on a simple pay-as-you-go or scale basis. Because this approach does not hold out the prospect of a large windfall to the attorney in the event of success, it is said to discourage frivolous and overly prolonged claims and to increase settlement or abandonment of claims.[57] However, as legal aid has become increasingly unavailable,[58] this method of attorney compensation has come under attack as an unfair obstacle to the filing of meritorious claims by middle- and lower-class individuals.[59]

In response to this criticism, and on the recommendation of Lord Harry Woolf, who has completed a review of the British civil litigation system, the British have for the past year been experimenting with a so-called "conditional" fee arrangement. In personal injury and some insolvency claims, as well as in cases before the European Court of Human Rights, a client and a solicitor may negotiate a "no win, no fee arrangement" with an "uplift." Translation: if the client loses, the solicitor waives the scale or hourly fee for services provided; if the client wins, the solicitor may recover his or her scale fee plus an enhancement

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52. *See* Rowe, Jr., *supra* note 10, at 851 n.93.

53. *See* Maimon Schwarzschild, *Class, National Character, and the Bar Reforms in Britain: Will There Always Be an England?*, 9 CONN. J. INT'L L. 185, 217 n.123 (1994).

54. *See* Tilbury & Luntz, *supra* note 36, at 771.

55. *See* June 3 Letter, *supra* note 19.

56. *See* OECD, *supra* note 14, at 26.

57. *See id.*

58. *See* Tilbury & Luntz, *supra* note 36, at 771.

59. *See* Fiona Bawdon, *Accident Victims Win Their Rights*, OBSERVER, June 16, 1996, *available in* 1996 WL 12063615.

of no more than 100% of the scale fee.[60] The British are careful to distinguish the conditional fee from the contingent fee, noting that while a contingency arrangement gives an attorney a share in the client's damages—a larger award yields a larger fee—a conditional fee arrangement is a fixed uplift which is not affected by the degree to which a claim succeeds, only by the condition of success itself.[61] Over the past year, the availability of the conditional fee appears to have had the desired effect of opening the British legal system to approximately 12,000 accident victims who, most likely, would "have otherwise had no chance of compensation."[62]

Whether conditional fees will make solicitors more "aggressive"—that is, cause them to seek out frivolous claims—remains to be seen. One observer suggests that the representative action will continue to be rare because "it is unlikely that many European firms would have the depth of resources to conduct group actions on the basis of conditional fees."[63]

One should note generally that conditional fee agreements are open to review by the court, which can reduce inappropriate uplifts and result in the discipline of solicitors.[64] In the majority of cases in Britain, Australia, and Ontario, the traditional method of attorney compensation continues to restrain lawyerly aggressiveness.

V. FEE SHIFTING

Perhaps no other foreign practice has attracted as much attention in the debate over civil justice reform as the "English rule" of costs. Under the traditional operation of the English rule, which is also used in Australia and Israel, costs "follow the event"; the losing party in a civil suit must pay the costs incurred by the winner, including counsel fees.[65] Fee shifting is supplemented by the "payment-in" scheme, under which a defendant may make a payment to the court in satisfaction of a monetary claim; should the plaintiff reject the offer and succeed in the action but recover less than the amount of the offer, the plaintiff must pay the defendant's costs from the time of the offer onward.

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60. *See* Letter from Andrew C. Dobson, Esq., solicitor in England, to Gerald Walpin, Esq. (June 18, 1996) [hereinafter June 18 Letter] (on file with *New York Law School Law Review*).

61. *See id.*

62. Bawdon, *supra* note 59.

63. Sparrow, *supra* note 26.

64. *See* June 18 Letter, *supra* note 60.

65. *See* SIME, *supra* note 21, § 40.1.

