TORT LAW AND THE ALTERNATIVES: SOME ANGLO-AMERICAN COMPARISONS*

P.S. ATIYAH†

Most Americans seem to think that there is a huge and increasing volume of litigation in their country. Expressions of deep concern appear both in the scholarly literature¹ and in the popular press. As Judge Aldisert of the United States Court of Appeals for the Third Circuit has written, "when people feel wronged by another person or institution, the immediate reaction is not to turn the other cheek, but to serve process and bring suit."² "Americans in all walks of life," notes *U.S. News & World Report*, "are being buried under an avalanche of lawsuits."³

This concern about the perceived overlitigious tendencies of Americans is also felt outside the United States. For a variety of reasons, people and institutions in other countries feel threatened by what happens in America. They worry that litigiousness will spread beyond America and engulf the world. The British medical profession, for example, is almost paranoiac in its fear of current trends in American malpractice litigation.⁴ Foreign businesses, in particular insurers and reinsurers, feel especially threatened by American litigation trends. They point out with some justification that their business becomes exceedingly hazardous when legal liability rules constantly change without notice, so that premiums collected are no longer sufficient to cover damages that have to be paid.⁵ Change is especially unpredictable in America where, unlike in Europe, the rules of legal liability are usually a product of judicial rather

* A version of the Currie Lecture given at Duke University Law School on March 26, 1987.

† Professor of English Law, Oxford University.

1. See, e.g., Rosenberg, *Contemporary Litigation in the United States*, in *LEGAL INSTITUTIONS TODAY: ENGLISH AND AMERICAN INSTITUTIONS COMPARED* 152 (H. Jones ed. 1977) [hereinafter *LEGAL INSTITUTIONS TODAY*].

2. Aldisert, *An American View of the Judicial Function*, in *LEGAL INSTITUTIONS TODAY*, *supra* note 1, at 31, 56.

3. Pike, *Why Everybody is Suing Everybody*, *U.S. NEWS & WORLD REP.*, Dec. 4, 1978, at 50, 50.

4. See, for example, C. HAWKINS, *MISHAP OR MALPRACTICE?* ch. 9 (1985), which—in a book designed for a British audience—includes virtually a whole chapter on the American malpractice situation.

5. See, e.g., Fleet, *Nader Charges Unfounded*, *The Times* (London), Jan. 16, 1986, at 19, col. 1 (reporting that Lloyd's of London has "lost all confidence [sic] in the US system of tort law," even though British insurers still often offer Americans coverage that American insurers themselves are unwilling to provide).

than legislative pronouncements and are therefore made without, or with less, advance notice.⁶ Still, foreign insurers who do business in the United States must, no doubt, expect to put up with American ways. This, of course, is also true of manufacturers who export goods to the United States, thereby exposing themselves to products liability suits over here.

Americans might spare a thought for foreigners affected by American litigation habits in ways impossible for them to foresee or guard against. There is, for instance, the foreign manufacturer who does no business directly with the United States, but who sells his products to another manufacturer in his own country, and does not discover (until he is served with a claim for damages in the American courts) that the buyer incorporated those products into a completed article sold in the United States.⁷ Even the humble European tourist who rents a car in America may discover only too late that his American insurance policy, unlike his insurance policy at home, offers only limited protection against liability. Unless he is particularly well informed about American practices, he may easily be caught unaware. Of course, the impact of American practices on foreigners is a two-way street. In recent years, foreigners injured in their own countries have discovered that it may be preferable to sue in America, if an American defendant is available, and if the American courts are prepared to accept jurisdiction.⁸ An asymmetry results because American law is generally more proplaintiff than the

6. Even in England, however, legislative changes do not always give insurers adequate notice of change. See P. ATIYAH & P. CANE, *ATIYAH'S ACCIDENTS, COMPENSATION AND THE LAW* 253 (4th ed. 1987) (sudden change in rules governing assessment of damages does not give insurers adequate warning when premiums calculated several years in advance). In this article I generally refer to "England" although many of the statistics and data relate to the whole of the United Kingdom, or (sometimes) to Great Britain. Statistics and other data relating to England nearly always cover both England and Wales.

7. See Warner, *CBI to Fight US Liability Ruling*, *The Times* (London), Apr. 28, 1986, at 17, col. 2 (Confederation of British Industry prepares to fight against a California court ruling that threatens extinction of "already excessive claims by the US authorities of jurisdiction over foreign companies."). This fear, of course, is yet to be fully realized. See *Asahi Metal Indus. Co. v. Superior Court*, 107 S. Ct. 1026 (1987) (holding unconstitutional assertion of personal jurisdiction over Japanese tire valve manufacturer, whose products eventually entered American market after being incorporated in Taiwanese inner tubes).

8. A recent and especially well-publicized example of this sort of international forum shopping involved the Union Carbide chemical disaster at Bhopal, India in December 1984. Following the accident, nearly 150 tort suits were filed in American courts by Indian citizens. After consolidation of these actions by the Judicial Panel on Multidistrict Litigation, see *In re Union Carbide Corp. Gas Plant Disaster*, 601 F. Supp. 1035 (J.P.M.D.L. 1985) (per curiam), the case was assigned to the United States District Court for the Southern District of New York. The consolidated action was then dismissed on forum non conveniens grounds in favor of the Indian forum. See *In re Union Carbide Corp. Gas Plant Disaster*, 634 F. Supp. 842 (S.D.N.Y. 1986), *aff'd in part and modified in part*, 809 F.2d 195 (2d Cir. 1987).

laws of other countries. Foreigners will sue in American courts much more frequently than Americans will sue in foreign courts; even though American lawyers may benefit from the importation of foreign lawsuits, American insurers and American premium payers carry the burden of paying damages awarded foreigners in these lawsuits. This net deficiency in the American balance of trade may, I am afraid, be seen by some of my compatriots as the well-deserved penalty Americans must pay for their litigiousness.

Because American litigiousness affects the whole world, and not just Americans, it is a particularly suitable topic for comparative study. Foreigners can therefore be forgiven for taking a particular interest when a distinguished American academic, Professor Marc Galanter of the University of Wisconsin Law School, labels the American litigation explosion a myth.⁹ America is, he says, no more litigious than it has ever been, and even more strikingly, it is no more litigious than many other countries. America is not, he says, "faced with an inexorable exponential explosion of cases, but with a series of local changes, some sudden, but most incremental, as particular kinds of troubles move in and out of the ambit of the courts."¹⁰ Even if there is a lot of litigation, his comforting message goes on, we must remember that it brings benefits as well as costs to a society.¹¹ Until there is evidence to suggest that the costs outweigh the benefits, there is obviously nothing to worry about.

I. THE VOLUME OF TORT LITIGATION

I want to first examine one relatively narrow question: the comparative volume of tort litigation and tort claims in England and the United States. Professor Galanter's writings discuss litigation in general and involve comparisons over time as well as comparisons among other countries.¹² So it is hardly surprising that he was unable to look at the fairly narrow question I want to look at in the same depth and with the same range of data.¹³ On the other hand, the comparison of tort rates in these two countries may be of greater interest, even to Americans, than some of the broader comparisons made by Galanter. First, England is still

9. See Galanter, *The Day After the Litigation Explosion*, 46 MD. L. REV. 3 (1986).

10. *Id.* at 38.

11. *Id.* at 28-37.

12. See, e.g., Galanter, *Reading the Landscape of Disputes: What We Know and Don't Know (and Think We Know) About Our Allegedly Contentious and Litigious Society*, 31 UCLA L. REV. 4, 36-61 (1983).

13. I must, however, disclaim any hope of matching Galanter's detailed statistics. One major difference between English and American legal studies is the relative paucity of research facilities available to the English law professor. Although this article contains some statistics, they are mostly rudimentary or based on very rough calculations and estimates.

thought to share much of American legal culture and legal ideals, even if, to paraphrase George Bernard Shaw, England and America sometimes appear to be two countries divided by a common legal heritage.¹⁴ Comparisons between these two countries should at least enable us to reduce the number of variables explaining the differences. Second, the focus on tort law is surely justified by the nature of tort litigation and the role it plays in society. Complaints about the volume of litigation in America appear to focus on the volume of *tort* claims. No doubt there are other types of suits which could appropriately be classified with tort claims; however, it is quite clear that anxieties about the volume of litigation are *not* directed to claims for many other kinds of legal redress, such as, for example, divorce suits, landlord/tenant disputes or claims for the simple payment of debts.¹⁵

Anxieties about tort litigation are surely of a different sort. No doubt these anxieties are compounded by, among other things, the difficulties of adjudicating and settling tort claims as compared, for instance, with adjudicating simple claims for debts. Although this undoubtedly increases the number of tort claims tried, the great mass of them are settled.¹⁶ Anxiety about the volume of tort litigation stems as well from worries that the legal system itself may be encouraging litigation which would not otherwise arise, or which would be channelled into less confrontational fora. Furthermore, it seems highly probable—though I cannot demonstrate it—that anxieties over the volume of litigation are also related to the sometimes astronomical damages paid in tort cases. There

14. Shaw is often said to have remarked that "England and America are two countries separated by the same language." See H. PROCHNOW & H. PROCHNOW, JR., *A TREASURY OF HUMOROUS QUOTATIONS* 129 (1969).

15. Of course, a sudden surge in claims of these kinds might also be a cause for concern. Rising divorce rates, to be sure, worry many people, but for reasons having less to do with their burden on the courts. Similarly, a surge in claims for debts might suggest that in a time of high unemployment, too many people are simply unable to keep afloat. But simple debt claims present few problems to the legal system. I do not presume to speak of the American position, but in England at least, it is well known that enormous numbers of suits are filed for simple debts, to which no defense is ever made, and which usually lead to rapid payment or to a judgment by default. These claims take up the time of court administrative staff, but the overwhelming mass of them take no judicial time and involve no hearing, and therefore play almost no part in clogging up the courts. It seems very unlikely that complaints about the rising volume of litigation have any relation to increases in the number of claims for debts.

16. It has been estimated that only 9% of all American civil cases go to trial. See 2 O. TRUBECK, J. GROSSMAN, W. FELSTINER, H. KRITZER & A. SARAT, *CIVIL LITIGATION RESEARCH PROJECT: FINAL REPORT* 56 (1983). In England, it seems that the trial rate is closer to 1% of total claims. See 2 REPORT OF THE ROYAL COMMISSION ON CIVIL LIABILITY AND PERSONAL INJURY, 1978, CMND. NO. 7054, at 19 table 11, 20 table 12 [hereinafter PEARSON REPORT] (estimating approximately 250,000 personal injury claims per annum; estimating that about 1% of claims reach trial).

seems, therefore, good reason to look particularly at tort suits when examining the volume of litigation.

A. *Judges, Lawyers and Filings.*

Professor Galanter's comparison of litigation rates between the United States and various other countries is based on three sets of data: the number of judges per million of population, the number of lawyers per million of population, and the number of civil cases per thousand.¹⁷ The English figures are based on 1973 data; the American figures for judges and lawyers are based on 1980 data; the American filings statistics are current as of 1975.

TABLE 1

	Judges per <u>million</u>	Lawyers per <u>million</u>	Filings per <u>thousand</u>
England & Wales	50.9	606.4	41.1
United States	94.9	2348.7	44.0

Although the number of filings is not very different in the two countries, there are, according to Galanter's figures, almost twice as many judges, and nearly four times as many lawyers in America as in England. One's immediate reaction to these figures is to wonder what all the additional American judges and lawyers are doing if England can get through the same volume of litigation (proportionate to population) with half the number of judges and a quarter the number of lawyers as the United States! Part of the explanation, of course, is that many of these American lawyers and judges are engaged in criminal work, the volume of which is much greater in the United States than in England. Even with this factor in mind, however, many of Galanter's figures are of doubtful value.

Let us first examine the figures for the numbers of judges in the two countries. Galanter himself is the first to concede that these comparisons, even in relation to such an apparently straightforward question, are extremely treacherous.¹⁸ Many disputes are handled by tribunals of various kinds which are not courts, and before adjudicators who may or may not be judges. Only some of these bodies and adjudicators ought to be included in a comparison of the number of judges. Moreover, the purpose of the comparison may well determine on which side of the line we place them. For instance, when computing the comparative costs of a

17. Galanter, *supra* note 12, at 52 table 3.

18. *Id.* at 51 ("Local differences in recording practices, differences in the jurisdiction of courts and other tribunals, and differences in what is recorded as a case all add to differences in substantive law, making comparison of litigation across societies extremely treacherous.").

legal system, they may be appropriately included with judges. If, however, we are trying to ascertain the extent to which adversarial-type litigation has been replaced by alternative dispute resolution procedures, many of them should clearly be excluded.¹⁹ Because I am primarily interested in determining how many judges are involved in adversarial litigation, I have simply excluded all such adjudicators from consideration.²⁰ The calculation is also complicated by the number of part-time judges and judges or magistrates who have little or no civil jurisdiction. I have attempted a relatively crude estimate of the number of judges in England and Wales by simply leaving out of account tribunals and adjudicators. I estimate that in England in 1984 there were about 12 judges per million of population,²¹ as compared to Galanter's estimate of over 50 per million. It may be misleading to compare this figure with Galanter's estimate of 94.9 judges per million in the United States, since the precise basis of his computation is not entirely clear, though his figures are said to be compiled from state and federal totals.²² All I can say, therefore, is that Galanter's figures on the number of English judges²³ appear entirely too high.

19. For example, workers' compensation disputes in England were dealt with by courts until 1948, when workers' compensation claims were absorbed by the social security, or "National Insurance" system, and channeled into the new National Insurance Appeal Tribunals. See National Insurance (Industrial Injuries) Act, 9 & 10 Geo., ch. 62 (1946), now replaced by the Social Security Act, ch. 14, §§ 50-78 (1975). One of the main purposes of this change was to remove workers' compensation claims from the adversarial (tort-like) procedures of the courts. See generally P. ATTYAH & P. CANE, *supra* note 6, at 313-26. Thus, it would be odd to include these tribunal members in a list of judges when one assesses the volume of tort litigation in England.

