

EMPIRICISM AND TORT LAW†

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I. INTRODUCTION

Although I am not a person who himself conducts empirical studies of tort law, I am an avid consumer of those studies that have been prepared.¹ In this regard, I can observe at the outset that there is an abundance of studies—indeed, an entire industry of studies—that have focused on the actual operation of the tort litigation system. Such studies were subjected to a meta-review by Michael Saks in a 100-page article in the early 1990s,² and another long meta-review by Marc Galanter a few years ago.³ A full review of that industry of studies, and likewise the Saks and Galanter meta-reviews, would take more time than I have been allotted at this conference and would likewise consume more space than the *University of Illinois Law Review* is willing to assign to me. However, with respect to those studies, there are a number of observations I would like to make; those observations will be deferred to the second half of this paper.

† This article was largely prepared during the Summer of 2001, after Professor Schwartz was diagnosed with and treated for a brain tumor. The organizers of the Symposium and Professor Schwartz agreed that he would contribute a less fully detailed paper than he would ordinarily have written. Professor Schwartz died before he was able to revise his paper or write a conclusion for it. The University of Illinois Law Review is, nevertheless, pleased and honored to present this typically thoughtful and insightful article by Professor Schwartz.

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1. See Gary T. Schwartz, *Reality and the Economic Analysis of Tort Law: Does Tort Law Really Deter?*, 42 UCLA L. REV. 377, 381–87 (1994) [hereinafter Schwartz, *Reality in Economic Analysis*]. A function that this article can serve is to enable me to update the bank of information on which I relied in my 1994 article. While obviously, I have kept my eyes open since 1994 to new information that might either confirm or dispute my 1994 findings, I can acknowledge that I have come up largely empty. About the most significant contribution is FRANK A. SLOAN, DRINKERS, DRIVERS, AND BARTENDERS: BALANCING PRIVATE CHOICES AND PUBLIC ACCOUNTABILITY (2000), an admirably multifaceted study of the liability of bartenders for serving excessive liquor to bar patrons who are already intoxicated.

2. Michael J. Saks, *Do We Really Know Anything About the Behavior of the Tort Litigation System—And Why Not?*, 140 U. PA. L. REV. 1147 (1992).

3. Marc Galanter, *Real World Torts: An Antidote to Anecdotes*, 55 MD. L. REV. 1093 (1996).

What I would like instead to focus on, in the paper's first half, is not the tort litigation system as such, but rather on the basic goals or objectives of tort law, and what we know or do not know about the extent to which tort law achieves those objectives. If one wants to consider tort law from an empirical perspective, these strike me as the core issues, even though they are treated only glancingly by scholars such as Saks and Galanter. To be sure, it should be acknowledged that identifying those goals or objectives is of course, a matter of theory; accordingly, various scholars, adhering to different theories, may themselves disagree about what the appropriate objectives of tort law indeed are.

II. TORT LAW'S OBJECTIVES

Many scholars (including me) endorse the deterrence of inappropriately dangerous conduct as an important goal of tort law. This certainly is a goal that is endorsed by tort scholars who are economically oriented, and it is likewise endorsed by scholars or analysts who find a humane or progressive dimension in the objective of preventing unnecessary deaths and serious injuries.⁴ Yet, while there is enormous attention to deterrence as a goal of tort law, there is substantial doubt about the actual deterrence efficacy of tort law. In an article I published several years ago, I identified two positions that groups of scholars have frequently taken.⁵ In particular, I referred to a number of tort analysts as "skeptics," who doubt that tort law achieves anything by way of deterring unduly dangerous conduct.⁶ But I also refer to a school of economic analysts, who tend, at least implicitly, to assume that there is almost a one-to-one relationship between the incentives afforded by tort liability rules and the actual conduct of potential tort defendants (and for that matter, the conduct of potential tort plaintiffs as well).⁷ In that article, I reviewed the evidence—and information—that was then available to me. Having done so, I ended up supporting an intermediate position, a position that suggested that tort law in fact provides some significant amount of deterrence, though not nearly as much deterrence as economic analysts implicitly assume.⁸

Let me begin here by critiquing my own earlier article. Certainly, there is an element of softness and vagueness in the intermediate position that it supports. Insofar as the article suggests that the deterrence efficacy of tort liability rules is something more than 1% but something less than 100%, it obviously leaves wide open the assessment of what the

4. See Gary T. Schwartz, *Mixed Theories of Tort Law: Affirming Both Deterrence and Corrective Justice*, 75 TEX. L. REV. 1801 (1997).

5. See Schwartz, *Reality in Economic Analysis*, *supra* note 1; see also Gary T. Schwartz, *Auto No-Fault and First-Party Insurance: Advantages and Problems*, 73 S. CAL. L. REV. 611 (2000).

6. Schwartz, *Reality in Economic Analysis*, *supra* note 1, at 381–87.

7. *Id.* at 379–81, 423.

