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Lumping as Default in Tort Cases: The Cultural Interpretation of Injury

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LUMPING AS DEFAULT IN TORT CASES: THE CULTURAL INTERPRETATION OF INJURY AND CAUSATION

*David M. Engel**

Empirical studies of the tort law system suggest that “lumping,” or decisions by victims to do without adequate remedies, should be regarded as the predominant response to injury in American society and elsewhere. Yet research on lumping remains conceptually impoverished and gives insufficient attention to the cultural frameworks victims use to interpret their experiences and determine their responses. This Article presents the stories of injury victims in Thailand and compares their common-sense understandings of torts and tort law to those of injured Americans. It argues that analyses of lumping in America as well as Asia should take into account the ways in which fundamental cultural constructs, such as understandings of the Self and of moral responsibility, give meaning to key tort law concepts such as “injury” and “causation,” which in turn shape the behavior of injury victims.

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TABLE OF CONTENTS

I. INTRODUCTION	35
II. DISCOURSES OF LUMPING	41
III. CULTURAL CONSTRUCTIONS OF INJURY AND THE INJURED SELF	46
IV. CULTURAL CONSTRUCTIONS OF CAUSATION AND RESPONSIBILITY	54
V. CONCLUSION.....	66

I. INTRODUCTION

There was a time not too long ago when it was accurate to say that research on the actual workings of the tort law system was sparse, uneven, and unsophisticated, particularly in comparison to research on the criminal justice system. As recently as 1992, an article that is still one of the finest overviews of the tort law system bore a title that reflected the author's frustration with the inadequacy of the research literature: *Do We Really Know Anything About the Behavior of the Tort Litigation System—And Why Not?*¹ Nearly two decades after this Michael J. Saks article appeared, the situation has improved significantly. An abundance of empirical research now addresses many aspects of the tort law system, including litigation rates,² jury behavior,³ tort lawyers,⁴ insurance,⁵ punitive damage awards,⁶ the impact of race and gender,⁷ the media,⁸ and the use of

1. 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).

2. E.g., Marc Galanter, *Real World Torts: An Antidote to Anecdote*, 55 MD. L. REV. 1093 (1996); John T. Nockleby, *How to Manufacture a Crisis: Evaluating Empirical Claims Behind "Tort Reform,"* 86 OR. L. REV. 533 (2007).

3. E.g., NEIL VIDMAR & VALERIE P. HANS, *AMERICAN JURIES: THE VERDICT* (2007); Shari Seidman Diamond, *Beyond Fantasy and Nightmare: A Portrait of the Jury*, 54 BUFF. L. REV. 717 (2006); Neil Vidmar, *The Performance of the American Civil Jury: An Empirical Perspective*, 40 ARIZ. L. REV. 849 (1998).

4. E.g., Lynn Mather, *Lawyers and Solicitors Separated by a Common Legal System: Anti-Tobacco Litigation in the United States and Britain*, in *FAULT LINES: TORT LAW AS CULTURAL PRACTICE* 192 (David M. Engel & Michael McCann eds., 2009); Tom Baker, *Blood Money, New Money and the Moral Economy of Tort Law in Action*, 35 LAW & SOC'Y REV. 275 (2001); Herbert M. Kritzer, *Defending Torts: What Should We Know?*, 1 J. TORT L. 3 (2007).

5. E.g., Tom Baker, *Liability Insurance at the Tort-Crime Boundary*, in *FAULT LINES: TORT LAW AS CULTURAL PRACTICE*, *supra* note 4, at 66; Tom Baker, *Liability Insurance as Tort Regulation: Six Ways That Liability Insurance Shapes Tort Law in Action*, 12 CONN. INS. L.J. 1 (2006); Albert Yoon & Tom Baker, *Offer-of-Judgment Rules and Civil Litigation: An Empirical Study of Automobile Insurance Litigation in the East*, 59 VAND. L. REV. 155 (2006); Kathryn Zeiler et al., *Physicians' Insurance Limits and Malpractice Payments: Evidence from Texas Closed Claims, 1990–2003*, 36 J. LEGAL STUD. (SPECIAL ISSUE) S9 (2007).