20. I have also left out of account magistrates, who handle a huge volume of minor criminal work in England, but have very little civil jurisdiction except in simple matrimonial and other family cases, and certainly none in tort cases.

21. This estimate was computed as follows: in 1985, there were 76 High Court Judges, 371 Circuit Judges, 507 Recorders and 485 Assistant Recorders. 16 CENTRAL STATISTICAL OFFICE, SOCIAL TRENDS 202 table 12.34 (1987) [hereinafter SOCIAL TRENDS]. Recorders and Assistant Recorders, however, are only part-time judges. *Social Trends* shows that High Court Judges sat for 13,000 days in 1985, Recorders for 12,500 days and Assistant Recorders for 12,250 days. *Id.* at 202. It seems, therefore, that in terms of equivalent full-time trial judges, there are 599: 76 Recorders, 76 Assistant Recorders, 76 High Court Judges, and the 371 Circuit Judges mentioned above. Combined with the nation's 34 appellate judges, listed in the *All England Law Reports*, the total number of judges in England is 633. The population of England and Wales in 1986 was approximately 49.8 million, see THE WORLD ALMANAC AND BOOK OF FACTS 729-30 (1987), which yields a figure of 12.7 judges per million.

22. Galanter, *supra* note 12, at 52 table 3. I have difficulty understanding how Galanter arrived at these figures. The 1986-87 *Book of the States* records that there are something over 8000 state court judges, but even when federal judges are included, this still gives a total of below 40 judges per million of population. 26 COUNCIL OF STATE GOVERNMENTS, THE BOOK OF STATES 155-58 tables 4.1, 4.2 (1986).

23. These figures appear to be largely derived from E. JOHNSON, JR., S. BLACK, A. DREW, W. FELSTINER, E. HANSEN & G. SABAGH, A COMPARATIVE ANALYSIS OF THE STATISTICAL DIMENSIONS OF THE JUSTICE SYSTEMS OF SEVEN INDUSTRIAL DEMOCRACIES 2-39 table II, 2-43 table VI

I turn next to the numbers of lawyers in the two countries, estimated by Galanter at 606.4 per million in England in 1973 and 2348.7 per million in the United States in 1980. Fortunately, it is much easier to find some accurate and up-to-date figures. In 1985 there were 5367 practicing barristers and 46,490 practicing solicitors in England, a total of 51,857,²⁴ which for a population of just under 50 million gives us about 1037 lawyers per million of population. This estimate, much higher than Galanter's figure, is due to a large increase in the number of English lawyers since 1973. The American Bar Foundation Research Study estimated that in 1985 there were approximately 674,000 attorneys in the United States,²⁵ or roughly 2808 lawyers per million Americans.²⁶ So, today there are almost three times as many lawyers per head in the United States as in England.

These figures, however, tell us fairly little about the comparative rates of tort litigation in England and the United States. I turn therefore to Galanter's third measure, the number or rate of filings in the two countries. As already indicated, the rate turns out to be surprisingly similar; some 41 filings per thousand in population in England and Wales, and some 44 per thousand in population in the United States. My own rough estimates confirm the English figure. Unfortunately, this figure reveals little about the relative levels of tort litigation, or indeed, any other litigation in the two countries. Everything depends, of course, on how "litigation" is defined. It does not seem very useful simply to count those pieces of paper used to initiate some kind of process in a court. The overwhelming majority of filings in England—what are called "plaints" in the County Courts—are simple claims for debts for goods supplied or for work done. In 1984 there were over 1.3 million such claims,²⁷ of which over one million led to judgment by default, or acceptance of the claim.²⁸ These cases involve no hearing, and judgments are obtained by what is in essence an administrative process. In a large number of other cases, the debtor pays the amount claimed (plus costs)

(1977) (report to the National Institute for Law Enforcement and Criminal Justice). For present purposes, the figures of English judges in this report (which are now somewhat dated anyhow) appear unduly inflated by the inclusion of magistrates (as opposed to judges), who have very little civil jurisdiction and none at all in tort cases.

24. 17 SOCIAL TRENDS, *supra* note 21, at 202 table 12.34.

25. B. CURRAN, THE LAWYER STATISTICAL REPORT: A STATISTICAL PROFILE OF THE U.S. LEGAL PROFESSION IN THE 1980s (1985).

26. This attorney per capita figure is based on an estimated United States population of 240 million. See *infra* note 33.

27. STATISTICS BRANCH, LORD CHANCELLOR'S DEPARTMENT, JUDICIAL STATISTICS ANNUAL REPORT 1984: ENGLAND AND WALES, 1985 CMND. NO. 9599, at 77 table 7.3 [hereinafter JUDICIAL STATISTICS].

28. *Id.* at 78 table 7.4.

as soon as the complaint is served on him; that is the end of the case. It does not seem very helpful to call this "litigation." It certainly bears very little resemblance to the classic paradigm of tort litigation, and is hardly the kind of legal process that stirs up the complaints, anxieties and even passions over the much discussed American "litigation explosion." I therefore see nothing in Professor Galanter's figures to rebut the common belief that American tort litigation volume greatly exceeds that of England.

B. *Aggregate Tort Claims and Costs.*

Let us see whether there is more useful information to be found in other sources. Although there is a good deal of information on hand, it is often unsatisfactory in form, and always raises great difficulties when used for comparative purposes. It is, however, more useful than comparing the number of judges or lawyers and filing rates. Let us consider first what information is available about tort law in aggregate terms. The best sources of information are in a 1985 study of American tort litigation by the Rand Corporation's Institute for Civil Justice²⁹ and the 1978 Pearson Royal Commission Report on tort litigation in the United Kingdom.³⁰ According to the Institute for Civil Justice, some 911,000 tort lawsuits were filed in 1985 in federal and state courts of general jurisdiction;³¹ according to the *Pearson Report*, there were in 1973 an estimated 250,000 tort claims for personal injuries in the United Kingdom.³² The population of the United States is roughly four times that of the United Kingdom,³³ so it looks at first blush as if the two figures are almost exactly comparable. Unfortunately things are never that simple. The main difficulty is that the American figure is of *lawsuits*, while the United Kingdom figure is for all personal injury tort *claims*—whether or not a lawsuit was filed. There is no doubt that a large number of tort claims, especially personal injury claims, are made and settled every year without suit being filed. Fortunately we have reasonably accurate and up-to-date figures on *lawsuits* in England. In 1984, 60,030 tort lawsuits were

29. J. KAKALIK & N. PACE, COSTS OF COMPENSATION PAID IN TORT LITIGATION (1986).

30. See 2 PEARSON REPORT, *supra* note 16.

31. J. KAKALIK & N. PACE, *supra* note 29, at 13.

32. 2 PEARSON REPORT, *supra* note 16, at 19 table 11.

33. The estimated (1986) population of the United Kingdom is approximately 56 million; the estimated (1986) population of the United States is approximately 240 million. See WORLD ALMANAC AND BOOK OF FACTS, *supra* note 21, at 729, 732. The population of England and Wales (as opposed to the United Kingdom—which includes Scotland and Northern Ireland) is about 49.8 million. *Id.* at 729-30.

filed in England.³⁴ When compared with the Institute for Civil Justice's figure of 911,000 American tort suits per annum, and after adjusting for population differences, this suggests an American tort lawsuit rate of nearly four times that in England.³⁵

Unfortunately, even these figures are of limited value. Despite the fact that complaints focus (for obvious reasons) on the amount of litigation (and hence the volume of lawsuits), the truth is that in the area of tort law, the number of lawsuits actually filed is of little importance. Most of these suits will not reach trial, but simply represent documents filed in a courtroom while a settlement is negotiated. Large numbers of claims will be made, and settlements negotiated even when no suit has been filed. Some lawyers regularly file suit and negotiate afterwards, others negotiate first and only file suit if the negotiations do not go well. It makes little practical difference which course is followed; it does, of course, profoundly affect the number of recorded lawsuits. Thus, it is really more important to have figures on the total number of tort claims made, rather than suits filed, though one might also be interested in figures of cases actually reaching trial and judgment. In the absence of information on the relative ratios of suits filed to claims made, it is simply not possible to say how the numbers of tort claims compare in aggregate terms. While in England it seems that no more than one personal injury claim in five lead to the filing of a lawsuit,³⁶ the American data suggest that a much larger proportion of claims lead to lawsuits—probably one in three in automobile cases, and perhaps as many as nine out of ten in malpractice cases.³⁷ This means that the estimated 911,000 filed lawsuits in America probably represent at least two million tort *claims*.³⁸

Unfortunately, there are no up-to-date English or United Kingdom figures fully comparable with the American tort litigation estimates of

34. There were 31,470 personal injury suits filed (i.e., writs issued) in the High Court and 24,060 in the County Courts in 1984. In addition, there were 810 non-personal injury tort suits filed in the High Court and 3690 in the County Courts. These are figures for England and Wales. JUDICIAL STATISTICS, *supra* note 27, at 33 table 3.2, 77 table 7.3.

35. $60,030 \times \frac{240 \text{ million}}{49.8 \text{ million}} = 289,301$, which is nearly one-third of the Institute for Civil Justice's figure of about 900,000 filings per annum. Note also that the English figure *includes* filings in courts of limited jurisdiction, while the American figure *excludes* such filings.

36. The *Pearson Report* estimated that roughly 250,000 claims per annum were made in England in 1973. See 2 PEARSON REPORT, *supra* note 16, at 19 table 11. According to more recent (1984) statistics, 60,030 tort suits were filed annually in England. See *supra* note 34 and accompanying text. Even allowing for a very modest increase in tort claims, the number of lawsuits filed today can scarcely be greater (and may be a lot less) than one in five claims.

37. See J. KAKALIK & N. PACE, *supra* note 29, at 31 (estimating that 33% of total compensation paid for auto accidents was paid in lawsuits, while 90% of medical malpractice payments was paid in lawsuits).

38. *Id.* at 13 (1985 figures).

the Institute for Civil Justice. The *Pearson Report's* estimate of the total value of tort payments and costs of administration in the United Kingdom in 1974 (but at 1977 prices) was £377 million.³⁹ It is impossible to translate this into 1985 figures, because apart from inflation, nothing is really known about the volume changes of tort litigation in either England or the United Kingdom since 1973. All that can be said is that, allowing for changes in the value of the British pound, total tort costs in the United Kingdom in 1985 would probably have been in the region of £1 billion, assuming no significant increase in the rates of claims or (in real terms) the levels of settlements.

Let me remind you that this United Kingdom estimate reflects the total cost of tort *claims*, and is not, like the American estimates of the Institute for Civil Justice, confined to the cost of tort lawsuits. To make any real comparison between these sets of figures, imprecise as they are, and qualified though they have to be, we must adjust the figures to reflect the difference between claims made and suits filed. As already noted, there is evidence that claims outnumber lawsuits by more than five to one in England, and by two or three to one in the United States.⁴⁰ But we cannot simply multiply the dollar estimate for lawsuits by a factor of five, because it is almost certain that a disproportionate number of the larger claims lead to suits being filed.⁴¹ Fortunately, the *Pearson Report* contains data which enables us to make some comparison between the cost of claims and the cost of suits. From this data it is possible to calculate that in the United Kingdom in 1973 the total cost of claims was more than two and one half times the cost of suits filed,⁴² though I have no way of knowing if the American proportion is comparable. At least this calculation enables one to reduce the estimate of the United Kingdom figures for total tort costs from £1 billion (for all tort claims) to something in the region of £400 million (for tort suits).

39. 2 PEARSON REPORT, *supra* note 16, at 207 table 158. This figure is based on an estimate of £202 million as total damages paid in personal injury cases in the United Kingdom, *see* 1 *id.* at 13 table 4, and £175 million as the cost of administering the whole system, including defendant and insurers' costs, *see* 2 *id.* at 207 table 158.

40. *See supra* note 36 and accompanying text (English figures); note 37 and accompanying text (American figures).

41. It is possible to compute from the *Pearson Report* data that settlements in cases when suit was filed were on average 3.85 times larger than settlements when no suit was filed. 2 PEARSON REPORT, *supra* note 16, at 155 table 104. For American data, *see* A. CONRAD, J. MORGAN, R. PRATT, JR., C. VOLTZ & R. BOMBAUGH, AUTOMOBILE ACCIDENT COSTS AND PAYMENTS 182 table 6-1 (1964) (showing higher settlement rates in Michigan survey after suits filed).

42. The *Pearson Report* shows average payments when no suit was filed is £400 and average payment when suit was filed can be computed at £1543. 2 PEARSON REPORT, *supra* note 16, at 155 table 104. From these figures it is possible to calculate total costs of claims in this sample of cases at £4.634 million, while the total cost of cases in which suit was filed was £1.787 million.

Thus, with all sorts of qualifications, the annual aggregate cost of tort suits in the United Kingdom may be in the order of £400 million, or at early 1988 exchange rates, about \$707 million, while the estimate of the Institute for Civil Justice of the total cost of tort suits in the United States was between \$29 and \$36 billion. Adjust by a factor of four (to reflect population differences) and we are still left with a staggering disparity, which I hesitate even to attempt to quantify because my figures are so rough, but which suggests that American tort costs are at least *ten* times higher per capita than those of the United Kingdom. This is as far as calculation can take us on the data presently available, and even then all sorts of qualifications still need to be made. First, the Institute for Civil Justice estimates relate to tort claims, while the *Pearson Report* figures refer only to personal injury claims, and take no account of property damage claims. I do not think this fact alone would make a huge difference to the figures because, surprising as it may seem, property damage litigation in England is relatively rare compared with personal injury litigation, except in automobile accident cases. Second, it must be remembered that a large part of tort damages in personal injury cases is designed to replace lost income, and to meet out-of-pocket costs. Insofar as incomes and costs are significantly higher in the United States than in England, tort payments would naturally be higher. This is in itself no evidence of a greater use of tort law. Third, while it is relatively easy to adjust for population differences, it also has to be remembered that the number of tort suits and claims must bear some relation to the number of torts committed; adjustment for that purpose is almost impossible.⁴³

C. *Data for Particular Kinds of Tort Claims.*

In addition to the aggregate data so far discussed, it is possible to find some figures dealing with particular kinds of tort claims and suits. If we could calculate what proportion of losses in the two countries are recovered in tort claims from various accidents, we could attempt to compile a comparative index revealing the degree to which tort claims are pursued. This would be a formidable task, which I have neither the research facilities nor the expertise to seriously attempt, even confined to the United States and England. I have, however, attempted an extremely rough calculation of this kind with regard to road accident costs. A

43. It is possible to look at accident statistics as some sort of surrogate. The best available statistics are those for auto accidents, which show that the American fatality rate is more than eight times that of the British rate, or more than twice the British rate per million of population. Compare U.S. DEP'T OF COMMERCE, STATISTICAL ABSTRACT OF THE UNITED STATES 1987 table 1026 (45,700 deaths from auto accidents in 1985) with U.K. ANNUAL ABSTRACT OF STATISTICS FOR 1985 table 10.12 (5165 auto accident deaths). The disparity in injury rates is much smaller.