8. *Id.* at 422–30.

exact extent of the deterrence efficacy of the tort system actually is. I should also acknowledge the limitations of my own abilities in working my way through the relevant empirical information. For example, there are by now a large number of empirical studies discussing what the significance is of moving from a tort system as applied to auto accidents to a system that includes a large measure of auto no-fault.⁹ I simply lack the statistical skills to assess the comparative merits of these various studies—which frequently reach different results or which at least provide diverging interpretations for what might be similar results.

Yet despite this self-critique, the intermediate position I adopted several years ago strikes me as attractive, in comparison to the stark alternatives of assuming that tort law achieves nothing by way of deterrence or assuming that tort law is almost completely effective. Moreover, I can mention that my article has not been entirely without influence within the Academy. During the 1980s, for example, Stephen Sugarman was a leader among the camp of realistic skeptics.¹⁰ In a more recent article, however, Professor Sugarman, referring to my article, seems much less skeptical than he previously had been.¹¹

A second objective for tort law is corrective justice or interpersonal fairness. This is an objective that is espoused by many scholars (including me), though it is commonly rejected or disdained by scholars whose approach to tort law is entirely economic or instrumental. Let me report the following. When economically oriented deterrence theorists are quizzed about what empirical support there might be for their own theories of tort law, I have frequently heard them respond by asking, “What empirical support is there for corrective justice approaches to tort law?” At this point, however, corrective justice scholars can frequently claim that they are in essence entitled to a free ride. Corrective justice, or interpersonal fairness, is, in their assessment, a philosophical norm. Accordingly, what is or is not a fair or just result is, in an important respect, not a matter of factual circumstances. To this extent, corrective justice scholars can regard empirical data as simply lacking in significance. Indeed, I cannot think of a single major book or article by a corrective justice scholar that has devoted any attention to empirical issues.

However, in this regard, one can consult a book published in 1997 by a Toronto team of scholars headed by Don Dewees, Michael Trebilcock, and David Duff, entitled *Exploring the Domain of Accident Law: Taking the Facts Seriously*.¹² That book attempts to give comprehensive consideration to empirical data and what light that data throws on the effectiveness of the tort system. Having identified various possible objec-

9. *Id.* at 394–97.

10. See Stephen D. Sugarman, *Doing Away with Tort Law*, 73 CAL. L. REV. 555 (1985).

11. See Stephen D. Sugarman, *A Century of Change in Personal Injury Law*, 88 CAL. L. REV. 2403 (2000).

12. DONALD N. DEWEES ET AL., *EXPLORING THE DOMAIN OF ACCIDENT LAW: TAKING THE FACTS SERIOUSLY* (1997).

tives of tort law, the book identifies both tort-system inputs and tort-system outputs, in an effort to assess the extent to which those inputs and outputs shed light on the functioning of the tort system.¹³ Corrective justice is one of the objectives that the Toronto book assigns to the tort system.¹⁴ Accordingly, the book inquires about tort-system outputs and what those outputs might reveal about the viability of the corrective-justice rationale for tort law.¹⁵

While I applaud the Toronto team's effort, I am required to say that the book's relevant subchapters are not especially successful. This is partly because the book is sometimes superficial in its assessment of what a corrective-justice rationale for tort law entails. For example, in discussing both the auto accident sector of the tort system and its medical malpractice sector, the Toronto book emphasizes that the relevant dependents are generally covered by liability insurance.¹⁶ Accordingly, payments to plaintiffs are made not by the tortfeasors themselves but rather by their insurance companies.

According to the Toronto team, this practical reality prevents the tort system from fulfilling a corrective-justice objective.¹⁷ But this effort to derive an entailment of corrective justice may well be premature. I am unaware of any corrective-justice scholars who themselves have conceded that liability insurance is inconsistent with the corrective-justice rationale. This is indeed an issue that I attempted to explore in an article a number of years ago¹⁸ My own conclusion was that liability insurance was inconsistent with certain interpretations of corrective justice but quite consistent with other interpretations.¹⁹ In particular, if corrective justice means that the tortfeasor has an obligation to assure that the victim of his negligence is compensated for his losses, then liability insurance furthers rather than undermines the corrective-justice rationale.

Another issue that the Toronto team explores is the percentage of victims of negligent conduct who are able to recover in tort for their losses.²⁰ Insofar as victims of negligence are not in a position to secure such compensation, the Toronto team regards this as an output that impugns the tort system's corrective justice objective.²¹ Accordingly, in their chapter on medical malpractice, the Toronto team emphasizes that the percentage of victims of medical malpractice who recover in tort

13. *Id.* at 10–12.

14. *Id.* at 11–12.

15. *Id.*

16. *See id.* at 19–20, 101.

17. *Id.*

18. Gary T. Schwartz, *The Ethics and Economics of Tort Liability Insurance*, CORNELL L. REV. 313 (1990).

19. *Id.* at 362–65.