The principle of costs following the event is not absolute, in that the court possesses "unlimited discretion" to award costs as "the justice of the case requires" and may deny the award of costs altogether.[66] In practice, the losing party is thus rarely ordered to pay the winner's costs in their entirety.[67] Nonetheless, fee shifting appears to be a significant disincentive to litigation.[68] Even a successful party may face an adverse cost order—not only where there has been misconduct, but also where the court finds that the winner failed to achieve "anything of value or substance which he could not have won" through settlement.[69]

As a measure which exists almost solely to discourage litigation, fee shifting is plainly at odds with the American ideal of ensuring access to justice. Although judges may use their discretion to make smaller cost orders where the unsuccessful party is on legal aid,[70] the legal aid policy of turning down cases in which costs may be awarded acts as a barrier to indigent personal injury plaintiffs.[71] Further, a middle-class individual who does not qualify for legal aid and has a reasonable but uncertain chance of success is ill-advised to risk his or her house by suing for damages.[72]

Where fee shifting has been employed in the United States, it has usually been structured as a one-way shift that increases rather than decreases a plaintiff's access to the system. For instance, under section 1988 of title 42 of the United States Code, a plaintiff may recover costs from the government for a civil rights violation but does not have to pay the government's costs if the claim fails.[73] The one-way shift, which

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66. *Id.* (citing Scherer v. Counting Instruments Ltd., 1 W.L.R. 615, 621-22 (C.A. 1986)). Costs may even be awarded against non-parties in exceptional cases. *See id.* § 40.3.6. (citing Aiden Shipping Co. Ltd. v. Interbulk Ltd., 2 W.L.R. 1051 (H.L. 1986)).

67. *See* ARONSON & HUNTER, *supra* note 18, § 1.18 (stating that in Australia, "one could usually count on the court ordered costs falling short of the winner's actual legal expenses by around one-third in the routine case, more in complex cases."); SIME, *supra* note 21, at 440 (stating that in the United Kingdom, "even a successful litigant usually has to pay something to its own solicitor"); August 13 Letter, *supra* note 36 (noting that court-ordered costs may fall short of actual expenses by as much as 80% in a commercial case in Sydney); June 3 Letter, *supra* note 19 (noting that, in Israel, fee assessments in tort actions may be as high as 10% of the recovery but are substantially lower in commercial actions).

68. *See* ARONSON & HUNTER, *supra* note 18, § 1.18; Tilbury & Luntz, *supra* note 36, at 771.

69. SIME, *supra* note 21, §§ 40.5.1, 40.5.4.

70. *See id.* § 40.6.2.

71. *See* Vargo, *supra* note 50, at 1613 n.393.

72. *See* Tilbury & Luntz, *supra* note 36, at 771.

73. 42 U.S.C. § 1988 (1994).

obviously does little to deter meritless claims, is rooted in Supreme Court precedent which focuses on the unfair and disparate impact that a two-way shift would have on the poor, the necessity of generating attorneys' fees litigation, and the lack of legislative action in this area.[74]

The English have recently responded to these concerns about the two-way shift. Along with conditional fees, they have instituted what is known as "after the event" insurance, which for a limited fee (£ 85) protects a party against having to pay the opposing party's legal costs.[75] In the first year of its availability, cost insurance seems to have had the desired effect of opening the legal system to plaintiffs with meritorious claims who otherwise would not have been able to sue for damages.[76]

Another way of adapting the English rule to our system has been suggested by Judge William Schwarzer of the United States District Court for the Northern District of California.[77] Where an offer of settlement has been made, Judge Schwarzer would implement fee shifting by amending Rule 68 of the Federal Rules of Civil Procedure to include attorney fees within "reasonable court costs." To mitigate the impact on lower and middle-class plaintiffs, Judge Schwarzer suggests (1) the use of discretion by judges "where necessary to avoid infliction of undue hardship on a party" and (2) the limitation of awardable costs to the amount of the judgment.[78] Under this proposal, if a plaintiff were to reject an offer of settlement and then go on to lose the case, the plaintiff would not be forced to pay the defendant's legal fees.[79] The condition that the judge's discretion be exercised only to avoid "undue hardship" is responsive to the concern that unlimited discretion could generate a "significant problem of satellite litigation" over attorneys' fees.[80]

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74. *See* Alyeska Pipeline Serv. Co. v. Wilderness Soc'y, 421 U.S. 241 (1975); Fleischman Distilling Corp. v. Maier Brewing Co., 386 U.S. 714, 718 (1967).