United States Department of Transportation study on auto accident costs estimated that the total compensable economic losses in 1967 were about \$10.5 billion,⁴⁴ and that about \$3.5 billion was paid out in tort recoveries.⁴⁵ That is to say, auto victims recovered through tort claims about 30 percent of their losses. It was recently estimated in the United Kingdom that the total cost of road accidents in Great Britain is about £2.7 billion, or roughly \$4.8 billion.⁴⁶ The *Pearson Report* estimated that in 1973 about £118 million was paid out in compensation for tort claims arising from road accidents.⁴⁷ Adjusting crudely for inflation, and assuming no other changes, it seems that in 1984 roughly \$413 million (or £236 million) was paid for tort claims out of \$4.7 billion in total damages and costs: in other words, tort recovery provided compensation for less than 9 percent of the total losses due to road accidents in the United Kingdom. These are the roughest of estimates, but at least they suggest that a much higher proportion of road accident losses are compensated through tort law in the United States than in England.

There is also some scanty information available on relative products liability claims in the two countries. In the United States, the *Interagency Task Force Report* estimated in 1976 that there were roughly 70,000 defective products law suits each year.⁴⁸ The only information from the United Kingdom is the figure provided in the *Pearson Report* which, in 1973, estimated the number of defective products tort claims at 1000 per year.⁴⁹ Once again, one must remember that the United Kingdom estimate is for all *claims*, and should be substantially reduced in order to compare with actual *lawsuits* filed in the United States. Assuming the ratio of claims to suits is five to one in the United Kingdom,⁵⁰ there are approximately 200 annual United Kingdom products liability lawsuits as compared with roughly 70,000 annual products liability lawsuits in the United States. No matter what adjustments are made for population and other variables, the conclusion is inescapable that the difference in the number of products liability suits between the two countries is largely the result of cultural and environmental factors. It is

44. U.S. DEP'T OF TRANSP., MOTOR VEHICLE CRASH LOSSES AND THEIR COMPENSATION IN THE UNITED STATES 6 table 2 (1971) (report to Congress and the President).

45. *Id.* at 48 table 20. This excludes medical expense payments paid directly to health care providers, as well as claimants' attorney's fees.

46. 16 SOCIAL TRENDS, *supra* note 21, at 118 (1986) (1984 estimate).

47. 2 PEARSON REPORT, *supra* note 16, at 59 table 43, estimates that there were 98,300 tort payments in respect of road accidents in the United Kingdom in 1973, yielding an average payment of roughly £1200. These figures were at 1977 prices; I have doubled them to reflect 1984 prices.

48. U.S. DEP'T OF COMMERCE INTERAGENCY TASK FORCE ON PRODUCT LIABILITY, FINAL REPORT I-3 (1978).

49. 2 PEARSON REPORT, *supra* note 16, at para. 228.

50. See *supra* note 36 and accompanying text.

simply inconceivable that this huge difference is due to the number of injuries caused by defective products. We are therefore driven to the conclusion that Americans do indeed have either a greater urge or incentive than the English to bring products liability tort suits.⁵¹

The story is much the same with medical malpractice. In 1983, for example, the United States saw some 40,000 malpractice claims against physicians and surgeons;⁵² this figure vastly exceeds the approximately 2000 annual claims processed by the medical defense societies in England.⁵³ The figures on medical malpractice premiums and payments reveal a great deal. Although premiums have doubled in the past two years in England, the standard premium as of 1987 was still only £576⁵⁴ (about \$1018), without any variation in premium rates according to medical speciality.⁵⁵ The total amount paid out for malpractice claims by the medical defense societies in recent years has been in the region of £15 million, or roughly \$26.5 million *per annum*.⁵⁶ Premiums of \$50,000 and even \$100,000 in the United States are not unknown.⁵⁷ Medical malpractice costs in America were estimated in 1984 to be between \$2 billion to \$4 billion per year.⁵⁸ Even after adjusting for population differences,

51. Furthermore, there is evidence (albeit not of very recent vintage) suggesting huge variations in the number of products liability suits brought in different parts of the United States. See R. KEETON & J. O'CONNELL, *AFTER CARS CRASH* 109 (1967).

52. 1 AMERICAN MEDICAL ASS'N, SPECIAL TASK FORCE ON PROFESSIONAL LIABILITY, PROFESSIONAL LIABILITY IN THE '80s 10 (1984).

53. There are two medical defense societies currently operating in England (though both also insure some doctors in the Commonwealth): the Medical Defense Union (MDU) and the Medical Protection Society (MPS). The MPS has about 100,000 members, the MDU rather more. These medical defense societies perform the same function as do medical liability insurers in the United States. See C. HAWKINS, *supra* note 4, at 17-57. The estimate of 2000 annual claims is derived from the MEDICAL PROTECTION SOCIETY, 1985 ANNUAL REPORT AND ACCOUNTS No. 93, which shows that the MPS handled 990 such claims in 1985. The other medical protection society, the MDU, probably handled a comparable number, though figures are not given in their annual reports.

54. Prentice, *Huge rise in GPs' defence premiums*, The Times (London), Aug. 19, 1986, at 3, col. 1.

55. C. HAWKINS, *supra* note 4, at 35.

56. In 1984, the MPS paid out £6.5 million (\$11.4 million at the early 1988 exchange rate of \$1.75 per £—the rate that is used throughout this article) for 990 claims (including those rejected). MEDICAL PROTECTION SOCIETY, *supra* note 53. The MDU paid out in 1983 (the last year for which figures are available) some £8.3 million (roughly \$14.5 million) in damages and costs. Both figures include dental claims as well as some medical and dental claims from Ireland and the Commonwealth countries. The amounts paid out have increased at a staggering rate. Only 20 years ago the total payments made were less than half a million pounds. See S. Clapin, *The Control of Medical Malpractice Through Legal Regulation* 42 (1982) (unpublished Oxford M. Litt. thesis).

57. See, e.g., Posner, *Trends in Medical Malpractice Insurance, 1970-1985*, 49 LAW & CONTEMP. PROBS., Spring 1986, at 37, 50 (Long Island, New York obstetricians paid \$68,100 for standard medical malpractice insurance in 1984. The premium rose to over \$100,000 in 1985.).

58. See *General Liability and Medical Malpractice Insurance Marketing*, BEST'S REV., Sept. 1985, at 108. The Institute for Civil Justice estimated that \$1.5 billion was paid to medical malpractice claimants by insurers in 1985. See J. KAKALIK & N. PACE, *supra* note 29, at 141. The Institute

the total cost of malpractice lawsuits in America is roughly thirty to forty times as great as it is in England. Of course, given the fact that individual recoveries are much higher in America, this does not mean that the number of claims or suits filed in America is thirty or forty times as great in England. But the size of aggregate tort payments is surely in itself a matter of interest and concern.

D. *Mass Tort Claims.*

Another aspect of modern tort law and tort litigation should also be mentioned: the mass tort claim. This is a relatively new phenomenon, restricted (thus far) mainly to the United States. These claims, as Professor Galanter has noted, are another cause of anxiety over the increase of tort litigation in America.⁵⁹ Although still relatively rare, these mass tort cases are often highly visible, much publicized events. They involve hundreds, and sometimes thousands of plaintiffs, immense investigatory efforts, and usually complex issues of law and fact. After large numbers of preliminary hearings and discovery skirmishes, they typically end in settlements whose chief beneficiaries seem to be attorneys rather than plaintiffs.⁶⁰ Among the best known of the recent mass tort claims are those involving Agent Orange,⁶¹ the drug Bendectin,⁶² asbestos⁶³ and the Dalkon Shield.⁶⁴ There is no doubt that these claims place an immense strain on the legal system; it has also been suggested that both costs and complexities increase exponentially with the number of parties, out of all

also estimated that "[t]he annual rate of growth in compensation paid from 1979 to 1985 averaged 25.0 percent." *Id.*

59. Galanter, *supra* note 9, at 24-26 (discussing increase of mass tort claims involving allegedly defective products, such as asbestos and the Dalkon Shield).

60. A number of these cases are reviewed in Sugarman, *Doing Away with Tort Law*, 73 CALIF. L. REV. 555, 596-603 (1985). Professor Sugarman noted the "[t]orts as a compensation mechanism is [both] highly uneven and terribly inefficient." *Id.* at 602. Litigation in the protracted and costly Dalkon Shield cases began in 1970; as of December 1984, only two-thirds of the roughly 11,200 claims were settled. *Id.* at 601-02. "By August 1984, [A.H.] Robins' [the producer of the Dalkon Shield] insurers had paid out \$132 million. Presumably, less than \$100 million went to the victims themselves. In addition, Robins had paid \$101 million in litigation expenses." *Id.* at 602-03 (footnote omitted).

61. *See In re "Agent Orange" Product Liability Litigation*, 597 F. Supp. 740 (E.D.N.Y. 1984); *see also* Sugarman, *supra* note 60, at 597-98.

62. *See In re Richardson-Merrell Inc. "Bendectin" Products Liability Litigation*, 533 F. Supp. 489 (J.P.M.D.L. 1982). *In re "Bendectin" Products Liability Litigation*, 102 F.R.D. 239 (S.D. Ohio), *vacated*, 749 F.2d 300 (6th Cir. 1984); *see also* Sugarman, *supra* note 60, at 599-600.

63. *See generally* Sugarman, *supra* note 60, at 600-01 (suggesting that as of date of article, some 25,000 claims had been brought against those in the asbestos industry).

64. *See, e.g., Palmer v. A.H. Robins Co.*, 684 P.2d 187 (Colo. 1984); *see also* Sugarman, *supra* note 60, at 601-03.

proportion to the size of their aggregate recoveries.⁶⁵

Although quantitative comparisons between such tort claims in different countries is impossible, largely because of their scarcity outside the United States, these claims must be considered when assessing the overall volume of tort litigation. Such cases are almost completely unknown in England. Although English law does not allow class actions,⁶⁶ it is occasionally possible to achieve a similar result by consolidating and then trying together a series of individual cases. An exceptionally high degree of cooperation among the lawyers for all parties is required for any worthwhile results to be achieved. A recent example of such a series of claims, *Thompson v. Smiths Shiprepairers (North Shields) Ltd.*,⁶⁷ involved six individual plaintiffs and three different defendants. The case involved tort claims by a number of workers against their employers for negligently exposing them to the risk of industrial deafness. As the judge explained, the legal system was in danger of being swamped because of the large (20,000) number of claims.⁶⁸ A number of these cases were therefore selected, by cooperation of the lawyers and parties, differing as to the identity of the employers, the type of work, the length of exposure, the degree of deafness and so on. Much of the evidence was, of course, expert testimony common to all the cases. Although a series of cases of this kind obviously involves much preparation and time, it was possible for these cases to be heard fully by a single judge, with a decision handed down within six weeks of the conclusion of the hearing. There was no appeal, and no further proceedings have been reported. Presumably most of the claims have now been settled with the assistance of this opinion. In terms of speed, efficiency and conservation of financial and legal resources, this case bears little resemblance to the mass tort claims that have troubled American lawyers for some years.

II. SOME POSSIBLE EXPLANATIONS FOR THE DIFFERENCES

If it is reasonably plain that the volume, and the total cost, of tort litigation and tort payments in the United States greatly exceed the comparable volume and costs in England, one must naturally ask why this is so. This leads to some pretty speculative inquiries. I shall start by men-

65. See Epstein, *The Legal and Insurance Dynamics of Mass Tort Litigation*, 13 J. LEGAL STUD. 475, 506 (1984).

66. See *Markt & Co., Ltd. v. Knight Steamship Co., Ltd.*, [1910] 2 K.B. 1021 (if only relief claimed is damages, other parties cannot have same interest as plaintiff so as to justify class action). For some modern questions about the continued validity of this approach, see Tur, *Litigation and the Consumer Interest: the Class Action and Beyond*, 2 LEGAL STUD. 135, 154-55 (1982) (discussing recent cases holding representative plaintiff may bring suit for damages).

67. [1984] 1 Q.B. 405 (1983).

68. *Id.* at 409.

tioning, only to put aside, three broad factors which partially explain the difference. I put them aside not because I do not believe they are important, but because their importance is difficult to assess, and, even if they do turn out to be verifiable, it is hard to see what can be done about them.