6. E.g., Stephen Daniels & Joanne Martin, *Punitive Damages, Change, and the Politics of Ideas: Defining Public Policy Problems*, 1998 WIS. L. REV. 71 (1998); Marc Galanter & David Luban, *Poetic Justice: Punitive Damages and Legal Pluralism*, 42 AM. U. L. REV. 1393 (1993); Michael Rustad, *In Defense of Punitive Damages in Products Liability: Testing Tort Anecdotes with Empirical Data*, 78 IOWA L. REV. 1 (1992).

7. E.g., MARTHA CHAMALLAS & JENNIFER WRIGGINS, *THE MEASURE OF INJURY: RACE, GENDER, AND TORT LAW* (2010); Martha Chamallas, *Civil Rights in Ordinary Tort Cases: Race, Gender, and the Calculation of Economic Loss*, 38 LOY. L.A. L. REV. 1435 (2005); Lucinda M. Finley, *Female Trouble: The Implications of Tort Reform for Women*, 64 TENN. L. REV. 847 (1997).

tort law in particular types of cases such as medical malpractice,⁹ products liability,¹⁰ and tobacco litigation.¹¹

This burgeoning research literature has deepened our understanding of tort law in society and has refuted many of the myths and stereotypes that have become so stubbornly rooted in public and professional perceptions. What have we learned? For one thing, it now seems completely uncontroversial to assert that most injuries go without a remedy, not only in our own society, but also across legal systems. “Lumping,” it appears, is the universal default mode for resolving injury cases.¹² Some may find this fact regrettable,¹³ while others may wish that lumping were even more widespread in our supposedly litigious society.¹⁴ The purpose of this

8. E.g., WILLIAM HALTOM & MICHAEL MCCANN, *DISTORTING THE LAW: POLITICS, MEDIA, AND THE LITIGATION CRISIS* (2004); William Haltom & Michael McCann, *Framing Fast-Food Litigation: Tort Claims, Mass Media, and the Politics of Responsibility in the United States*, in *FAULT LINES: TORT LAW AS CULTURAL PRACTICE*, *supra* note 4, at 97; Robert J. MacCoun, *Media Reporting of Jury Verdicts: Is the Tail (of the Distribution) Wagging the Dog?*, 55 DEPAUL L. REV. 539 (2006).

9. E.g., TOM BAKER, *THE MEDICAL MALPRACTICE MYTH* (2005); David A. Hyman & Charles Silver, *Medical Malpractice and Tort Reform: It's the Incentives, Stupid*, 59 VAND. L. REV. 1085 (2006); Philip G. Peters, Jr., *Doctors and Juries*, 105 MICH. L. REV. 1453 (2007); Joanna M. Shepherd, *Tort Reforms' Winners and Losers: The Competing Effects of Care and Activity Levels*, 55 UCLA L. REV. 905 (2008).

10. E.g., Richard L. Cupp Jr. & Danielle Polage, *The Rhetoric of Strict Products Liability Versus Negligence: An Empirical Analysis*, 77 N.Y.U. L. REV. 874 (2002); John C.P. Goldberg & Benjamin C. Zipursky, *The Easy Case for Products Liability Law, A Response to Professors Polinsky and Shavell*, 123 HARV. L. REV. 1919 (2010); James A. Henderson, Jr. & Theodore Eisenberg, *The Quiet Revolution in Products Liability: An Empirical Study of Legal Change*, 37 UCLA L. REV. 479 (1990); A. Mitchell Polinsky & Steven Shavell, *The Uneasy Case for Product Liability*, 123 HARV. L. REV. 1437 (2010).

11. E.g., DONALD G. GIFFORD, *SUING THE TOBACCO AND LEAD PIGMENT INDUSTRIES: GOVERNMENT LITIGATION AS PUBLIC HEALTH PRESCRIPTION* (2010); *REGULATING TOBACCO* (Robert Rabin & Stephen D. Sugarman eds., 2001); Mather, *supra* note 4; Lynn Mather, *Theorizing About Trial Courts: Lawyers, Policymaking, and Tobacco Litigation*, 23 LAW & SOC. INQUIRY 897 (1998).