75. *See* Bawdon, *supra* note 59.

76. *See id.*

77. *See* Committee on Fed. Legislation, *Attorney Fee-Shifting and the Settlement Process*, 51 REC. ASS'N B. CITY N.Y. 391, 399 (1996).

78. *Id.* at 399-400. Where judgment is rendered for the defendant but no monetary award is assessed against the plaintiff, there would be no awardable costs; where necessary, the Committee endorses the use of Federal Rule of Civil Procedure 11 sanctions rather than fee-shifting to deal with plaintiffs who bring such cases frivolously. *See id.* at 411.

79. *See id.* Note that the Committee on Federal Legislation itself endorses the Schwarzer Proposal only for federal diversity cases. *See id.* at 413.

80. *See id.* at 398. Alaska, which employs fee shifting under Rule 82 of the Alaska Rules of Civil Procedure, has in fact experienced a great deal of attorney's fees litigation for this reason. However, it should be noted that the court's discretion extends only to successful defendants, whereas there is an explicit schedule of fees for successful

VI. DAMAGES

Regardless of where the power to assess damages lies, it is apparent that awards which are "grossly excessive," like that in *BMW*,[81] are assessed far too often and that there seems to be a trend towards awards which defy description, like that in the *GM* case.[82] The problem is not limited to punitive damages, but extends to compensatory awards which include "pain and suffering"; each type of award serves essentially as a license for "sympathy verdicts."

For a variety of reasons, other civil systems have not experienced damage awards of comparable magnitude or frequency. Israel, for one, does not employ punitive damages at all.[83] However, the elimination of punitive damages in this country is unlikely, given that the use of punitive awards is firmly rooted in precedent and regarded as "the hammer of civil justice."[84] More limited and thus potentially more feasible approaches are suggested by civil systems in the Commonwealth.

One possibility is simply placing a cap on damages. Canada, for example, caps damage awards at a level adjusted annually according to the Consumer Price Index; the cap for non-pecuniary damages in 1995 was approximately $260,000.[85] A variation on the cap is the tariff. Some Australian jurisdictions, in an effort to achieve consistency, place a tariff on non-pecuniary loss in defamation cases to ensure that these awards are not disproportionate to awards for non-economic loss in serious personal injury cases.[86] British judges use a tariff as well.[87]

Another possibility is changing the manner in which damages are calculated. In Britain, for instance, the availability of comprehensive unemployment, disability and medical benefits and the rejection of the collateral benefit rule (except with respect to private insurance) operate

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plaintiffs; it is likely the disparate treatment of plaintiffs and defendants, rather than the exercise of judicial discretion alone, which generates most of the controversy. *See* Vargo, *supra* note 50, at 1622-24.

81. BMW of N. Am., Inc. v. Gore, 116 S. Ct. 1589 (1996); *see also supra* text accompanying notes 2-6.

82. Hardy v. General Motors Corp., CV-93-56 (Ala. Cir. Ct. Lowndes County 1996); *see also supra* text accompanying notes 7-9.

83. *See* June 3 Letter, *supra* note 19.

84. Scheiner, *supra* note 48, at 142.

85. *See* PETER RICHARDSON & MACKENZIE GERVAIS, PRODUCTS LIABILITY - THE CANADIAN EXPERIENCE 167, 176, 187 (1995) (ALI-ABA Course of Study).

86. *See* Tilbury & Luntz, *supra* note 36, at 791.