The first of these factors is the availability of the contingent fee arrangement in America, which means that an accident victim with a reasonably plausible cause of action will normally have no problem in finding a lawyer to take his case. In England, contingent fees are considered unethical,⁶⁹ but lawyers are not prohibited from arranging to have their fees in personal injury cases paid from the recovery; indeed, this is a common arrangement.⁷⁰ This is not regarded as violating the prohibition against the contingent fee; the lawyer is not permitted to waive all claims to payment in the event of no recovery, nor is he permitted to accept a percentage of the recovery in lieu of a fee. These differences in fee practice may appear relatively unimportant, because the reality is that the accident victim with a reasonable case should be able to find a lawyer with equal ease in England and America. Nevertheless, the differences appear to be very considerable, though it is not easy to explain exactly why. Any suggestion that the contingent fee enables American lawyers to take on speculative cases is usually criticized as unfounded, on the ground that no lawyer wants to take on work that is unlikely to bring in any reward. Perhaps the difference lies in the fact that personal injury litigation is actually highly profitable to lawyers in America, and that they do have an interest to take on and vigorously pursue such cases. In England, personal injury litigation is not generally regarded as highly profitable, and because of this many lawyers are uninterested in such work. If they do take on such cases, they may be prone either to recommend settlement or abandonment of the case long before an American attorney would take such a step. Possibly more important than the differences themselves is public knowledge of the respective arrangements. I believe the contingent fee is a well understood arrangement in America, and probably few Americans are discouraged from applying to lawyers out of fear of the cost; in England, on the other hand, fear of legal costs does seem to be a factor that sometimes discourages accident victims from seeking legal assistance.⁷¹

69. See Solicitors Act, 1974, ch. 47, § 59(2)(b); see also *In re Trepca Mines, Ltd.* (No. 2), [1963] 1 Ch. 199, 219-20 (C.A. 1962) (agreement by lawyer to share damages contrary to public policy, not merely unprofessional).

70. P. ATIYAH & P. CANE, *supra* note 6, at 259.

71. See Harris, *Claims for Damages: Negotiating, Settling or Abandoning*, in COMPENSATION AND SUPPORT FOR ILLNESS AND INJURY 72 table 2.12 (D. Harris ed. 1984) [hereinafter COMPENSATION AND SUPPORT] (showing 11% of possible claimants deterred by fear of legal costs).

The second factor arises from broad political and institutional differences between the United States and Britain.⁷² Britain is a country with powerful centralized political institutions, in which governments are expected to govern, and legislatures to legislate. Major social problems are expected to be addressed by these institutions. Individual decisionmaking, whether through the market or through decentralized judicial decisionmaking, does not play as large a role in Britain as it does in America. Indeed, I suspect that if Britain ever had as much tort litigation as does the United States, it would probably be regarded as an intolerable state of affairs, and would prompt the government and legislature to reduce the volume of litigation and the level of compensation. In contrast, legislative and executive decisionmaking in America is traditionally more decentralized; judges and juries are the traditional sources for many of these decentralized decisions. It is thus no exaggeration to see American tort law as the major means for setting norms and standards for social and economic behavior.⁷³ American tort law is a response to the demands of a society in which there are many grievances not regarded as the responsibility of governments to redress.

The third factor, about which I shall say very little, concerns the possible litigiousness of the American people. It is sometimes suggested that Americans are more aggressive, more hostile and less willing to put up with minor complaints and disturbances in their lives. As Professor Galanter has observed, it is not entirely clear whether the comparison implicitly drawn by such suggestions is with Americans as they once were, or with other peoples and countries today.⁷⁴ So far as comparisons with Britain (and indeed many other countries) are concerned, the far higher levels of criminal violence in America may be evidence supporting this thesis.⁷⁵ One of the great difficulties in trying to isolate factors of this kind is that we do not know to what degree the law reflects, as opposed to creates, these public attitudes. Some modern research at the Centre for Social-Legal Studies at Oxford suggests that it is very danger-

72. See generally P. ATIYAH & R. SUMMERS, *FORM AND SUBSTANCE IN ANGLO-AMERICAN LAW* (1987).

73. See, e.g., SPECIAL COMM. ON THE TORT LIAB. SYS., AMERICAN BAR ASS'N, *TOWARDS A JURISPRUDENCE OF INJURY: THE CONTINUING CREATION OF A SYSTEM OF SUBSTANTIVE JUSTICE IN AMERICAN TORT LAW* 3-10 to 3-13, 3-21 to 3-29 (1984) [hereinafter *TOWARDS A JURISPRUDENCE OF INJURY*] (discussing "[t]he moral thrust of tort law").

74. Galanter, *supra* note 9, at 11, 36.

75. For some basic data on the very different levels of criminal violence in New York City and London, see Hughes, *English Criminal Justice: Is it Better Than Ours?*, 26 ARIZ. L. REV. 507, 809-10 (1984) (using 1978 figures for London and 1980 figures for New York to formulate "a rough comparison suggest[ing] that London has an incidence of about 1.6 homicides per 100,000 people, while New York has 25.75; London has 4 rapes per 100,000, while New York has 53; London has 94 robberies per 100,000, while New York has 1429).

ous to assume that tort law mirrors the public desire for vengeance or compensation against perceived malefactors;⁷⁶ on the contrary, this research suggests that except in very simple cases, accident victims tend to allocate blame after they have learned what the law requires for a claim to be made, and that their demands for compensation for injuries are frequently not directed against those who cause the injuries, but against those who can pay.⁷⁷ Of course in England these matters are settled by judges and not juries; it may therefore be argued that American juries keep tort law more closely in accord with public sentiments. One problem with this thesis is the variability of American juries. We are, for example, told by experienced tort lawyers that the same injury might lead to a tort award ranging "from \$10,000 to \$2,000,000 depending on the jurisdiction."⁷⁸ If juries are as variable in their views of what justice requires, it is difficult to feel confident that American tort law does, or even can, reflect such an extraordinary diversity of opinion. Perhaps even in America, current practice determines public ideas and sentiments as much as it reflects them; these are, indeed, difficult matters to assess.

It is, I think, possible to explain differences in the volume and cost of tort litigation between England and America without referring to the alleged litigiousness of the American people. Grievants, like most people, will respond to incentives and disincentives. It is true, as Professor Galanter suggests, that litigation is rarely simple and often emotionally traumatic, so a high volume of litigation is unlikely to be the result of a casual and lighthearted desire to make someone's life uncomfortable.⁷⁹ Other things being equal, one might expect grievants to pursue alternatives that produce comparable benefits at lower costs. But in fact other things are not equal. Tort law is much more widely available in the United States than in England, simply because the law is more favorable to plaintiffs. Here, therefore, is one major set of factors explaining why the volume of tort litigation is so much lower in England. A second factor, I shall suggest, is that the incentive to litigate is much greater in America because the rewards are much higher. Even if the hassle and emotional strain of making a tort claim is as great in America as in England (and I think that it probably is not), the levels of damages in many American tort suits are now so great that they surely must be a major factor in explaining why so many more suits are brought. Third, I shall

76. See Lloyd-Bostock, *Fault and Liability for Accidents: The Accident Victim's Perspective*, in COMPENSATION AND SUPPORT, *supra* note 71, at 159-60.

77. *Id.* at 151 (citing survey evidence suggesting that "[t]he attribution of fault is a justification rather than a motive for seeking damages" (emphasis in original)).

78. TOWARDS A JURISPRUDENCE OF INJURY, *supra* note 73, at 2-26.

79. Galanter, *supra* note 9, at 25-26, 30.

suggest that there are more nonlitigious alternatives in England than in the United States.

These three factors may well sufficiently explain in large part the differences between England and America without having to postulate that Americans are more aggressive, more self-assertive and more litigious than the English. Perhaps they are—these things are not easily proved, but of one thing I am reasonably confident: if English law and practices were replaced overnight by American law and practices, there would be a massive increase in the volume of tort claims and suits in England.

A. *American Law is More Proplaintiff Than English Law.*

American and English tort doctrines increasingly have tended to drift apart, and although there may be a few corners of the law in which English law is actually more proplaintiff than in some American jurisdictions,⁸⁰ most of the differences tend to favor the plaintiff in America.⁸¹ I shall pick out what seems to me to be some of the more important differences.

First, English tort law is still overwhelmingly fault-based,⁸² while American tort law today contains many more examples of strict liability. It is difficult to assess the importance of this factor. Many American lawyers suggest that products liability cases are still difficult to win if there was no fault because juries do not like to rule against blameless

80. It must always be remembered, however, that it is *uncertainty* that engenders most trials and appeals. For instance, in one major respect English law tends to be more proplaintiff than American law: the liability insurance system relating to road accidents is more extensive in the United Kingdom, because it is compulsory and because it also covers unlimited liabilities. This tends to eliminate many forms of litigation common in the United States which occur as a result of the driver being uninsured or insured for an inadequate sum, thereby driving the plaintiff to sue other defendants, whose legal and factual responsibilities are more problematic. Other things being equal (which of course they are not), this would result in American law producing fewer tort payments but more claims and trials.

81. But there are exceptions. See, for example, *McLoughlin v. O'Brian*, [1983] 1 A.C. 410, 418 (1982), in which the House of Lords followed the Supreme Court of California's decision in *Dillon v. Legg*, 682 Cal. 2d 728, 441 P.2d 912, 69 Cal. Rptr. 72 (1968), and allowed a cause of action for the negligent infliction of emotional distress. This, of course, is not the prevailing law in a majority of American states. See, e.g., *McGovern v. Piccolo*, 33 Conn. Supp. 225, 372 A.2d 989 (1976); *Tobin v. Grossman*, 24 N.Y.2d 609, 249 N.E.2d 419, 301 N.Y.S.2d 554 (1969); *Whetham v. Bismarck Hospital*, 197 N.W.2d 678 (N.D. 1972); *Grimsby v. Samson*, 85 Wash. 2d 52, 530 P.2d 291 (1975).

82. The one prominent exception to fault-based liability is the area of defamation, which remains a strict liability tort in England. See R. HEUSTON, *SALMOND ON TORTS* 135 (18th ed. 1981). Thus, it is easier to establish a defamation cause of action in Great Britain than in America, where constitutional doctrine now severely restricts tort liability. See *New York Times Co. v. Sullivan*, 376 U.S. 254 (1964). On the other hand, British defamation suits are notorious for their cost and procedural pitfalls, so the disincentives to litigate are very great, despite the apparent ease of establishing a cause of action.

defendants.⁸³ English law recognizes a form of strict products liability through sales warranty law,⁸⁴ although this remedy fails to protect the nonbuyer-plaintiff and is available only against the seller-defendant. In practice, however, it probably covers the great majority of ordinary products liability claims.⁸⁵ Perhaps of equal practical importance is the "informed consent" doctrine recognized in many American jurisdictions. It effectively turns liability for intentional battery into something approximating (in some cases) strict liability.⁸⁶ England rejects this informed consent doctrine, insisting instead that the failure to warn of the risks attending medical or surgical procedures must be tested against the usual fault standard applicable to medical negligence.⁸⁷

Second, the fact that most American tort actions are tried by a jury while English actions are tried by a judge may well mean that negligence is more easily found in America than in England. Again, it is difficult to be sure about this. It would be wrong to make the facile assumption that American juries, if given the chance, will always find for the plaintiff. But two important differences between an English judge and an American jury make sympathy verdicts more likely in America. First, the American juror is sheltered by the anonymity of the collective decision-making process. Second, the English judge must give reasons for his decisions, even on questions of fact. These reasons, often considerably detailed and often discussed at length in appellate opinions, are part of any important or complex decision. Unlike an American judge, who usually only has to decide whether evidence of negligence is fit for the jury, an English judge must first decide whether there actually was negligence, and then must justify his or her decision. This means that findings of negligence not really warranted by the evidence are much less likely to occur in England. This is especially noticeable in professional liability cases, particularly in medical malpractice cases, where English judges appear to bend over backwards to avoid either second-guessing or condemning the judgment of their fellow professionals. Indeed, English judges are openly fearful of the American medical malpractice litigation

83. See, e.g., 4 F. HARPER, F. JAMES & O. GRAY, *THE LAW OF TORTS* § 22.1, at 270 n.23 (2d ed. 1986 & Supp. 1987).

84. See P. ATIYAH, *THE SALE OF GOODS* 100-59 (7th ed. 1985).

85. *Id.* at 160-66. The Consumer Protection Act, 1987, ch. 43, §§ 1-9, will introduce some degree of strict liability for defective products when it comes into force, but the legislation unfortunately takes very little account of the American experience. See generally Stapleton, *Products Liability Reform—Real or Illusory?*, 6 OXFORD J. LEGAL STUD. 392 (1986) (criticizing reformers' adoption of defect-based, cost-benefit regime similar to that in the United States rather than a full strict liability approach).

86. See, e.g., *Canterbury v. Spence*, 464 F.2d 772, 780-92 (D.C. Cir.) (surveying informed consent law), *cert. denied*, 409 U.S. 1064 (1972).

87. See *Sidaway v. Bethlem Royal Hospital*, [1985] 1 A.C. 871.

experience, and sometimes comment on it in refusing to find English doctors guilty of negligence.⁸⁸

Third, damages for the death of a close relative, irrespective of financial dependency, are more available in the United States than in England. In most states, an action lies on behalf of either the estate or the designated beneficiaries of a person who has died as the result of a tort; full damages (even punitive damages) are usually available.⁸⁹ In England, on the other hand, unless the plaintiff can prove actual financial loss or financial dependence upon the deceased, wrongful death liability is very limited. Today, this limited liability is a statutorily fixed sum of £3500 (approximately \$6125) for the loss of a minor unmarried child or a spouse.⁹⁰ Because the amount is fixed by the statute, the death of small children rarely gives rise today to litigation in England. Similarly, there is virtually no legal liability for the tort-related death of elderly retired people who have no financial dependents. Thus, a major source of tort liability and lawsuits in the United States simply does not exist in England.⁹¹

Fourth, levels of damages are far higher in America than in England. To a limited extent, this is explicable by the prosaic fact that earnings and out-of-pocket losses will be higher in America than in England. But there are other reasons why damages are far higher. Even with regard to earning losses, I think American juries are much more generous than English judges in calculating the present value of future losses and

88. See, for example, Lord Denning's opinion in *Whitehouse v. Jordan*:

Take heed of what has happened in the United States. "Medical malpractice" cases there are very worrying, especially as they are tried by juries who have sympathy for the patient and none for the doctor, who is insured. The damages are colossal. The doctors insure but the premiums are very high: and these have to be passed on in fees to the patients. Experienced practitioners are known to have refused to treat patients for fear of being accused of negligence. Young men are even deterred from entering the profession because of the risks involved. In the interests of all, we must avoid such consequences in England.