20. DEWEES ET AL., *supra* note 12, at 11–12.

21. *Id.*

seems quite low, and they regard this “output” as refuting a corrective-justice rationale for the law of medical malpractice.²²

However, if one moves from medical malpractice to auto accidents, the situation changes quite dramatically. Most victims of motoring negligence do seem able to recover for their losses in tort. Yet in their subchapter on auto accidents, the Toronto team fails to make this point, and hence fails to give the auto-litigation system the corrective-justice commendation that it perhaps deserves. In general, the Toronto team seems far more interested in the extent to which the glass is not full, rather than the extent to which it may be partially or even substantially full. The team seems far more interested in developing points that criticize the tort system than in developing those points that might suggest support.

To be sure, the Toronto team, in its focus on the percentage of victims of negligence who do secure a tort recovery, should be given credit for identifying one empirical line of inquiry that does seem relevant to an assessment of the corrective-justice rationale for tort liability. And their finding does indeed cast a negative light on the medical malpractice system. It is helpful, however, to continue to consider why so many victims of medical malpractice are not in a position to launch successful personal-injury claims. Such an assessment is relevant to the question of how generalizable the team’s critique of the malpractice system might be. One reason for the underenforcement of valid claims is that a patient suffering an adverse result may not be in a position to recognize that this result is a consequence of medical malpractice rather than merely something that is entailed by the medical problem that brought the patient into association with the physician or the hospital in the first place. Related to this point is the very high cost of proving a medical malpractice claim in court. Under the prevailing rules of medical malpractice law, which require the plaintiff to prove that the physician has departed from prevailing medical standards, the plaintiff (or the plaintiff’s lawyer), in order to present a plausible case, must at the very least hire one or two experts who can indeed identify prevailing standards and who can then compare those standards to the facts of the treatment in the individual case. Lawyers frequently tell me that apart from a limited number of distinctly easy cases (for example, a sponge left in a patient after surgery), the cost of mounting a plausible malpractice claim is at least \$50,000. Accordingly, unless the victim’s damages are well in excess of \$100,000, developing a malpractice claim is not economically sensible on the part of the lawyer whom the malpractice victim might consult. Not only, then, are malpractice claims generally hard to develop, but unless the victim’s injuries are conspicuously severe, the cost of mounting such a claim generally discourages a skilled lawyer from even accepting the case. To that extent, even though auto accident litigation and medical-malpractice liti-

22. *Id.* at 120–22.

gation are each governed by a negligence liability standard, the difficulties of proving negligence in the two categories of cases vary dramatically.²³ All of this suggests to me a real problem with the medical malpractice system, especially in its application to those victims whose injuries are less than catastrophic. As it happens, this is a problem that I had occasion to mention at a conference here at the University of Illinois not long ago.²⁴

If one considers further what empirical information might bear on an assessment of the corrective-justice rationale for tort law, there is one line of analysis that goes unmentioned by the Toronto team. Various studies have been conducted relating to the "sense of satisfaction" that litigating a tort claim provides to tort plaintiffs. To be sure, care should be given to the significance of tort plaintiffs' "sense of satisfaction." Consider an accident victim who has pursued a tort claim to a particular outcome. Whether that victim believes that this outcome is fair or just is, of course, not the same as whether that outcome is indeed fair or just. The latter is, if you will, a matter of moral philosophy, rather than of the victim's own belief.

One further problem is that whatever sense of fairness plaintiffs (and for that matter, defendants) end up experiencing may be a matter of the adequacy of the relevant civil procedures, as well as a matter of the tort liability rules that eventually determine litigation outcomes. Studies conducted by Lind and MacCoun compare the attitudes of litigants who have gone through full trials with the attitudes of those victims who have gone through arbitration or through judicial settlement conferences.²⁵ The study finds a higher level of satisfaction for those who have proceeded with trials or arbitration, evidently because of the greater respect shown for the positions they have taken.²⁶ Certainly, such studies, though of some interest to students of tort liability rules as such, are primarily of interest to scholars who focus on issues of civil procedure. In any event, the RAND Corporation Institute for Civil Justice, in one of its most important studies, has gathered valuable data on the perceptions of fairness experienced by tort plaintiffs.²⁷

A quite separate line of empirical information concerns the extent of the overhead of the tort system. One should be careful, however, in clarifying what the significance is of data bearing on the extent of that overhead. Is it indeed an objective of tort law to efficiently deliver com-

23. In an auto case, the only evidence needed may be the eyewitness testimony of the victim concerning the circumstances of the individual accident.

24. Gary T. Schwartz, *Medical Malpractice, Tort, Contract, and Managed Care*, 1998 U. ILL. L. REV. 885.

25. E. ALLAN LIND ET AL., *THE PERCEPTION OF JUSTICE: TORT LITIGANTS' VIEWS OF TRIAL, COURT-ANNEXED ARBITRATION, AND JUDICIAL SETTLEMENT CONFERENCES 1* (RAND Inst. for Civil Justice ed., 1989).

26. *Id.* at 75-79.