87. *See* Schwarzschild, *supra* note 53, at 217-18.

jointly to limit awards.[88] Further, British courts calculate damages for lost wages based on a plaintiff's net after-tax income rather than gross salary.[89] British courts can also employ an interim damages scheme, in which a defendant pays some agreed-upon amount to an injured plaintiff and the court retains the power to modify the judgment if the plaintiff's condition improves.[90] This last approach responds to the concern that a plaintiff may exaggerate or unnecessarily prolong the appearance of suffering during the trial—for example, by donning the stereotypical neck-brace—only miraculously to recover and enjoy a wealthy, healthy life.[91] Unsurprisingly, judgments in the United Kingdom tend to be much lower than they are here; a 1991 survey suggests that there are fewer than forty million dollar personal injury verdicts annually in England and Wales combined, compared to at least 700 here.[92]

If punitive damages cannot be eliminated from the American system, it may at least be possible to limit their use to certain categories of cases. *Rookes v. Barnard*,[93] a 1963 decision of the House of Lords, limited the availability of "exemplary" damages in the United Kingdom to three types of cases: first, cases in which the government or a government agent has acted in an "oppressive, arbitrary, or unconstitutional" manner; second, cases in which it appears that "the defendant has calculated that the profit to be made from a course of conduct is likely to exceed any compensation payable to the plaintiff"; and third, cases in which exemplary damages were already (prior to 1964) permitted by statute.[94] The practical effect of *Rookes* has been the standardization of what would otherwise be the most "unpredictable" factor in damage calculation, resulting in far smaller and less frequent punitive awards than those assessed in the United States.[95]

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88. *See* Atiyah, *supra* note 1, at 1024-25.

89. *See id.*

90. *See* Nancy M. Simone, *Medical Malpractice Litigation: A Comparative Analysis of the United States and Great Britain*, 12 SUFFOLK TRANSNAT'L L.J. 577, 595 (1989).

91. In this regard, it is interesting to note that Australian courts tend to discount awards on the assumption that the "vicissitudes of life" may bring good fortune or opportunities that alleviate a plaintiff's suffering; this assumption contrasts sharply with the hopelessly bleak picture painted by many plaintiffs' attorneys and adopted in part, or whole, by juries. *See* Tilbury & Luntz, *supra* note 36, at 771.

92. *See* Schwarzschild, *supra* note 53, at 218.

93. [1964] App. Cas. 1129 (1963).

94. Tilbury & Luntz, *supra* note 36, at 774.

95. *See* Schwarzschild, *supra* note 53, at 217.

Though Canada and Australia have declined to follow *Rookes*,[96] the courts of both nations apply considerable restraint in the assessment of punitive damages. For example, Australian courts award punitive damages only "where the defendant engages in conscious wrongdoing in contumelious disregard of another's rights."[97] Generally, the reluctance of courts in Commonwealth nations to employ punitive damages rests on a number of policies: the theory that punitive damages tend to blur the line between civil and criminal law, but disregard the rights of defendants in civil trials where evidentiary and other protections are not as strong as in the criminal arena; the belief that "damages" should be awarded for the purpose of compensation, not punishment; the fear that privately sought punitive damages allow the state to "abnegate[] its role as the exacter of punishment on behalf of the community;" and the idea that individual plaintiffs should not "profit from the punishment of the defendant," especially where the jury is inclined to assess punitive damages on the basis of harm believed to have been done to persons other than the plaintiff in the case.[98]

Finally, it should be noted that reforms in other areas of civil litigation are likely to affect punitive damage levels. To the extent that juries often inflate punitive damage awards in order to make up for the portion of a compensatory award that represents attorneys' fees, reforming the attorney compensation structure could reduce punitive awards. Also, as discussed above, setting guidelines for punitive awards and placing the power to award punitive damages in the hands of judges rather than juries would probably reduce the incidence of excessive "sympathy verdicts," assuming that judges in the United States would apply the guidelines more conservatively than juries.

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96. *See, e.g.*, Vorvis v. Insurance Corp. of Canada, [1989] S.C.R. 1085, 1104-05 (Can. 1989); Uren v. John Fairfax & Sons, (1966) 117 C.L.R. 118, 123 (Austl.).