[1980] 1 All E.R. 650, 658 (C.A. 1979). Although other judges are not as open as Lord Denning in acknowledging their fear of the American experience, it probably influences their decisionmaking.

89. 4 F. HARPER, F. JAMES & O. GRAY, *supra* note 83, § 24.2, at 459.

90. Administration of Justice Act, 1982, ch. 53, § 3. This section replaced some rather confused and complex law under which damages for "lost expectation of life" could be recovered on behalf of the estate of a person even if there was no financial dependency. See Fatal Accidents Act, 1976, ch. 30. Such damages (which were in any event for very limited amounts) were abolished by the 1982 Act. *Id.* § 1.

91. When I was a visiting Professor at Duke Law School in the spring semester of 1985, I was struck by newspaper reports of a case in Durham, North Carolina in which the parents of a sixteen year-old child recovered damages of \$3 million against the Duke Power Company for alleged negligence in failing to lock an electric substation into which the deceased child had entered. See, e.g., Stevenson, *Duke Power Suit Cash Pledged*, Durham Morning Herald, Jan. 29, 1985, at 1, col. 3. I thought it unlikely that an English judge (at least on the basis of these newspaper reports) would have found negligence in such a case. In any event, the parents could not have recovered in England more than the statutory sum of £3500.

in discounting contingencies. Because English judges are responsible for fixing (and justifying) the awards, and because their decisions are subject to appellate review, these figures are calculated in a fairly precise manner.⁹² There is a widespread belief,⁹³ supported to some extent by the *Pearson Report*,⁹⁴ that English judges, for all their experience, tend to systematically undervalue the present value of future earnings. In some American cases, detailed jury instructions are not given with regard to discounting the future loss to arrive at present value;⁹⁵ even when such instructions are given, juries seem to have a good deal of latitude and often take a fairly generous view. Some Americans argue that this is one way of offsetting the unfairness of not instructing the jury to take account of future inflation or legal fees.⁹⁶ The English courts, however, do not take account of inflation because the plaintiff receives a lump sum which he can invest to protect himself against any future fall in the value of money.⁹⁷

A much more important influence upon the size of damage awards is the extraordinarily high levels in America for pain and suffering, or loss of amenity as it is called in England. Because civil jury trials in the United States are constitutionally guaranteed,⁹⁸ American judges can do little more than check wilder or more eccentric jury awards. On the other hand, the English system leads to a high degree of internal consistency; it is possible to say that today the maximum award for pain and suffering in England is approaching £100,000 or about \$175,000.⁹⁹ This, of course, is a great deal less than American juries award in cases of any gravity, where damages of several million dollars are often given and upheld. Although the huge disparities in American jury awards make systematic contrast with English practice impossible, even average awards in American personal injury cases are substantially higher than those in

92. See, e.g., *Mitchell v. Mulholland*, [1971] A.C. 666 (1970); *Taylor v. O'Connor*, [1971] A.C. 115 (1970).

93. See, e.g., *Prevett, Actuarial Assessment of Damages: The Thalidomide Case*, 35 MOD. L. REV. 140, 257 (1972) (advocating use of actuarial methods in the assessment of damages).

94. 1 PEARSON REPORT, *supra* note 16, paras. 675-691 (majority view); *id.* paras. 709-726 (minority view). See generally *id.* ch. 15 (discussing calculation of damages).

95. 4 F. HARPER, F. JAMES & O. GRAY, *supra* note 83, § 25.8, at 553-54 (discussing cases in which jurors allowed to use judgment based on available evidence in awarding damages to plaintiffs either with no source of income, or earnings demonstrably lower than earning capacity).

96. See, e.g., *McWeeney v. New York, N.H. & H. R.R.*, 282 F.2d 34, 37-38 (2d Cir.) (Friendly, J.), *cert. denied*, 364 U.S. 870 (1960).

97. See *Cookson v. Knowles*, [1979] A.C. 556, 576-77 (1978).

98. U.S. CONST. amend. VII.

99. Cf. *Housecroft v. Burnett*, [1986] 1 All E.R. 332, 340 (C.A. 1985) (establishing an average figure of £75,000 (roughly \$131,250) for a tetraplegic's pain and suffering and loss of amenities).

England.¹⁰⁰ As already noted, there are similar disparities between American and English awards in wrongful death cases.

On top of these differences in compensatory awards is the fact that punitive damages in tort cases are far more available in the United States than in England. There has been an explosive growth in punitive damage awards in recent years, particularly in the area of products liability.¹⁰¹ Although many of the more outlandish awards do not survive appeal,¹⁰² the appellate court's sense of a "tolerable" award often seems to depend on what juries typically do. Where juries habitually award punitive damages of \$10 million or more, appellate courts may reluctantly encroach on the decision of the jury by giving the plaintiff a choice between a retrial or a substantially reduced award of only one million dollars—not a trivial sum for damages, which by definition, goes beyond what is needed to fully compensate the plaintiff for his injuries.¹⁰³ In England, punitive damages are almost never allowed in ordinary personal injury cases,¹⁰⁴ including intentional tort cases, unless an unconstitutional action, such as wrongful arrest by police authorities, is involved.

One other set of rules leads to higher damages in the United States than in England. The collateral benefit rule, more widely applied in America, allows the plaintiff to pile benefit upon benefit.¹⁰⁵ Although the

100. Compare 2 PEARSON REPORT, *supra* note 16, at 173 table 128 (median award of damages in court in England and Wales was £1155 in 1973 (1977 prices), equal perhaps to about £3500 today or approximately \$6125) with J. KAKALIK & N. PACE, *supra* note 29, at 35 (average American tort lawsuit award between \$24,000 and \$29,000 in 1985). Note, however, that the English figure excludes "costs" which would be separately paid for by defendant, while the American figure includes the fee which plaintiff would have to pay his lawyers.

101. See generally 4 F. HARPER, F. JAMES & O. GRAY, *supra* note 83, § 25.1, at 491 n.2, § 25.5A, at 526 & n.2; Owen, *Problems in Assessing Punitive Damages Against Manufacturers of Defective Products*, 49 U. CHI. L. REV. 1, 1-5 (1982).

102. See Landes & Posner, *A Positive Economic Analysis of Products Liability*, 14 J. LEGAL STUD. 535, 563-66 (1985).

103. Thus, although the jury's preposterous verdict for \$125 million in punitive damages in the Ford Pinto case was set aside on appeal, the plaintiff was still given the alternative of keeping \$3.5 million in punitive damages (on top of his compensatory award of \$2.5 million). See *Grimshaw v. Ford Motor Co.*, 119 Cal. App. 3d 757, 174 Cal. Rptr. 348 (1981). The sum of \$125 million (in 1981) can be contrasted with the estimated *total* of personal injury tort liability payments in the United Kingdom (in 1974) of £202 million. See 2 PEARSON REPORT, *supra* note 16, at 207 table 138.

104. See *Holden v. Chief Constable of Lancashire*, [1987] 1 Q.B. 380 (C.A. 1985); *Broome v. Cassell & Co., Ltd.*, [1972] A.C. 1027; *Rookes v. Barnard*, [1964] A.C. 1129.

105. See generally 4 F. HARPER, F. JAMES & O. GRAY, *supra* note 83, § 25.22, at 648-50 ("[T]he plaintiff who has been paid his salary or a pension during disability, or had his medical expenses or other losses paid for by another, or out of the proceeds of an accident or other insurance policy, may still recover full damages for these items from a defendant who is liable for the injury. To this extent, plaintiff may get double payment on account of the same items." (footnotes omitted)).

rule is also widely applied to private insurance benefits in England,¹⁰⁶ many social security benefits are either partly or entirely deducted from the damage award.¹⁰⁷ Similarly, damages in England are calculated after deduction of income tax.¹⁰⁸ Nearly all American courts award damages based on gross pretax earnings.¹⁰⁹ Finally, the usual American rule is that wages or salary paid by the employer to an injured plaintiff unable to work is a collateral benefit which does not reduce the damages;¹¹⁰ under the English rule such payments are deducted from the plaintiff's damage recovery.¹¹¹

III. SOME ALTERNATIVES TO TORT LAW

The pursuit of tort claims by accident victims depends to some degree on what alternatives are available. English law seems to offer alternatives which are often easier to pursue and more attractive to the claimant than those likely to be available in America.¹¹² Of course, it is not always easy to know what accident victims would actually prefer. It may be that litigation alternatives are pursued in England when tort suits would be filed in America, not so much because the English victim prefers a different outcome, but because more obstacles lie in the way of a tort suit in England. But there are cases in which claimants seek other forms of satisfaction besides monetary damages. For example, unexpected hospital deaths often lead to litigation, not because the relatives want damages, but because they want explanations. A different course might be pursued if satisfactory information were made available. Accident victims whose immediate financial costs are compensated—medical and basic wage losses—may decide that the cost of obtaining additional compensation outweighs the probable benefits. If, however, they were denied all immediate relief, they would be under greater pressure to pursue a tort claim. I will suggest that in England accident victims are more likely to have their basic losses taken care of, and are therefore less likely to pursue possible tort recoveries through suit.

106. See *Hussain v. New Taplow Paper Mills, Ltd.*, [1987] 1 All E.R. 417 (C.A. 1986) (proceeds of employer's insurance policy for payment of sick pay to injured workman deductible from damages in action against employer).

107. See P. ATIYAH & P. CANE, *supra* note 6, at 405-09.

108. See *British Trans. Comm. v. Gourley*, [1956] A.C. 185, 210 (1955).

109. See 4 F. HARPER, F. JAMES & O. GRAY, *supra* note 83, § 25.12.

110. See RESTATEMENT (SECOND) OF TORTS § 920A(2) & comment c(2) (1979).

111. Although this question has never been squarely answered in England, it has long been assumed to be the state of the law. See *Metropolitan Police Dist. v. Croydon Corp.*, [1957] 2 Q.B. 154 (C.A. 1956); *Parry v. Cleaver*, [1970] A.C. 1 (1969).

112. It is also more difficult for the comparativist to study nonlitigious alternatives. While I am reasonably confident that I can compare tort law in England and the United States, I have to confess to a much scantier knowledge of alternative nontort remedies in America.

A. *Medical and Hospital Costs.*

Unlike his American counterpart, the English accident victim never has to worry about medical and hospital costs. Despite its many problems, the National Health Service remains committed to ensuring that everyone receives necessary medical and hospital treatment without charge.¹¹³ This is far different from the American situation. Although most Americans have some form of medical and hospital insurance, significant numbers have none, and many of those who are insured have restricted or inadequate coverage.

B. *Basic Earnings Losses.*

It is today very difficult even to compare generally earnings losses across international boundaries. Social security and welfare programs have become more and more complex, and fringe benefits in the form of sick pay or disability insurance are extensive but erratic in their coverage. I cannot pretend to offer any information on the modern position in the United States. There recently has been a major move in England toward the privatization of short-term sickness and disability payments. Legislation passed during Mrs. Thatcher's administration has obligated employers to pay "statutory sick pay" for the first twenty-eight weeks of disability, irrespective of the cause of disability.¹¹⁴ At the same time, the state has ceased to pay sickness and injury benefits to persons who are normally employed.¹¹⁵ Although the levels of statutory sick pay vary to a limited degree by income, they are low, and the maxima are reached on an income that is substantially below half the average industrial earnings.¹¹⁶ There are no increases for dependents and the payments are tax-

113. Despite this fact, however, claims for medical and hospital charges are still made, and indeed constitute a major proportion of the largest tort claims. The reason for this is that private medicine still exists in the United Kingdom. The Law Reform (Personal Injuries) Act, 1948, 11 & 12 Geo. 6, ch. 41, expressly provides that claims for medical and hospital fees arising out of a tort are not affected by the fact that the treatment could have been obtained from the National Health Service free of charge. For obvious reasons, private treatment is more likely to be sought in the post-trial (or settlement) periods.

114. Statutory sick pay was first introduced by the Social Security and Housing Benefits Act, 1982, ch. 24, § 1-27, (when it covered only the first 8 weeks of disability) and was extended by the Social Security Act, 1985, ch. 53, § 18, to cover the first 28 weeks of disability. Employers are entitled to be recouped by the state for the cost of these benefits, so they remain a form of Social Security rather than fringe benefits: the employers are used as an administrative agency by the state, largely because it was thought they could perform this function more efficiently than the state bodies, especially given the widespread existence of contractual fringe benefit schemes.

115. Long-term disability payments are, however, still made by the state, where incapacity lasts for more than 13 weeks (for injuries received out of and in the course of employment), and after 28 weeks in other cases. For a sketch of the state benefit provisions, see P. ATIYAH & P. CANE, *supra* note 6, at 355-68.

116. *Id.* at 334.

able. These benefits, in other words, are far from generous, and anybody reduced to living on them would probably suffer a substantial loss of income.

Of course, the minimum statutory requirements are exceeded by many employers under voluntary sick pay schemes, which have become far more extensive in recent years.¹¹⁷ Few highly salaried earners in England today could expect to suffer a major decline in their income if they were unable to work because of sickness or injury for a period of a few weeks, and often up to six months; and although more prolonged and serious injuries might eventually lead to dismissal, a great many employers today incorporate some sort of disability insurance in their schemes, thereby enabling a person who is permanently incapacitated to retire prematurely on a full pension.¹¹⁸

At the same time, other developments in the private markets have helped to mitigate the effect of short-term disabilities. During the past decade of high unemployment, insurance for two of the most important individual financial commitments—home mortgage and consumer credit payments—has become increasingly common. Although probably largely designed to protect against the very visible risks of unemployment, this insurance now often includes life and disability protections. Thus, a person injured in an accident today, and unable to work for some months, may well find that his home repayments and his bank loan (or other credit payments) on his car are covered by some form of insurance protection. It is at present impossible to give more precise data about this kind of insurance, or to quantify the amounts involved. But when we add this type of protection to the statutory and voluntary sickness and disability pay schemes, it is not unreasonable to conclude that most people in England probably do not today suffer significant net earnings losses for short-term disabilities up to six months in duration.¹¹⁹ Income protection programs of this kind are far from universal, and are no doubt restricted in many ways. But given the present hostility to massive state-run welfare programs, they could well represent an important trend in the development of private alternatives to income protection.