12. “Lumping” in this Article refers to outcomes in injury cases in which the individual who suffers harm makes no claim against the injurer for any kind of remedy or accepts a token settlement that he or she considers inadequate. The term “lumping” gained currency in sociolegal circles with the publication of William L.F. Felstiner’s *Influences of Social Organization on Dispute Processing*: “In lumping it the salience of the dispute is reduced not so much by limiting the contacts between the disputants, but by ignoring the dispute, by declining to take any or much action in response to the controversy.” William L.F. Felstiner, *Influences of Social Organization on Dispute Processing*, 9 LAW & SOC’Y REV. 63, 81 (1974).

13. See, e.g., Rick Abel, *The Real Tort Crisis: Too Few Claims*, 48 OHIO ST. L.J. 443, 447 (1987) (arguing that the real problem with the tort system is not litigiousness but a crisis of underclaiming).

14. E.g., PETER HUBER, *LIABILITY: THE LEGAL REVOLUTION AND ITS CONSEQUENCES* (1988); WALTER K. OLSON, *THE LITIGATION EXPLOSION: WHAT HAPPENED WHEN AMERICA*

Article is not to embrace either of these normative positions or to propose specific measures that would increase—or decrease—the availability of remedies for those who suffer injuries. Rather, I will argue that our view of the issue itself has remained conceptually impoverished despite the increased attention empirical researchers have paid to tort law.

To understand why so many injury victims “lump” their misfortunes, we should examine popular understandings of the concept of injury itself and the concept of causation that links the injury victim to potential remedy agents. I will argue that the attribution of meaning to both of these concepts—injury and causation—involves a complex interpretive process. Both concepts are defined by the convergence of ideas and practices that vary across social settings and across social groups within those settings. Moreover, to parse either concept, it is necessary to consider its definitional dependence on other closely related concepts. Specifically, ideas about injury are linked to ideas about the Self who is vulnerable to harm, and ideas about causation are linked to ideas about moral responsibility.¹⁵ The challenge for the sociolegal analysis of tort law, then, is to view both injuries and remedies as cultural constructs and to theorize how these constructs evolve and transform over time and in different social and economic circumstances. Responding to this challenge may help researchers deal more thoughtfully with the issue of injuries without remedies, which is the broader theme of this Symposium issue.

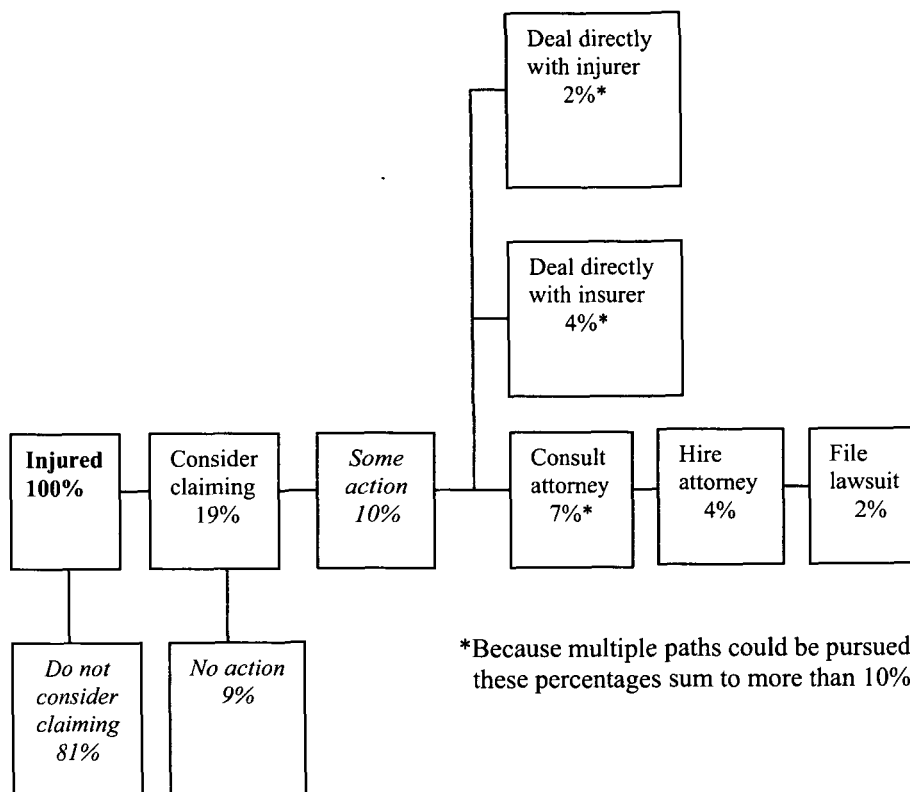
In this Article, then, I want to endorse a recent movement among some sociolegal scholars to view injuries, remedies, and tort law in relation to an array of cultural practices and categories through which injury victims give meaning to their experiences and gravitate—or are compelled—toward particular responses.¹⁶ This culturally oriented perspective on tort law provides a necessary supplement to the extremely valuable but primarily positivist depictions of injuries and remedies that predominate in the current