27. *Id.* at 46, 48-49 figs.4.1, 4.2, 4.3.

pensation to accident victims? Is this indeed a primary objective? If it is, then the empirical information shows with adequate clarity that the tort system is a significant failure. Even for auto accidents where high volume helps constrain overhead, only about 67% of the resources entering the system end up being delivered to accident victims.²⁸ When litigation is required, the net compensation delivered to accident victims is even less than this. Thus, for non-auto litigation, the net compensation delivered to accident victims is significantly less than 50%. Scholars such as Saks and Galanter have relied on data of this sort in their critique of the tort system.²⁹

Many tort scholars, however, would regard this line of criticism as misplaced, at least in part. Those scholars, at the level of theory, reject the idea that compensating accident victims as such, is an important or essential objective of tort law. For the economist, for example, the compensation made available to accident victims is merely an inducement to victims to encourage them to bring those lawsuits that will achieve the basic objective of deterrence.³⁰ To be sure, if economic analysts are concerned with reducing the costs of accidents, they are also concerned with cost minimization across the board. Even if tort law is indeed effective in reducing accident costs, that cost savings must be balanced against the cost overhead entailed by the tort system as such. Whether that overhead is 45% or instead 60% is, therefore, an important consideration. But it is by no means decisive. For all one knows, the deterrence benefits of the tort system might overwhelm the tort system's overhead, whatever that overhead might be. Whether the overhead is 45% or instead 60% may, therefore, be an issue that ultimately has no more than limited or partial significance.

For the corrective justice scholar, the issue of system overhead plays out in a somewhat different way. If the function of the compensation provided to the victim is to achieve justice, or to eliminate the injustice that initially results when the defendant injures the plaintiff by tortious conduct, the fact that the system involves some significant measure of overhead may not call into question its basic function in providing corrective justice. To provide a perhaps helpful analogy to the criminal law, the county district attorney's office may devote significant resources to bringing successful prosecutions against persons who have committed serious felonies. But if that criminal justice system is itself justified in terms of the moral objective of retribution, one could regard the exact extent of the resources that are devoted to the efforts of the district attorney's office as not especially significant.

28. See, e.g., STEPHEN CARROLL ET AL., *THE COSTS OF EXCESS MEDICAL CLAIMS FOR AUTOMOBILE PERSONAL INJURIES* (RAND Inst. for Civil Justice ed., 1995).

29. See, e.g., Galanter, *supra* note 3, at 1160.

30. See, e.g., RICHARD A. POSNER, *ECONOMIC ANALYSIS OF LAW* 209 (5th ed. 1998).

Despite what seems to be the obvious relevance of this line of analysis, it is difficult to believe that the corrective-justice rationale for tort law is immune from all considerations relating to the extent of the tort system. A common observation is that the benefit derived from the achievement of justice is not entirely independent of the cost of achieving such a just result. If this common observation is on the right track, then there may well be some overhead cost of the tort system that might make that system unattractive as a device for achieving corrective justice. The failure of corrective-justice scholars, at least so far, to consider issues such as this indicates something about the limitations of the current corpus of corrective-justice scholarship.

III. THE WORKING OF THE TORT-LITIGATION SYSTEM

As indicated in this paper's introduction, most empirical studies concerning tort law relate to the operation of the tort litigation system. In discussing the findings and conclusions that those studies have brought forward, let me here identify the competing views taken by two dramatically competing groups. One view I will refer to as the "alarmist view." That view suggests that the court system is in all kinds of ways, out of control. Tort law does not deter wrongdoing; rather, it terrifies potential defendants, perhaps encouraging them to leave their industries; and it encourages excessive litigation in search of scandalously large judgments. It is appropriate to acknowledge here, that at least in the past, one contributor to the alarmist view is the current Solicitor General, Theodore Olsen. He has referred to our system of civil liability as "demented."³¹

It is initially fair to point out that the alarmist view has been poorly documented empirically; indeed, it is supported in large part by anecdotes and factoids. Worse yet, the alarmist view has contributed significantly to the tort-reform movement in a way that has given that movement a somewhat disreputable view in the eyes of many serious scholars. The alarmist view is often seen as a concoction of a right-wing political movement.

The alternative to what I have referred to as the alarmist view is what I will here describe as the "reassuring view." This view is largely reflected in the meta-reviews by Saks and Galanter that have been referred to above.³² The reassuring view is likewise embodied in recent symposia in the *Wisconsin Law Review*³³ and the *DePaul Law Review*.³⁴ Likewise, the reassuring view is supported by careful one-state studies

31. Theodore B. Olsen, *Was Justice Served?*, WALL ST. J., Oct. 4, 1995, at A-14.

32. See *supra* notes 1-2.

33. See Special Issue: *The Future of Punitive Damages*, 1998 WIS. L. REV. 1.

34. Symposium, *The American Civil Jury: Illusion and Reality*, 49 DEPAUL L. REV. 197 (1998).

conducted by scholars such as Thomas Eaton³⁵ and Deborah Merritt.³⁶ Similarly, the alarmist view is supported by much of the work conducted by Theodore Eisenberg,³⁷ who is in attendance at this conference. To summarize, the reassuring view tends to emphasize that the number of tort claims is surprisingly low and has remained relatively stable over time. Awards are generally modest or moderate in their amounts. Juries generally reach plausible results on the issues of both liability and damages. Moreover, those results are about the same as the results that judges would reach if trial were by judge rather than by jury. Similarly, the number of punitive-damage verdicts in personal-injury cases is quite small, and the size of those verdicts is generally predictable. Moreover, the amount of punitive-damage awards is generally under control, especially given the prospect of judicial review.