97. Tilbury & Luntz, *supra* note 36, at 786.

98. *Id.* at 787; *see also* Bruce Feldthusen, *Punitive Damages in Canada: Can the Coffee Ever Be Too Hot?*, 17 LOY. L.A. INT'L & COMP. L.J. 793, 803-08 (1995). One approach which might respond to these concerns is the increased use of civil penalties, for example, the awarding of punitive damages to the state. Although critics argue that plaintiffs have no incentive to sue for damages that do not accrue to them, administrative law provides one model for the use of civil penalties that responds to the incentive problem. Under New York City's fair housing law, for example, once a plaintiff has shown that his or her complaint meets a probable cause standard, the City Commission on Human Rights can essentially become a co-plaintiff by helping to investigate the plaintiff's charges of discrimination.

VII. ALTERNATIVE DISPUTE RESOLUTION: AVOIDING PROLONGED CLAIMS

Another way in which other nations have decreased pressure on their civil justice systems is by encouraging alternative dispute resolution (ADR) and judicially supervised settlement of claims. Australia, which is experiencing "something of a boom" in the use of ADR,[99] has been particularly successful at developing special procedures for handling small claims,[100] including mediation and appraisal by independent experts.[101] Australia also provides for administrative adjudication of some personal injury claims which eases pressure on the judicial system. For example, in New South Wales, Australia, the Dust Disease Tribunal hears claims for damages resulting from diseases such as asbestosis and silicosis.[102] The tribunal has exclusive jurisdiction over these claims and employs streamlined hearing procedures in which claimants may use evidence presented by other claimants in prior proceedings.[103]

The United Kingdom has not made extensive use of ADR, in part because "the problems with [the British] litigation system have not been perceived as being . . . [as] extreme as in the US."[104] Nonetheless, in a specific effort to avoid the American "medical malpractice crisis," Britain has created a number of alternative forums for resolving malpractice claims without litigation. These include the use of consultants for patients' clinical complaints, the use of Health Service Ombudsmen for administrative grievances, and the referral of serious medical complaints to the General Medical Council, which, like a state medical board, can bar a physician from practicing medicine.[105]

New Zealand, meanwhile, "has essentially replaced its tort liability system" with a comprehensive no-fault accident compensation scheme, based on the premise that consumers are better served by a system that can produce consistent and predictable results than one that offers a small

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99. August 29 Letter, *supra* note 21; August 13 Letter, *supra* note 36.

100. *See* OECD, *supra* note 14, at 29.

101. *See* ARONSON & HUNTER, *supra* note 18, §§ 2.02-2.04.

102. *See* John G. Fleming, *Mass Torts*, 42 AM. J. COMP. L. 507, 526 (1994).

103. *See id.*

104. John Kendall, *ADR—A Real Change in the Air*, INT'L COM. LITIG., Nov., 1995, at 28-29.

105. *See* Simone, *supra* note 90, at 592-94. Query whether the centralization of most health care and health care administration through the British National Health Service enhances the functioning of these alternative methods of dispute resolution: Would patients who, in effect, "underwrite" the system with their tax dollars, be less motivated by the "pot-of-gold" for them at the end of the litigation rainbow merely because they had to pay part of that recovery in tax dollars? *See id.* at 589-90.

chance of "striking it rich."[106] As in the class action context, non-judicial resolution of individual claims may alleviate the pressure on the civil justice system.

American lawyers can remain fat and happy, sweeping in the increasing tide of monetary benefits that come with the litigation explosion. We can continue to keep our John Q. Citizen hat in the closet, never wearing it to create any guilty conscience as to what we are doing to America, our businesses, and our citizens. We can also be as blinded as the blindfolded symbol of justice to the fact that our system of justice, our courts, and the legal profession have replaced the former confidence of the American citizenry in our system of justice with a cynicism that will, if uncorrected, result in the destruction of that institution.

Can we change the tide? Yes, we can change, but not by continuing the status quo that primarily benefits the legal profession itself. It is not un-American to recognize our flaws and learn from the practices of other, well-respected countries.

106. *See* OECD, *supra* note 14, at 29, 37.