UNLEASHED THE LAWSUIT (1991); Steven B. Hantler et al., *Is the “Crisis” in the Civil Justice System Real or Imagined?*, 38 LOY. L.A. L. REV. 1121 (2005).

15. See discussion *infra* Parts III–IV.

16. See generally FAULT LINES: TORT LAW AS CULTURAL PRACTICE, *supra* note 4 (presenting interdisciplinary studies of tort law issues, actors, and institutions viewed in relation to their cultural settings in the United States, Europe, and Asia).

empirical research literature.¹⁷ Most often, sociolegal researchers have described the behavior of the tort law system in terms of a sequence of discrete decision points, as exemplified by the decision tree appearing in a landmark study of accidental injuries published by the RAND Corporation's Institute for Civil Justice:¹⁸



This chart illustrates the classic model underlying most sociolegal scholarship on tort law. Turned on its side, the decision tree becomes the injury “pyramid” that has provided the basis for most of the empirical research on tort law conducted during the past few decades, including my own. Analysis focuses on the choices injured persons make at each step along the way: the vast majority (81 percent), according to the RAND study, did not consider

17. *Id.*

18. DEBORAH R. HENSLER ET AL., COMPENSATION FOR ACCIDENTAL INJURIES IN THE UNITED STATES 122 (1991).

claiming.¹⁹ Of the 19 percent who did consider claiming, nearly half took no action.²⁰ The remaining 10 percent of those who had been injured made several different, sometimes overlapping, choices: dealing directly with the injurer (2 percent), dealing directly with an insurer (4 percent), and consulting an attorney (7 percent).²¹ The behavior of the tort law system in this model comprises a series of binary choices made by the injured party.²² Each decision point could in turn become the subject of further study as researchers attempt to identify the factors that would lead an individual to choose or reject a particular option. Ultimately, this model provides a view of cases proceeding toward greater levels of institutional formality, although the real story, as Saks and others have long reminded us, is the extraordinary attrition that occurs en route.²³ Far more cases drop out of the process than move forward step by step to a setting in which a remedy might be provided. Lumping is presumably the outcome in many or most of the cases that fall by the wayside, particularly in those that drop out in the initial stages before the injury victim deals with the injurer, an insurer, or an attorney.²⁴

For all that this decision tree or pyramid model has contributed to knowledge of the real behavior of the tort law system, it has also diverted attention from underlying considerations that might help to explain why nine out of ten injury victims take no action at all—why, that is, most injuries go without remedies. To gain insight into the interpretive frameworks that shape the perception of harmful events from the very outset, we must go beyond a model based on binary decisions made by rational actors as they move from one end of a flow chart to the other. Instead, we must consider in greater depth the subjective thought processes and conceptual categories of ordinary people who have suffered harm—and of others who may have an interest in their injuries.

19. *Id.*

20. *Id.*

21. *Id.*

22. *See id.* at 121–22.

23. *See, e.g.,* Saks, *supra* note 1, at 1183–89.

24. *See id.*

In this Article, I draw on examples of injury narratives from my own fieldwork in northern Thailand.²⁵ Each of the three substantive sections of the Article begins with a description of an interview with a man or woman hospitalized because of serious injuries. In my fieldwork, I interviewed a number of accident victims during or shortly after their treatment in a hospital in Chiangmai, Thailand, as part of a larger study of injury, law, and social change in a society transformed by globalization.²⁶ The social and cultural setting may seem distant and unfamiliar from a North American perspective, but I found many of the same dynamics and constitutive processes in Thailand that I and others have encountered in American settings.²⁷ It is perhaps easier to discern the operation of key cultural factors from a distance rather than in a narrative where all the concepts and images seem overly familiar and tend to be taken for granted.