I find generally unfortunate the alarmist view and the extent to which it has influenced both public opinion and political debate. Nevertheless, I am far from adequately consoled by the reassuring view. Let me identify the reasons for my nonconsolation.

First of all, I can point out that while it is common to identify the alarmist view with political interests that are on the right, the views contributing to the alarmist view have also been advanced, at least at times, by scholars on the left. For example, in his 1985 book, *Total Justice*, Lawrence Friedman describes what he regards as the prevailing legal culture and finds in that legal culture a “general expectation of recompense for injuries and loss.”³⁸ More specifically, Friedman finds that juries are far more willing than they were before to measure tort compensation in very generous terms, in light of a social theory of “total justice.”³⁹ Friedman suggests that courts are far less willing now than they were in earlier decades to reduce individual awards that might themselves seem extravagant or excessive.⁴⁰ Accordingly, the view that tort awards have been increasing sharply (more on this point below) in a way that courts are not willing to control is a view that is adhered to on the political left rather than the political right.

A further point is that at times analysts contributing to the reassuring view focus on unduly easy targets afforded by alarmist writers, in a way that makes the reassuring view seem itself complacent. Too often, alarmist advocates suggest that jury verdicts are themselves “random,” in terms of the results reached on the issue of liability, and on the measure

35. Thomas A. Eaton et. al., *Another Brick in the Wall: An Empirical Look at Georgia Tort Litigation in the 1990's*, 34 GA. L. REV. 1056 (2000); Thomas A. Eaton & Susette N. Talarcio, *A Profile of Tort Litigation in Georgia and Reflections on Tort Reform*, 30 GA. L. REV. 627 (1996).

36. Deborah Jones Merritt & Kathryn Barry, *Is the Tort System in Crisis?: New Empirical Evidence*, 60 OHIO ST. L.J. 315 (1999).

37. See, e.g., Theodore Eisenberg et. al., *The Predictability of Punitive Damages*, 26 J. LEGAL STUD. 623 (1997).

38. LAWRENCE FRIEDMAN, *TOTAL JUSTICE* 5 (1985).

39. *Id.* at 61.

40. *Id.* at 62–63.

of damages. Given such claims of randomness, those contributing to the reassuring view can show that there is a substantial correlation between the merits of the claim and the outcome on the issue of liability, and likewise a substantial correlation between the seriousness of the injury and the damage award that the jury assigns. By showing such a substantial correlation, those in the reassuring camp can claim that they have defeated the idea that jury verdicts are, indeed, random. However, even if the idea of complete randomness is defeated, that leaves open the possibility that jury verdicts are random to some significant extent. By focusing on the most extreme claims of "randomness" that alarmist critics advance, the scholars in the reassuring camp are often able to avoid what may be the more difficult and the more serious criticisms.

Indeed, my own review of the reassuring writings suggests to me that they sometimes mischaracterize the relevant empirical writings in a way that suggests that they themselves have a mildly ideological tinge, despite their own commitment to empiricism. For example, both the meta-reviews prepared by Saks and Galanter suggest in a significant way that the tort system, rather than being marked by an excessive number of bogus claims, exhibits a significant underenforcement of legally valid claims.⁴¹ In making this point, both Saks and Galanter rely on an important study conducted by the RAND Corporation's Institute for Civil Justice.⁴² That study finds that only 10% of all accident victims recover any damages at all from the tort system.⁴³ One empirical study of the resolution of medical malpractice claims concludes that "unjustified payments are probably uncommon."⁴⁴

This is, indeed, an important finding that the RAND system generates. But that finding is evidently misinterpreted by both Saks and Galanter, insofar as they seemingly conclude that the RAND finding shows that the tort system exhibits an underenforcement of legally valid claims. The RAND study, while finding a 10% rate of tort recoveries by accident victims, is utterly silent on the issue of what percentage of all injuries are indeed caused by the tortious conduct of one or more parties. Certainly, the RAND study does show that Americans are not simply suing at the

41. See *supra* notes 2-3.

42. DEBORAH R. HENSLER ET AL., COMPENSATION FOR ACCIDENT INJURIES IN THE UNITED STATES 1 (RAND Inst. for Civil Justice ed., 1991).

43. *Id.*; see also Frank A. Sloan & Chee Ruey Hsieh, *Injury, Liability, and the Decision to File a Medical Malpractice Claim*, 29 LAW & SOC'Y REV. 413 (1995).