Despite the gradual cutting down in the range and generosity of state welfare benefits in the United Kingdom during the Thatcher admin-

117. *Id.* at 371-73.

118. *Id.* at 372-73.

119. Furthermore, we know that the overwhelming majority of accident victims are fully recovered within six months. See 2 PEARSON REPORT, *supra* note 16, at 12 table 5 (showing that only 1.6% of the injured are not fully recovered after six months). Of course, this is not to say that the seriously injured and disabled are not without serious financial problems. They remain less generously treated by all welfare programs, as well as by the tort system.

istration, it still seems that the proportion of accident victims who suffer significant financial deprivation is quite small. No doubt the losses of *expectations*—future earnings—are much greater, and still far more significant, but the propensity to sue may correlate more highly with financial deprivation than with losses of bare expectations.¹²⁰

C. *No-Fault Benefits: Workers' Compensation and No-Fault Automobile Schemes.*

I turn now to two major areas in which American law seems to offer a higher level of nontort protection than the law in England. All American states have workers' compensation laws, and nearly half of them have auto no-fault laws. The United Kingdom has neither. It is true that there remain in the United Kingdom certain residual state benefits available only to those who have suffered injury as the result of an accident arising out of and in the course of employment; to that extent the United Kingdom retains a workers' compensation scheme. But separate legal provisions for such employment-related accidents have gradually disappeared since workers' compensation became part of the British welfare state in 1948. In recent years, the more generous benefits once available for industrial injuries have gradually been lowered to the same rate for all categories of the sick and disabled. Furthermore, it seems clear that (at least under Conservative governments) this trend will continue, though in some cases it will be necessary to level-up the benefits currently available to injured workers only. In particular, long-term disability payments today are still much more generous for those injured at work than for the naturally or congenitally disabled. It is, however, believed that the long-term government policy is to increase the disability benefits to the second group until they match those for people injured on the job. Eventually, it is expected that the "industrial preference"—that is the better treatment of those injured at work—will disappear, and with it, so will the last traces of the old workers' compensation system.

At the same time, injured workmen in the United Kingdom, unlike their American counterparts, never gave up the right to sue their employer in tort; indeed, the abolition of the fellow-servant rule in England greatly assisted the growth of litigation arising out of industrial acci-

120. Although this is no doubt speculative, some evidence for this proposition may be found in the (unexpected) discovery in the Oxford Socio-Legal Centre study that the propensity to sue in England actually varies inversely with socio-economic class, that is, less wealthy people are more likely to sue. See Genn, *Who Claims Compensation: Factors Associated with Claiming and Obtaining Damages*, in COMPENSATION AND SUPPORT, *supra* note 71, at 53, 63. At least one possible explanation for this is that accident victims from higher social classes suffer less real financial deprivation (because of the existence of various benefits outlined in the text) even though they may suffer greater losses of expected future earnings.

dents.¹²¹ As a result, by English standards, litigation arising out of workers' injuries is relatively common, and, according to the *Pearson Report*, nearly half of all personal injury payments in 1973 compensated industrial injuries.¹²² All this may seem to run counter to the suggestion that the very weak propensity to claim in tort in England may be due to the availability of adequate state health and other benefits, which greatly reduce the levels of financial deprivation. The explanation for this may lie partly in the role of trade unions in relation to industrial accidents. One of the major services provided by British trade unions to their members has traditionally been legal and financial assistance in dealing with industrial accidents.¹²³ Furthermore, the unions often have actively pursued such claims on behalf of their members, and have even financed litigation without any risk to the member.¹²⁴ To some extent, therefore, they behave more like American attorneys pursuing a tort claim, except that they do not demand any proportion of the tort recoveries.

The general position in America is of course well known. Workers' compensation statutes generally bar any tort suit against the employer, though in recent decades injured workers have actively pursued tort claims against third parties. This is generally believed to be one of the major causes for the explosion of products liability claims, in that a high proportion of such claims are brought by workers injured by defective tools or working equipment, or by workers' compensation insurers pursuing subrogation rights.¹²⁵ This is an area, then, in which the law in the United States actually appears more hostile to tort claims and litigation than in the United Kingdom. It is not possible to measure the quantitative significance of this difference, or the degree to which it affects the overall finding that tort claims and payments are far higher in the United States than in the United Kingdom. Nor is it even possible to offer any rational explanation—as opposed to an historical explanation—of why this area seems to be singled out for such a different approach, bucking the general trend in both countries.¹²⁶

121. P. ATIYAH & P. CANE, *supra* note 6, at 408.

122. See 2 PEARSON REPORT, *supra* note 16, at 19, table 11.

123. See Latta & Lewis, *Trade Union Legal Services*, 12 BRIT. J. INDUS. REL. 56, 56-57 (1974) (surveying services provided); Genn, *supra* note 120, at 67-70 (describing influence of trade union activities on behalf of injured workers in prelitigation stages); Harris, *supra* note 71, at 119-20 (same).

124. This perhaps explains why a higher proportion of first offers of settlement is accepted in automobile accident claims than in work-related accident claims. See Harris, *supra* note 71, at 101 table 3.6.

125. See, e.g., THE CALIFORNIA CITIZENS' COMMISSION ON TORT REFORM, RIGHTING THE LIABILITY BALANCE 40-41 (1977).

126. A comparable area concerns accidental injuries suffered by military personnel. In both countries, such personnel will be entitled to state pension or disability payments. Tort liability of the

The position with regard to road accidents is more confused. Here again, there is no overt no-fault scheme in the United Kingdom, though of course the health and welfare benefits of the modern state are available to all accident victims. In the United States, twenty-four states have no-fault legislation conferring a range of benefits.¹²⁷ Some, though not all, limit the right to sue in tort.¹²⁸ Many of the states adopted the so-called "add-on" schemes, that is, schemes that do not limit the right to sue, but confer additional no-fault benefits on top of common law rights.¹²⁹ Although there seems no doubt that schemes which actually limit the right to sue succeed in reducing the number of tort claims,¹³⁰ it is controversial whether the add-on schemes also reduce the volume of litigation. On the one hand, some have argued that if the victim can promptly claim his no-fault benefits, he may be less inclined to incur the hassle of pursuing a tort claim even when he remains entitled to do so. On the other hand, it is argued that add-on schemes that do not restrict the right to sue are hardly likely to have any impact on tort claims.¹³¹ I have argued that in the United Kingdom, the existence of a welfare state (and other measures), which limits the size of financial deprivation following an accident, is a major factor in keeping down the volume of tort claims, even when such claims could be brought.¹³² If this does not happen in the United States, the question must be whether it is due to cultural differences. That is, of course, perfectly plausible, but a simpler explanation is that the hassle of making a tort claim in America is outweighed by the probable benefits. Beyond this, it is not possible to say whether there is proportionately less litigation arising out of workers' accidents in the United States than in Britain, and if not, which factors are chiefly responsible for outweighing the effect of the American no-fault compensation schemes.

national government in both countries has been traditionally barred. *See Feres v. United States*, 340 U.S. 135 (1950); Crown Proceedings Act, 1947, 10 & 11 Geo. 6, ch. 44, § 10. This section was repealed by the Crown Proceedings (Armed Forces) Act, 1987, ch. 25, so as to confer the right on military personnel to sue the Crown in tort. This is an illustration of the diversity of policies which operate in Britain in this area, the present government being more ideologically favorable to tort claims than many other governments of recent times, even though the general trend is still toward further development of nontort alternatives.

127. *See* 3 F. HARPER, F. JAMES & O. GRAY, *supra* note 83, § 13.8, at 164 and *supp.* at 116.

128. *See id.* § 13.8, at 166.

129. *Id.* § 13.8, at 165.

130. *See, e.g.*, the careful studies contained in COUNCIL ON LAW-RELATED STUDIES, NO-FAULT AUTOMOBILE INSURANCE IN ACTION: THE EXPERIENCE IN MASSACHUSETTS, FLORIDA, DELAWARE AND MICHIGAN (1977).

131. *See, e.g.*, the exchanges reproduced in O'Connell, *Operation of No-Fault Auto Laws: A Survey of Surveys*, 56 NEB. L. REV. 23 n.47 (1977).

132. *See supra* notes 113-20 and accompanying text.

D. *Nontort Investigations and Adjudications.*

From these two areas, in one of which at least (workers' accidents) America may actually have a lower litigation rate than Britain, I turn to examine a series of alternatives to tort law that probably reduce the propensity to sue in England. These alternatives can be broadly divided into two groups.¹³³ The first group are alternative methods of inquiry and adjudication that do not necessarily involve the payment of compensation. The second group are alternative sources of compensation that may reduce the financial pressures to make a claim in tort. The two sets of alternatives are not entirely separable because some in the first group include relatively minor provisions for compensation. It is interesting that there is no alternative to tort law that sets out to perform both the compensatory and deterrent functions of tort law. Whether this indicates a greater specialization of function (and, perhaps, greater efficiency) is an interesting question, though at present any answer is likely to be highly controversial.¹³⁴

I start then with the nontort investigatory and adjudicative procedures. At the outset I must disclaim any pretense of pursuing the comparative method in detail. I simply do not know to what extent nontort alternatives are being developed in the United States, or even what pressures there may be for such alternatives. I can only record my general impression that tort law is still extensively perceived in the United States as an excellent investigatory procedure. When accidents occur, or disasters strike, those who want to know precisely what happened, and why it happened, appear to turn immediately to the courts for answers.¹³⁵ It

133. There is, of course, a third group of alternatives to one of the functions allegedly performed by tort law, namely the regulatory laws and institutions, which attempt by direct measures to limit and control accident or injury levels. I do not attempt to deal with these in this article because it cannot seriously be suggested that significant numbers of tort suits are brought *in order to* regulate or control accident and injury levels, even if they indirectly perform this function. Hence, the existence of such alternatives to this function of tort law is unlikely to have more than a marginal effect on the tort claim rate, unless and until a society determines that the preventive and regulatory function is better performed by other means, and therefore curtails the legal availability of tort claims, as New Zealand has done. See generally G. PALMER, *COMPENSATION FOR INCAPACITY* (1979) (analyzing tort, workers' compensation and social security reform in New Zealand and Australia).

134. It seems sensible to separate these two functions of tort law and deal with them distinctly, because it is not obvious why the amount needed to deter potential tortfeasors should also be the appropriate sum to compensate accident victims. Indeed, there are strong reasons for thinking the reverse. See Atiyah, *A Legal Perspective on Recent Contributions to the Valuation of Life*, in *THE VALUE OF LIFE AND SAFETY* 185, 188-92 (M. Jones-Lee ed. 1982).

135. The *Challenger* disaster seems to have been one of the few examples in recent times in which a public investigation (by a committee of the United States House of Representatives), rather than tort litigation, brought the facts to light. See HOUSE COMM. ON SCIENCE AND TECHNOLOGY, *INVESTIGATION OF THE CHALLENGER ACCIDENT*, H.R. REP. NO. 1016, 99th Cong., 2d Sess. 3 (1986).

may well be that the self-financing aspects of American tort law are partly responsible for this tendency. The contingent fee means that people can find lawyers to bring their suits, and the willingness of juries to award substantial damages in cases where English judges would not, means that lawyers, in turn, are willing to take such cases on a contingent fee. In England, many such cases probably fail to get into the tort groove because lawyers can only be found to take cases in which damages will be sufficiently large to cover the lawyer's fee; and although this works well enough in many ordinary cases of bodily injury, it may not work in many other situations, particularly when the cost of investigation is likely to be very high. On the other hand, the high damages awarded in many American tort cases may be partly explicable because the American jury can only express its indignation at the defendant's behavior, or its sympathy with the plaintiff, in one way—by awarding damages. In England, many of the alternatives to tort law (like tort law itself¹³⁶) are designed to produce a neutral and impartial set of detailed findings that can be published to the world. To some extent such publications express condemnation of the defendant's behavior; and when there is little or no actual financial loss as a result of that misbehavior, it is perhaps a better way (at least to a non-American) of proceeding than an award of enormous damages.

At all events, it seems clear that there is constant pressure in England to find and develop alternative sources of adjudication and investigation. Let me mention just a few of these. The first alternative, which is purely investigatory, is the public inquiry, conducted under a variety of statutes.¹³⁷ The initiative for setting up such a Tribunal of Inquiry rests with the executive, but sometimes supportive resolutions are needed from the two Houses of Parliament. These inquiries are closely modeled on ordinary adversary proceedings, but this obviously raises difficulties since judges sitting in adversary proceedings do not act on their own motion, but wait for some party to initiate proceedings. In practice, Tribunals of Inquiry do not actually direct the investigations into the disasters they are called upon to examine. The investigation itself will be conducted by government officials, lawyers and (when necessary) police and other experts, acting under the general direction of the Tribunal. They take the initiative in calling the leading witnesses and directing the Tribunal's inquiries into the channels that have been found most likely to reveal the causes of the disaster. Other parties may also apply to call witnesses.

136. It must be remembered that in England, tort cases are tried by judges who make detailed findings of fact, a function an American jury does not perform. A judge can therefore express his—and the public's—indignation in words, rather than by piling on damages.

137. In particular, see the Tribunals of Inquiry (Evidence) Act, 1921, 11 Geo. 5, ch. 7.

The Chairman of the Inquiry is almost invariably a senior judge; counsel appear in front of the Tribunal and examine and cross-examine the witnesses; eventually a report is issued, which reads very much like an opinion of an English judge giving his detailed findings based on the facts in a tort case. Of course there are differences, in that the report will also contain recommendations as to the future, and its findings on the conduct of the various parties involved will not be made in exclusively legal terms, but may also be couched in terms of "blameworthiness"¹³⁸ or the like. Such inquiries are nearly always held in the case of mass disasters, where many people are killed or injured, such as major fires, explosions or other natural disasters. Similar inquiries are also very common in the case of aircraft and railway crashes. Although these Tribunals of Inquiry have no power to award damages, their findings are likely to be so detailed that it is very unlikely that anyone would contest them. Once the report is published, tort claims are likely to be made on the basis of the findings wherever they appear warranted, and will almost certainly be quickly settled, subject to disputes on quantum.