In Part II, which begins with an account offered by an injury victim named Prayat,²⁸ I set forth some general observations about the narratives of lumping that I encountered in Asian and American settings. In Part III, after a brief account by an injury victim named Pinkaeo, I discuss the relationship between lumping, the social construction of “injury,” and the close connection between concepts of injury and concepts of the Self in Thailand and the United States. In Part IV, which begins with an injury narrative by Thipha, I discuss the relationship between lumping and the social construction of

25. Descriptions and detailed examples of injury narratives appear in DAVID M. ENGEL & JARUWAN S. ENGEL, *TORT, CUSTOM, AND KARMA: GLOBALIZATION AND LEGAL CONSCIOUSNESS IN THAILAND* (2010). In our fieldwork, we interviewed thirty-five current or recent hospital patients, selected from a group of ninety-three injury victims admitted for medical treatment over a four-month period. The qualitative, open-ended interviews were part of a larger study that involved more than one hundred interviews with village leaders, insurance adjusters, attorneys, judges, monks, spirit mediums, Thai scholars, doctors, government officials, and others. In addition, we conducted an exhaustive docket study of every injury case litigated in the Chiangmai Provincial Court from 1992 to 1997. We photocopied and analyzed the pleadings, motions, and judgments in every case file and compared our findings to similar data we had previously gathered in the same court for cases litigated from 1965 to 1974.

26. *See id.*

27. *E.g.*, David M. Engel, *The Oven Bird's Song: Insiders, Outsiders, and Personal Injuries in an American Community*, 18 *LAW & SOC'Y REV.* 551 (1984) (presenting findings from a study of formal and informal resolution of injury cases in a small community in the American Midwest); *see also* CAROL J. GREENHOUSE ET AL., *LAW AND COMMUNITY IN THREE AMERICAN TOWNS* (1994) (comparing the findings of ethnographic research conducted by David Engel in a Midwestern American community, Carol Greenhouse in a suburban community in the American South, and Barbara Yngvesson in a small New England community).

28. Pseudonyms are used for all interviewees cited in this Article.

“causation,” as well as the linkages between concepts of causation and concepts of responsibility. Part V offers some general conclusions about lumping as a form of cultural practice.

II. DISCOURSES OF LUMPING

Prayat, a forty-seven-year-old agricultural extension worker, suffered multiple leg fractures in a traffic accident. His description of the accident makes it clear that he considers his injury the fault of a careless driver whose car collided with his motorcycle:

I was returning from a dinner honoring a colleague at a restaurant near the new provincial office building in Mae Jo. It was around nine or ten in the evening. I had had a few drinks, but I wasn't drunk. Anyway, I tend to drive my motorcycle quite slowly, and I always keep to the left [Thailand follows the British practice of driving on the left side of the road]. At the intersection, a car cut right in front of me and struck my motorcycle. That's how I was injured. If I had been driving fast, it would have been very serious. I was taken to the hospital in an ambulance. The other driver was in a car, not a motorcycle, so he wasn't hurt at all. He stopped after the accident and went to the hospital when I was admitted. He told my wife that he'd come back again the next day to arrange things, but he never came. Since that day, I've never seen him, but I didn't file any sort of claim or complaint.²⁹

Prayat is well aware that he could have pursued a remedy through official channels. If he had submitted a report to the police, he could have exerted pressure on the other driver to pay an out-of-court settlement. He could even have filed a tort claim. Although quite rare, tort cases do appear on the docket of the Chiangmai Provincial Court.³⁰ From 1992 to 1997, sixty-six personal injury claims were litigated in Chiangmai.³¹ The average damage award in such cases was 189,152 *baht* (at that time, approximately \$4,730), and the average court-approved settlement during the same period

29. All quotations from interviews with Thai individuals are the author's translations from Thai-language transcriptions of the original audio recordings. The transcripts are on file with the author.