44. See Mark I. Taragin, *The Influence of Standard of Care and Severity of Injury on the Resolution of Medical Malpractice Claims*, 117 ANNALS INTERNAL MED. 780 (1992). However, another study finds that there is a substantial chance of a payment being made to a malpractice plaintiff even though a review of the medical records finds an absence of malpractice. See Frederick W. Cheney, *Standard of Care and Anesthesia Liability*, 261 JAMA 1599 (1989). Those reviewing the empirical literature in a sense have the choice as to whether to highlight the finding in the Taragin article or, instead, favor the finding in the Cheney article. Compare David M. Studdert et. al., *Beyond Dead Reckoning: Measures of Medical Injury Burden Malpractice Litigation, and Alternative Compensation Models from Utah and Colorado*, 33 IND. L. REV. 1643, 1686 n.15 (2000) (citing the Taragin article), with DEWEES, *supra* note 12, at 121 (citing the Cheney study).

metaphorical drop of a hat; to this extent, the study challenges the alarmist view, at least in its most outlandish statements. But the RAND study says nothing at all about the extent to which those victimized by tortious conduct are declining to bring or enforce valid tort claims. That scholars as shrewd as Saks and Galanter would misread the RAND study in this way suggests to me an ideological predisposition on their part towards the conclusion of underutilization that they derive.

In this regard, one can study the internal logic in the Conclusion of the Saks meta-review. The first half of that Conclusion reemphasizes how the alarmist view is poorly supported by the relevant facts.⁴⁵ But the second half of the Conclusion goes off in a different direction, emphasizing how uncertain and inconclusive all of the relevant data turn out to be. It is as though Saks wants to have it both ways. On the one hand, he writes as a social scientist emphasizing the uncertainties in the empirical data; on the other hand, he writes as a critic of the factual positions that he seems to disapprove of.

A second point is that scholars on the left, who rely on empirical data in order to challenge the tort-reform movement that is perceived as politically on the right, seem themselves willing to depart from the empirical approach when doing so would support their own political values. Consider in this regard, Marc Galanter, who is a superb scholar. Galanter has complained at length about the extent to which the public discussion of punitive-damage practices has relied on myths rather than realities.⁴⁶ However, Galanter has also coauthored an article that attempts to provide normative support for current punitive-damage practices.⁴⁷ In that article, he and his coauthor discuss at length the *Ford Pinto* case.⁴⁸ I am required to report that this discussion is primarily mythical rather than empirical. Quite simply, the Galanter account invents facts about the case that are simply absent in the record of the case, or in the court's opinion.⁴⁹ If, then, the alarmist opponents of punitive damages have frequently relied on the technique of mythimizing, that technique has not been absent from the arsenal of those who are in general affiliated with the reassuring view. To that extent, those scholars' commitment to an empirical approach, regardless of the outcomes that such an approach might yield, can be called into question.

Furthermore, there is indeed evidence of the overuse or abuse of the tort system by supposed tort victims that has not been adequately discussed by those advocating the reassuring view. To be sure, a recent study of auto-claiming practices, for example, prepared by Steve Carroll

45. See Saks, *supra* note 2, at 1287–88.

46. See, e.g., Marc Galanter, *Shadow Play: The Fabled Menace of Punitive Damages*, 1998 WIS. L. REV. 1.

47. Marc Galanter & Davis Luban, *Poetic Justice: Punitive Damages and Legal Pluralism*, 42 AM. U. L. REV. 1393 (1993).

48. *Id.* at 1436–38.

49. See Gary T. Schwartz, *The Myth of the Ford Pinto Case*, 43 RUTGERS L. REV. 1013 (1991).

for the RAND Institute of Civil Justice, compares the pattern of claimed auto injuries in tort jurisdictions with the pattern of claim injuries in jurisdictions that have adopted strong no-fault auto compensation programs as an alternative to the ordinary tort system.⁵⁰ As one compares the logic for claiming in tort jurisdictions with the logic for claiming under no-fault programs, one can see how tort jurisdictions are likely to encourage inflated claims for so-called soft injuries. And indeed, the Carroll finding is that a very substantial fraction of all soft-injury claims in tort jurisdictions are indeed bogus, or at least significantly inflated.⁵¹

Let me repeat again the point I volunteered above—that I am not a trained empirical methodologist. Nevertheless, I can acknowledge that Carroll's methodology seems pretty solid to me; and so far as I can tell, his methodology and his conclusions have not yet been called into question by other scholars. If Carroll is correct, then excessive claims are a major feature of the tort system, at least in its application to routine auto accidents—accidents that RAND tends to refer to as belonging to the first tier of the tort system.

Yet, if this is an appropriate evaluation of first-tier tort claims, other comments may be available concerning the excesses of the tort system with respect to high-stakes mass torts, the so-called third tier of the tort system. Consider, for example, tort litigation for breast-implant injuries. Over \$7 billion was offered in settlement to the supposed victims of breast implants, and even that settlement broke down because not enough plaintiffs were willing to accept it.⁵² At the time of the settlement offer, there was real doubt as to whether breast implants really cause the type of auto-immune diseases that the settlement was largely designed to cover.