These Tribunals of Inquiry are established to allay public anxieties about the causes of major accidents and disasters. It is felt that the public is entitled to know what has caused such disasters in order that appropriate preventive measures can be taken, including if need be, changes in the law. They are not, therefore, designed primarily for the benefit of the victims of the disasters and their families; but in practice, they can be of enormous assistance to private tort claimants, in that the claimants are spared the massive cost of the investigations necessary to discover the causes of such disasters and to allocate responsibility for them. The victims of such mass disasters are, therefore, likely to stay their claim pending the findings of a Tribunal of Inquiry, though suits may sometimes be filed to avoid statute of limitations difficulties.

Next there are the Ombudsmen. An Ombudsman can be defined as a grievance commissioner with investigatory powers, and, on occasion, with power to award compensation as well. Ombudsmen first made their appearance in Britain in the field of public administration as a result of a perceived need for further protection against maladministration. This first Ombudsman—the Parliamentary Commissioner for Administration—is a statutory figure with statutory powers.¹³⁹ His jurisdiction is much wider than English tort law, since he even deals with such matters as delays or discourtesy by government officials in dealing with members

138. See, for example, REPORT OF THE TRIBUNAL APPOINTED TO INQUIRE INTO THE DISASTER AT ABERFAN, 1967 H.L. No. 316, H.C. No. 553, at 39, para. 77, which also gives details at paragraphs 5-14 on the working procedures of the Tribunal.

139. Parliamentary Commissioner Act, 1967, ch. 13.

of the public. Unlike a judge, he has no formal powers to award compensation. The Ombudsman may not investigate complaints where the complainant has a perfectly good cause of action in law, unless he is satisfied that it would be unreasonable to expect the complainant to pursue the legal remedy.¹⁴⁰ Thus, the Ombudsman's jurisdiction is actually based on a cultural component, and the less the propensity to sue is valued, the more extensive the Ombudsman's jurisdiction will become. In modern English practice, the Parliamentary Commissioner, like most Ombudsmen, operates much less publicly than Tribunals of Inquiry. He does not usually hold oral hearings, but investigates complaints privately, usually by demanding production of papers and making written inquiries. The Ombudsmen are more investigatory in function than Tribunals, which (as we have seen) work in a semi-adversarial procedure. Furthermore, unlike courts and Tribunals of Inquiry, the Ombudsman has his own permanent staff of officials who work under his direction. Thus, once the complainant has made his written complaint to an Ombudsman, there may be little more for him to do, though he may later have an opportunity of replying to any answers made by the respondents to the complaint. Because the Ombudsman's published findings are laid before Parliament, they carry considerable moral force. Further, he sometimes recommends that financial losses caused by maladministration be replaced by the relevant government department on an *ex gratia* basis. Typical cases concern quantifiable financial losses due to incorrect advice given by a government department.¹⁴¹ The Ombudsman, however, is inclined to leave complainants to their legal remedies in the court where they seek compensation for nonpecuniary losses, because of mental distress or defamation.¹⁴²

In addition to these national Ombudsmen, the Local Government Act of 1974¹⁴³ established three local government Ombudsmen for England and one for Wales. These Ombudsmen are given broad powers to handle complaints of maladministration by local authorities.¹⁴⁴ Like the national Ombudsmen, these local Ombudsmen handle many complaints which might otherwise have become tort claims. Although they have no power to award compensation, they can make findings of wrongdoing and recommend to the relevant local authority some *ex gratia* payment. They may also make further reports if their findings are rejected by the local authority. Many people find this procedure both cumbersome and

140. *Id.* § 5(2).

141. See THE COMMISSIONER'S SECOND REPORT FOR 1985-86, H.C. No. 275, ch. 1, at 3-10.

142. See *id.* at 47.

143. Local Government Act, 1974, ch. 7.

144. See, e.g., THE LOCAL OMBUDSMEN, REPORT FOR YEAR ENDED MARCH 31, 1986.

ineffectual because it ultimately leaves local authorities to judge their own cause. On more than one occasion local authorities have simply ignored the findings by the local Ombudsmen. There is, therefore, pressure to make the local Ombudsman's findings legally enforceable; but even as currently used, they do offer an alternative to proceedings in tort in certain cases.¹⁴⁵

Another Ombudsman, whose jurisdiction overlaps significantly with tort law, is the Health Service Commissioner. This Ombudsman is limited in his authority; he can investigate claims with a remedy in law, in cases where he thinks it reasonable for the complainant not to sue.¹⁴⁶ His principal field of investigation relates to failures of service in the National Health Service hospitals and extends to many cases which could easily form the basis of malpractice actions. Because many cases within his jurisdiction could also be brought as tort actions, the Health Ombudsman generally conditions his involvement in the investigation upon the express waiver by the complainant of any claims to sue. Although adversary-minded tort lawyers may find this requirement outrageous, the claim waiver requirement is justified by the purpose of the investigation: in cases of sudden or unexpected death, or death due to medical mistreatment, the relatives often want explanations rather than compensation (which in fatal cases may not even be recoverable in tort).¹⁴⁷ These explanations, however, are seldom forthcoming from hospital staffs reluctant to disclose information which ultimately might be used against them in a malpractice suit. Thus, this policy seems to be justified by the results, in that many complainants are willing to waive their legal claims in exchange for a detailed and thorough investigation by the Health Ombudsman. Indeed, he sometimes holds oral hearings, especially in cases involving conflicting evidence. The Ombudsman's published reports are minutely detailed and every bit as thorough as a High Court decision.¹⁴⁸

The work of the Health Ombudsman suggests that tort law has its own built-in Catch-22: individuals who refuse to observe the decent courtesies of life and disclose potentially embarrassing information for fear of suit often find themselves in court—and subsequently liable for

145. For instance, a case referred to in the 1986 Report, *supra* note 144, in which a local authority stripped the tiles off the complainant's roof, overlooking the fact that he had actually bought his house from them (that is, they no longer owned the house), and then refused to answer his solicitors' letters. *Id.* at para. 20; see also *id.* at para. 76 (death of child while in local authority's care).

146. National Health Service Act, 1977, ch. 49, § 116 (matters not subject to investigation).

147. P. ATIYAH & P. CANE, *supra* note 6, at 76-80.

148. See, e.g., HEALTH SERVICE COMMISSIONER, SECOND REPORT FOR SESSION 1980-81, Case No. 450, at 24-35 (a very bad case which would certainly have founded a tort claim if it had not been for the waiver).

huge damages—precisely because they have failed to cooperate in the first place. Because the existence of tort law and the threat of litigation often prevents the disclosure of information (which is often all that is sought), a tort suit becomes a kind of “freedom of information” action for those wishing only to find out what actually happened. This, I think, is borne out by study of many of the cases examined by the Health Ombudsman. Many begin with some relatively trivial discourtesy to either a hospital patient or relative of the patient, linked with some medically related trauma suffered by the patient. In the absence of more information as to what has actually happened, these incidents easily can be attributed to medical or hospital negligence. These discourtesies, which then tend to result in a complaint, are usually cleared up by private examination by the Ombudsman. The result is often a handsome apology, as well as subsequent steps to avoid repetition of the events. One does not have to use much imagination to appreciate the likely result in the absence of these investigatory processes. The minor courtesy of disclosure is denied; litigation ensues in which unjustified allegations are made about the actual treatment of patients and any resultant mishaps or deaths. After months or even years of delay, during which the litigants become more and more indignant and obdurate, a trial is held in which sores are opened and terrible allegations are made public. Public indignation and sympathy are multiplied, and huge damages are awarded for something which only dubiously was the result of medical negligence.

The relative success of the Ombudsmen may partly explain the recent public demand for greater regulation and control by various professional bodies over their own members. In the past, self-regulation over professional misconduct was largely confined to the most serious violations, such as fraud by solicitors and other lawyers, or scandalous and gross medical malpractice. In recent years, many professional bodies have come under heavy public pressure to exercise greater control over less outrageous professional misconduct, such as negligence and incompetence. Many British professional bodies have statutory disciplinary powers over their own members; their proper exercise is seen by Parliament and the public as some sort of a *quid pro quo* for the monopoly privileges that the profession enjoys. The professions are, therefore, very sensitive to public complaints over their failures to exercise disciplinary control.

Solicitors have been particularly hard hit by the increasing public pressure upon the professions. The Law Society, a statutory body that exercises control over the solicitors branch of the English legal profession, has had disciplinary powers over its members for many years. A first attempt to alleviate public anxiety over the failure of the profession

to exercise adequate control over its own members came in 1974 when the Lord Chancellor was empowered to appoint a Lay Observer to supervise the Law Society's use of its disciplinary powers.¹⁴⁹ Although the Lay Observer annually reports to the Lord Chancellor, it soon became clear that he had no real power to do anything about complaints of professional negligence.¹⁵⁰ The Law Society simply declined to adjudicate complaints of mere negligence against solicitors, perhaps out of fear that their investigations would result in civil suits and expanding legal liability. In the 1980s, however, the Law Society was rocked to its foundations by a complaint of gross overcharging against a member of its own governing body.¹⁵¹ The complaint, rejected by the Law Society, was brought before the High Court, where very serious charges were either admitted or proven. The solicitor was eventually struck off the roll (that is, disqualified from practice) by the Court. After a Committee of Inquiry described the Law Society's handling of the whole episode as a "disgrace to the Law Society,"¹⁵² and following an exhaustive study of the Law Society's disciplinary procedures,¹⁵³ new statutory provisions were enacted.¹⁵⁴

Today, the Law Society has a Solicitors' Disciplinary Tribunal, which is serviced by a Complaints Bureau. The Complaints Bureau conducts the investigations and, when necessary, presents a case before the Tribunal. Furthermore, these bodies are now explicitly empowered to investigate allegations of negligence and incompetence. In addition, the Tribunal may to some extent police attorney fees. Although it cannot award damages at large, the Tribunal can disallow claims for fees for incompetent work. This power extends beyond legal liability in that the Tribunal could, for instance, deny compensation for dilatory professional services even when no financial loss has been caused. It can also require unsatisfactory work to be rectified at the solicitor's own expense. As with the various Ombudsmen, the new statutory provisions prevent the Law Society from exercising disciplinary powers in cases where the complainant has a legal remedy that he could "reasonably" have been ex-

149. Solicitors Act, 1974, ch. 47, § 45. The Act also provided that the Solicitors' Disciplinary Tribunal contain some lay members. *Id.* at § 46(3).

150. See, e.g., THE TENTH ANNUAL REPORT OF THE LAY OBSERVER, 1985, H.C. No. 387, at 3-4 para. 8.

151. The full story is detailed in the Report of the Committee of Enquiry, published as a supplement to 81 LAW SOCIETY'S GAZETTE 474 (1984).

152. *Id.*, supp. at para. 43.

153. See *Enquiry by Coopers & Lybrand Management Consultants*, 83 LAW SOCIETY'S GAZETTE 580 (1986).

154. See Administration of Justice Act, 1985, ch. 61, § 1 (amending Solicitors Act, 1974, ch. 47, § 44A).

pected to exercise.¹⁵⁵

It remains to be seen to what degree other professions will be able to provide a comparable system of public redress for negligence and incompetence. The Bar insists that its Code of Professional Practice requires every practicing barrister to be "competent in his professional activities," but solicitors regularly complain that the Bar never disciplines barristers for incompetence.¹⁵⁶ The medical profession is still restricted to disciplinary control over "serious professional misconduct," which may not extend to matters of carelessness, rudeness, bad timekeeping, overcharging and so on.¹⁵⁷ The disciplinary body for the medical profession, the General Medical Council, receives many such complaints; although currently regarded as outside its statutory jurisdiction, the President of the Council has publicly questioned whether its powers should not now be expanded to deal with these complaints.¹⁵⁸ Members of the public, however, have alternative channels of complaint with respect to allegations against the National Health Service doctors. Although these doctors are employed under contracts with the Department of Health, they nominally enjoy "independent contractor" status, and are not treated as government employees. Complaints can be made about their professional behavior to one of the statutory bodies, called Family Practitioners' Committees, which have various disciplinary powers, such as the power to recommend the Department of Health to deduct sums due to them by way of remuneration.¹⁵⁹

Another body which offers some alternative investigatory procedures to tort law is the new Police Complaints Authority, established by statute in 1984.¹⁶⁰ As with the solicitors, there has been a long history of trial and error with regard to investigations of public complaints against the police. The main problem is finding an appropriate body to carry out the investigations. This difficulty is alleviated by the absence of a British national police force. The police in the United Kingdom are local bodies,

155. *Id.* at § 44A(3)(a).

156. *See, e.g., Disciplining Inefficiency*, 137 NEW L.J. 68 (1987).

157. *See* The Independent (London), Jan. 30, 1987, at 3.

158. *Id.* Since 1984 the General Medical Council (GMC) has taken cognizance of behavior which is "incompetent, inconsiderate and unacceptable or obvious misconduct," *id.*, but it still insists that it is only concerned with *serious* or *gross* misconduct. *See GMC Strengthens Professional Conduct Procedure*, 289 BRIT. MED. J. 1325, 1326 (1984).

159. The most serious allegations go to a National Health Service Tribunal, which has power to disqualify a practitioner from working under the Health Service altogether. *See* National Health Service Act, 1977, ch. 49, § 46. Consumers' organizations complain that the procedure before these disciplinary bodies is weighed against the complainant who is not allowed to appear by counsel or solicitor, whereas, the doctor is. These nontort alternatives are fully explored in S. Chopin, *supra* note 56, at ch. V (though there have been changes since this thesis was written).