However, within the last two years, a panel of scientists reported to a federal district court judge, and a committee composed by the National Academy of Sciences has issued its report.⁵³ Each of these two documents concludes that the current evidence does not support the claim that breast implants are an important cause of auto-immune diseases. Granted, the current evidence may not be conclusive on the issue of breast-implant responsibility for such diseases. Even so, if later studies do find that breast implants cause such auto-immune diseases, it is very difficult to believe that the volume of such diseases (which until now have not been scientifically confirmed) will be so substantial as to provide a rationale for the \$7 billion settlement offer.

50. Stephen Carroll, *Effects of an Auto-Choice Automobile Insurance Plan on Costs and Premiums*, at <http://www.rand.org/publications/CT/CT141/> (last visited Feb. 2, 2002).

51. *Id.* at 2.

52. Daniel Wise, *Advice to Breast Implant Plaintiffs: Take the Money*, *RECORDER*, July 1, 1999, at 2.

53. *SAFETY OF SILICONE BREAST IMPLANTS 179-97* (Stuart Bondurant et al. eds., 2000).

Another example concerns a fascinating article coauthored by Theodore Eisenberg and Kevin M. Clermont several years ago.⁵⁴ This article compares the outcome of cases decided by judges with the outcomes of cases decided by juries. Its interesting finding is that the judicial outcomes were more favorable to plaintiffs than the jury outcomes. This article has been interpreted by many (including Galanter) as refuting the idea that juries are more sympathetic to personal-injury victims than judges would be. But Eisenberg himself is explicit that this is a misinterpretation.⁵⁵ Cases get sent to judges only if each side waives its right to trial by jury. Absent knowledge as to what factors persuade parties to waive their jury-trial right, the significance of the outcome of cases that are dealt with by bench trials is extremely difficult to ascertain. As Eisenberg and I agreed in conversation at the *University of Illinois Law Review* conference, in a way one would expect there to be no bench trials at all. In almost every case, either the plaintiff or the defendant would see some advantage in having the case tried by a jury rather than by a judge. The finding of the Eisenberg article is, therefore, certainly intriguing, but it does not begin to support the interpretation that has commonly been bestowed upon it. Indeed, that interpretation, when it comes from a skilled methodologist, is so unjustified as to come across as ideologically colored.

A related question concerns the size of personal-injury awards. The alarmist view tends to regard the size of such awards as disturbing, while the reassuring view tends to regard them as moderate and acceptable. Here the relevant data compiled mainly by the RAND Institute for Civil Justice, which has been studying jury awards for many years. Early RAND studies focused on awards in San Francisco and Cook County, Illinois, during the period of 1959 to 1980.⁵⁶ One study found that while the median award remained reasonably stable, the average award (in real dollars) doubled during the twenty-year period. A later study looked at awards in several California counties and also Cook County during the 1980s.⁵⁷ This study found that the mean award had doubled again.⁵⁸ RAND is currently updating its data on jury awards, but the new RAND findings are not yet available.

Of course, there are enormous problems involved in interpreting the significance of the median or the mean jury award. After all, the vast majority of cases settle, and it is only the exceptional cases—perhaps 1%

54. Kevin M. Clermont & Theodore Eisenberg, *Trial by Jury or Judge: Transcending Empiricism*, 77 CORNELL L. REV. 1124 (1992).

55. *Id.* at 1174.

56. MICHAEL G. SHANLEY & MARK A. PETERSON, *COMPARATIVE JUSTICE: CIVIL JURY VERDICTS IN SAN FRANCISCO AND COOK COUNTIES, 1959-1980* (RAND Inst. for Civil Justice ed., 1983).

57. ERIK MOELLER, *TRENDS IN CIVIL JURY VERDICTS SINCE 1985* (RAND Inst. for Civil Justice ed., 1996).

58. *Id.*

or 3% of the total—that finally are decided by the jury. If jury awards are increasing, this might support either of two inferences. One, that juries are becoming more generous in their assessment of injuries; and second, lawyers are modifying their settlement strategies, so that a different set of cases is being sent to juries for the evaluation of damages. The study referred to above by Eric Moeller finds that both factors are in operation: lawyers have modified their practices, resulting in the selection of cases for jury trials, and juries are becoming significantly more generous in evaluating injuries of those cases that are submitted to them.⁵⁹ I have spoken to Moeller about his confidence in his findings. As he tells me, “My r-squares are pretty good by the norms of the social sciences, but they are not that great.”

There is likewise the question of the size of punitive damage awards. It is quite clear that the award of punitive damages is anything but “routine,” and it seems equally clear that the percentage of punitive damage awards is not growing significantly. Still, there seems to be adequate evidence that when punitive damages *are* awarded, the size of the award is increasing. This finding is supported by RAND documents.⁶⁰ And it is also supported anecdotally. In 1981, the jury returned a \$125 million punitive damage verdict in the *Ford Pinto* case. That verdict was later reduced by the trial judge to \$3.5 million. Even so, the jury’s original award, and the reduced award supported by the trial judge were regarded as extraordinary.