160. Police and Criminal Evidence Act, 1984, ch. 60, §§ 83-105.

under the control of Chief Constables and local Police Authorities, though subject to some national supervision by national officers, such as the Chief Inspector of Constabulary and, ultimately, the Home Secretary.¹⁶¹ It is therefore possible to call in officers from one police force to investigate allegations against members of another. Of course such an investigation, without any supervision, would be unsatisfactory because of the natural public suspicion that the police would tend to cover up the misdeeds of their own colleagues. The new statutory scheme adopted in 1984 attempts to overcome this difficulty by creating an independent body known as the Police Complaints Authority, which supervises the investigation of complaints. This means that the investigatory officers have to be selected with the approval of the Authority, which closely monitors their investigation. They exercise some general control over the way an investigation is conducted (including even sitting in when witnesses are interviewed), read the investigators' reports and statements taken from witnesses, and where appropriate, refer the case to the public prosecutor to consider whether criminal charges are appropriate. They can also direct that disciplinary proceedings be taken against a police officer. In serious cases, when allegations are likely to be made (such as when an innocent member of the public is shot by police in the course of their duties), a member of the Authority is likely to take charge of an investigation almost immediately. The Authority also has power to recommend changes in police practice and procedure to local police authorities; in their first year they obtained various changes relating to the use of police dogs, police cell procedure and the marking of police cars.¹⁶²

This is a new body, and it is not yet clear how successful it will be in convincing the public that it is capable of remaining truly independent and exercising adequate control over the police. It is also not yet clear how far it can offer a satisfactory alternative to tort proceedings. It has no power to award compensation, or direct the payment of compensation, though its published findings will in some cases almost certainly form the basis of tort claims. It will never wholly replace the need for possible tort claims, because in the absence of oral hearings, the Authority has no real ability to make findings against police officers where the facts are seriously in dispute, especially when the only available evidence comes from the officers themselves. In such cases the Authority may find itself faced with two flatly inconsistent accounts, and it will often be unable to resolve the conflict. On the other hand, the Authority's investigatory process moves at a speed which can never be matched by tort

161. See Police Act, 1964, ch. 48, as subsequently amended.

162. See FIRST ANNUAL REPORT OF THE POLICE COMPLAINTS AUTHORITY 1985 H.M.S.O., 1986.

claims,¹⁶³ and should often be able to offer an investigatory service superior to anything the ordinary tort claimant can get from his lawyer.

Most of the alternatives to tort law so far reviewed are primarily investigatory, and are therefore deterrent, rather than compensatory in purpose. One of the main sets of alternatives to tort today, which is designed to be compensatory, is the increasing provision for victims of crime. Two main sets of procedures are currently at work. The first, which deals mainly with relatively minor cases, gives the criminal courts powers to order that compensation be paid by an offender when someone has suffered loss or injury as a result of his crime.¹⁶⁴ Very large numbers of such compensation orders are made today by criminal courts,¹⁶⁵ though it is often complained that courts are much more willing to make compensation orders in cases involving property damage rather than personal injury.¹⁶⁶ The difficulty seems to be that criminal courts are inexperienced in fixing damages for nonpecuniary losses, and feel much more confident about making compensation orders when some evidence is given as to the value of damaged or destroyed property. Recently, some regions have experimented with simple tariffs to guide criminal courts in compensating victims in minor personal injury cases; these have been found quite successful.¹⁶⁷ There are also wider proposals for enabling criminal courts to make further compensation orders.¹⁶⁸

The second set of provisions provides a more substantial nontort remedy for serious cases of personal injury. Since its creation in 1964, the Criminal Injuries Compensation Board has provided substantial compensation for those injured as a result of criminal violence.¹⁶⁹ The Board operates under a scheme approved by Parliament (though it has

163. For example, on January 1, 1987, a black youth of 19 was arrested and a few days later taken to the hospital with severe injuries which required brain surgery and left him partially paralyzed. His father complained that when he inquired of the police where his son was, he was refused all information, and only discovered his whereabouts after his son had been admitted to the hospital and operated upon. By January 22, the case was under investigation by the Police Complaints Authority. See *The Independent* (London), Jan. 23, 1987, at 2.

164. Powers of Criminal Courts Act, 1973, ch. 62, § 35. In England, the term "compensation," which in American usage often implies state-paid compensation, extends to compensation paid by the offender himself. In America, compensation paid by the offender is called "reparation."

165. See 16 *SOCIAL TRENDS*, *supra* note 21, at 197 (119,000 compensation orders made by magistrates' courts in 1984 and 6000 made by the Crown Court).

166. Vennard, *Magistrates' Assessments of Compensation For Injury*, 1979 *CRIM. L. REV.* 510, 510.

167. *Id.* at 511-13.

168. See generally D. HODGSON, *THE PROFITS OF CRIME AND THEIR RECOVERY* (1984); Ashworth, *Punishment and Compensation: Victims, Offenders and the State*, 6 *OX. J. L. STUD.* 86 (1986).

169. For a summary of the scheme, see P. ATIYAH & P. CANE, *supra* note 6, at 291-312; see also *REPORTS OF THE CRIMINAL INJURIES COMPENSATION BOARD*, cited in P. ATIYAH & P. CANE, *supra* note 6, at xxii; D. MIERS, *RESPONSES TO VICTIMIZATION* (1978).

not yet been put into statutory form)¹⁷⁰ and is funded by public monies. In essence, and subject to some qualifications, the Board pays compensation on the same principles and at the same general levels as damages at common law, including sums for pain and suffering and loss of amenity. Because tort damages in England are assessed by judges and not juries, there is no particular difficulty in having comparable levels assessed by a Board of qualified lawyers.¹⁷¹ There are several important differences between the awards made by the Board and the courts: the scheme establishes a threshold, at present of £400 (roughly \$700), below which compensation is not payable, as well as a fairly high ceiling for loss of earnings (presently about £30,000 or \$52,500 per annum); although the Board does not award punitive damages, compensation is payable even when the injury was caused by someone not responsible in tort because of insanity or infancy; the collateral benefits rule does not operate with regard to any other benefits payable out of public funds; finally, there is a rather wide exclusion from compensation of those whose conduct or way of life makes their compensation out of public funds inappropriate.¹⁷² Despite the exclusions, the scheme is in many respects very generous—far more generous than comparable American schemes¹⁷³—and it replaces a considerable amount of potential tort litigation. Although not many tort actions are brought against violent criminals themselves, there are of course many tort claims, both in England and America, which arise out of criminal violence. Furthermore, because many of these possible tort claims are likely to be brought against third parties rather than the criminals themselves, they often present especially difficult questions of responsibility, and are likely to be appealed.¹⁷⁴ Thus, the existence of

170. The scheme was in the process of being put into statutory form as part of the Criminal Justice Bill in 1987, when the dissolution of Parliament led to its abandonment for the time being.

171. There has been difficulty with certain cases, such as rape, in which tort claims are very rarely brought in England, since there is little experience for the Board to rely on. In the extraordinary case of *W. v. Meah*, damages in tort of £10,250 (roughly \$17,940) were awarded against a rapist after the victim had been awarded £3600 (roughly \$6300) by the Criminal Injuries Board, [1986] 1 All E.R. 935, 942 (1985). Awards from the board must be repaid out of the damages recovered from the attacker. The damages in *Meah* would certainly have been vastly higher if assessed by an American jury—perhaps a hundred times higher.

172. For a discussion of these exclusions, see P. ATIYAH & P. CANE, *supra* note 6, at 306-08.

173. For a summary of some American schemes (which it must be said are stingy by comparison with the English provisions), see Hoelzel, *A Survey of 27 Victim Compensation Programs*, 63 JUDICATURE 485 (1980).

174. Among the many sorts of cases falling within the scheme are claims that could be brought in tort against doctors or psychiatrists for failing to warn of the homicidal threats of a patient, *see, e.g., Tarasoff v. Regents of Univ. of Cal.*, 17 Cal. 3d 425, 551 P.2d 334, 131 Cal. Rptr. 14 (1976), or against other public officials for similar failings, *see, e.g., Johnson v. California*, 69 Cal. 2d 782, 447 P.2d 352, 73 Cal. Rptr. 240 (1968), claims against the police for failure to protect a plaintiff, *see* many examples cited in M. SHAPO, *THE DUTY TO ACT* 98-134 (1977), and claims against railroads,

this scheme, which enables compensation to be claimed more cheaply and more easily than by litigation, undoubtedly serves to eliminate many possible tort claims.

IV. SOME CONCLUSIONS

This rapid survey of some of the alternatives to tort law in England does not profess to be comprehensive. There are in fact many other areas where alternatives are coming into existence, or becoming more widely used. Some are primarily deterrent in nature, others are compensatory in purpose, some simply offer a different procedure to adjudicate claims that could be brought in tort. In some cases the alternatives replace claims which are perhaps more likely to be brought in contract but which could also be brought in tort. For example, the Press Council,¹⁷⁵ although lacking power to impose sanctions, offers the possibility of a condemnatory ruling as an alternative to a suit for defamation or one for breach of confidentiality or infringement of privacy (the last of which is not a tort in English law). There are as well new Ombudsmen appearing in the private market, such as the Banking Ombudsman and the Insurance Ombudsman, both of whom have power to award quite substantial compensation in a dispute between a customer and a bank or insurer. In addition, the Control of Pollution Act of 1974 enables the citizen to obtain an order for the abatement of a noise nuisance through an administrative body (a local authority¹⁷⁶). Some of these local authorities have delegated their powers to a single person who can, when appropriate, make an immediate order to stop a noise nuisance in the middle of the night—something which would hardly be possible for a court to do. Finally, any serious comparative study would reveal that England has procedures for dealing with certain abuses of legal process typically redressed in America by tort actions, even though English procedures would not be perceived as being alternatives to tort. For instance, the control of court procedures by orders for costs (including attorney's fees), or for prejudgment interest, or simply by preventing the abuse of ordinary court procedures, seems more widely practiced in England than in America, where new tort liabilities for abuses of process, or even for failure to pay debt by insurance companies, have been invented or

hotels and other institutions for failure to protect inmates, see 3 F. HARPER, F. JAMES & O. GRAY, *supra* note 83, § 16.5, at 413 n.63.

175. See N. PAUL, *PRINCIPLES FOR THE PRESS, A DIGEST OF PRESS COUNCIL DECISIONS, 1953-1984* (1985). The Press Council has had some very distinguished Chairmen, such as Lord Devlin, Lord Pearce and (currently) Sir Zelman Cowen, but it has not been very effective. For a highly critical view, see G. ROBERTSON, *PEOPLE AGAINST THE PRESS* (1983).

176. Control of Pollution Act, 1974, ch. 40, §§ 58-59.

developed.¹⁷⁷

Is it now possible to draw any general conclusions from this survey? I think it is possible to make two tentative suggestions. The first is that tort litigation, particularly in the higher courts, appears to me to be regarded in England as something fundamentally out of the ordinary. Litigation, and especially High Court litigation, is, I think, clearly regarded as a way of control and of securing compensation that is not, and ought not to be, regarded as a routine, everyday procedure. This is, I think, well demonstrated by the regular recurrence of the formula in modern nontort alternative procedures that the alternative is to be open to citizens when it would not be "reasonable" for that claim to be brought in the courts. What can be sensed from the use and workings of this formula is the idea, not merely that relatively trivial cases should not be litigated, but that litigation itself is often, indeed very often, unreasonable. The alternatives seem to be favorably regarded particularly when the claimant is not claiming substantial compensation, or is only claiming for quantifiable economic losses, and is not asking for compensation for pain and suffering. In a great many areas the first and most obvious means of obtaining compensation, or of controlling some perceived abuse, lies outside the courts. But equally it remains true that the courts often continue in the background to be available for major issues of principles, or for really new and big cases. Historically, this falls into line with the traditional use of the court system in England. Courts have never been regarded as instruments for everyday use in England. They are too slow, too expensive, too cumbersome and too alien to the man in the street. They are far more effective when they are used as instruments of supervision, called on only for occasional use. My sense is that this is less true in America, where tort claims are, in many areas, thought of as the primary means of redress of grievances, rather than as rare and cumbersome weapons to be wheeled out for occasional use only.

The second tentative conclusion that can be drawn from this article is that tort law, as a general medium of legal control of standards of behavior, plays a much more important role in America than in England.

177. American developments involving the creation or expansion of tort liability in circumstances in which English law proceeds by more direct control of abuse of process, are illustrated by RESTATEMENT (SECOND) OF TORTS §§ 674, 682 (1977) (wrongful use of civil proceedings; abuse of process). Compare *O'Toole v. Franklin*, 279 Or. 513, 569 P.2d 561 (1977) (discussing in context of malicious prosecution the "English Rule" of special injury and the more expansive "American Rule" as it appears in RESTATEMENT (SECOND) OF TORTS § 674 (1977)); Schwarzer, *Sanctions Under the New Federal Rule 11—A Closer Look*, 104 F.R.D. 181 (1985) (discussing increased sanctions provided for in the 1983 amendment to Rule 11 of the Federal Rules of Civil Procedure) with *Business Computers Int'l, Ltd. v. Registrar of Companies*, [1987] 3 All E.R. 465 (control of litigation by court held a ground for declining to extend liability for negligent conduct of litigation).

Nobody in England would regard tort law as playing more than a very peripheral role in the life of the society, as having any major responsibility for setting social standards of behavior, or as policing and controlling the operation of the free market. That is clearly not the case in the United States. Because of the power of juries, the very large awards of damages in America as compared with the rather miniscule awards in England, and because so many areas of public life and activity are controlled by the courts in America (as opposed to being regulated by the legislature or the government, as they are in England¹⁷⁸), tort law is a more central part of the means of social control in America. Together with the free market, tort law thus 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; but that is another story.¹⁷⁹

178. See P. ATIYAH & R. SUMMERS, *supra* note 72, at 115-56.

179. See Atiyah, *American Tort Law in Crisis*, 7 OX. J. LEG. STUD. 279 (1987).