In 2000, in a somewhat similar case involving a General Motors minivan, the jury’s punitive damage award was \$4 billion.⁶¹ That award was reduced by the trial judge, but even after reduction, the award remained at \$1.1 billion.⁶² When I was called by the media to comment on the original \$4 billion award, I was reluctant to do so, aware of the likelihood that it would be dramatically reduced by the trial judge. Frankly, I am flabbergasted that the award, even after reduction, is in excess of \$1 billion.

In a recent article, Theodore Eisenberg has found that punitive damage awards are generally “predictable,” insofar as they tend to cluster at a certain multiple of the compensatory damage award.⁶³ Eisenberg believes that his finding is descriptively important and suggests that it is normatively reassuring as well, since in Eisenberg’s view it seems to make good sense to have the punitive damage award a multiple of the

59. *Id.*

60. ERIK MOELLER ET AL., PUNITIVE DAMAGES IN FINANCIAL INJURY JURY VERDICTS (RAND Inst. for Civil Justice ed., 1997).

61. *Jury Rules Against GM for 4.9B/ Highest Award in Personal Injury Case*, NEWSDAY, July 10, 1999, at A06.

62. *Judge Reduces \$4.9 Billion Award Against GM by More than \$3 Billion*, CHI. TRIB., Aug. 27, 1999, at 18.

63. Eisenberg et al., *supra* note 37.

compensatory damage award.⁶⁴ However, the normative good sense of this is not apparent to me. Granted, courts, including the U.S. Supreme Court, have endorsed the idea of a reasonable relationship between compensatory damages and punitive damages. But at the level of academic theory, the rationality of that reasonable relationship test is certainly open to doubt. Partly this is because of the relationship between tortious conduct and the actual injuries that may result. Tortious conduct increases the prospect of such an injury, but the severity of the injury is to a large extent fortuitous. An instance of drunk driving, for example, can produce a very minor injury or a disastrous injury. Moreover, if it is correct that compensatory damages for personal injuries have been increasing significantly, then supporting a measure of punitive damages that pegs punitives at a multiple of compensatories increases the significance of the increasing amount of compensatory damage awards themselves. Consider, for example, the General Motors case that was discussed above. In that case, there were three victims who suffered serious personal injuries. The aggregate of the awards for their personal injuries was \$110 million. This approaches \$35 million for the injuries suffered by each of the three. These are verdicts that are staggeringly large even by recent American standards. To allow punitives to be in turn measured by taking compensatories into account has an enormous, dynamic effect on the calculation of punitive damages.

In terms of assessing the level of American personal-injury awards, it is certainly relevant to consider what the awards are for personal injuries in other Western legal systems. Actually, measuring awards for economic losses is perplexing, since the net economic losses incurred by victims in other countries depends so significantly on what social-security programs there are to compensate those victims for their losses. If one is to make international comparison, it makes the most sense to focus on damages for non-pecuniary loss.

Data on such damages has been gathered by the European Center for Tort and Insurance Law.⁶⁵ The following data estimate the award for non-pecuniary losses in various European countries for cases involving quadriplegia. The numbers are in euros, as of April 29, 2000, at a time when the euro was roughly equivalent to \$1. For the eight countries surveyed, the lowest award was in The Netherlands, within the range of 55,000 to 95,000 euros.⁶⁶ The largest award was in Italy, for 390,000 euros.⁶⁷ The award in England would have been in the range of 260,000 to 333,000 euros,⁶⁸ while the award in Germany would have been close to

64. *Id.* at 660.

65. DAMAGES FOR NON-PECUNIARY LOSS IN A COMPARATIVE PERSPECTIVE (W.V. Horton Rogers ed., 2001) [hereinafter DAMAGES FOR NON-PECUNIARY LOSS].

66. W.V.H. Rogers, *Comparative Report of a Project Carried Out by the European Centre for Tort and Insurance Law*, in DAMAGES FOR NON-PECUNIARY LOSS, *supra* note 65, at 295 app.

67. *Id.*

68. *Id.*

200,000 euros.⁶⁹ The award in England is as large as it is mainly because of *Heil v. Rankin*,⁷⁰ a March 2000 opinion of the Court of Appeal, which explicitly endorsed increasing the level of damages for non-pecuniary loss in serious cases by up to 100%. It is obvious that all of these figures, even the Italian figure, are trivial compared to what the award would be for non-pecuniary loss in an American case involving quadriplegia. The range of verdicts that ensues from juries makes it difficult to come up with a characteristic American figure. In California, for instance, it would be amazing if the award for non-pecuniary damages in a case involving quadriplegia was for less than several million dollars.

69. *Id.*

70. *Heil v. Rankin*, 2 W.L.R. 1173 (Eng. C.A. 2000).