30. See ENGEL & ENGEL, *supra* note 25, at 95–122.

31. See *id.* at 102 tbl.5.1.

was 100,000 *baht* (approximately \$2,500).³² Thai tort law might have permitted Prayat to recover damages not only for costs incurred during medical treatment,³³ but also for current and future lost earnings³⁴ and pain and suffering.³⁵

Prayat knew that he could have lodged a valid claim for a substantial amount of money against the other driver, a merchant driving a large car, who was evidently negligent and had sufficient resources to respond to a tort judgment. Yet, Prayat elected to lump his injury. Since Prayat was a government official, his medical bills were covered and he did not suffer a loss of wages. Nevertheless, both as a matter of law and informal practice, he was clearly entitled to substantial compensation from the other driver. His narrative of lumping continues with a description of events following admission to the hospital:

If he had any compassion, he would have come to see me. He never came, so I don't have to give it any thought. I didn't feel very good about the way he behaved. One day an insurance company representative for the other driver came to see me, but I never followed up on that. I never did anything about it. The other driver never spoke to me himself. In fact, I never saw his face. Since I work for the government, I was able to charge the medical expenses, so I didn't have any financial problem. But my leg was badly swollen, and a number of bones were broken.

If I filed a police report or a legal claim, it would just take a lot of time. I didn't want to have any conflict. I just felt it was my own bad karma. If the police had been there at the time, they would have charged him with a serious offense. His insurance company actually phoned me twice, and I just told them, "I don't want to get involved. I'm not interested in getting anything from anyone." They wanted

32. *Id.* at 117. By comparison, in 1998 the average monthly income *per household* in Thailand was 12,492 *baht*. NAT'L STATISTICAL OFFICE, CORE ECONOMIC INDICATORS OF THAILAND (2004), available at <http://unpan1.un.org/intradoc/groups/public/documents/apcity/unpan015286.pdf> (last visited Dec. 17, 2010).

33. CIVIL AND COMMERCIAL CODE OF THAILAND § 444.

34. *Id.*

35. *See id.* § 446.

me to fill out the forms so they could pay me, but I refused. I didn't want to have anything to do with them.

I'm a person who doesn't like to have any problem with anyone. I told my family not to bother filing a police report, not to notify them about his license number, and so forth. I didn't want to put the effort into that kind of thing, going to the police station, and so on. So I chose not to pursue it. I just chalk it up to my own karma. It was just my time to get injured.

Most of the interviewees in northern Thailand shared Prayat's preference for lumping. None of them brought a tort claim. None received a substantial remedy, and most—like Prayat—received little or no compensation. Prayat knew that he had other options. It would have been a simple matter to complete the documentation that the injurer's insurance company wanted to send him. Moreover, Prayat was not intimidated or afraid to take on the injurer, who was not a person of greater wealth or power. Prayat was a mid-range government official, which gave him some status in the local society, and his monthly salary of 14,500 *baht* (then approximately \$363) made him one of the wealthiest of the injury victims who participated in our study. He explained his choice of lumping not in terms of domination by a powerful adversary, but in terms of local norms and religious beliefs opposed to materialism and conflict:

People in the North, maybe we just have meritorious spirits. That's just how we are. If something is destined to happen, then we just let it go. This has to do with our moral code, the ethics we learned in school when the religious teachers instructed us. Everything we learned, every branch of our instruction has molded us. Buddhism teaches people to do only good, and we keep that sort of thing in our minds at all times. That's why our society is like this.

Prayat's response to his injury was typical of virtually all our Thai interviewees.³⁶ Whether the injurer was rich or poor, powerful or powerless, the injury victims never brought a tort action and rarely pursued a complaint of any kind beyond informal settlement negotiations in the police station. Generally speaking, the interviewees received no compensation at all or token settlements

36. See ENGEL & ENGEL, *supra* note 25.

and trivial no-fault motor vehicle insurance payments. In short, most injuries went without remedies.

Although it may seem remarkable that most Thai injury victims were ready to forego claims to which they appeared entitled, studies of injury victims in the United States suggest many similarities. As the RAND study found, only one in ten accident victims brought a claim of any kind, only one out of twenty-five hired an attorney, and only one in fifty filed a lawsuit.³⁷ It might be countered that the accidents in the RAND study were not necessarily tortious and that lumping by the injury victim could have been legally appropriate in the cases in which negligence did not cause the accident. The Saks study, however, traced a large sample of medical injury cases in which a neutral panel of doctors had concluded that physician negligence *was* the probable cause of harm.³⁸ Even in those presumably tortious injury cases, only 4 percent of the victims consulted a lawyer, and only 2 percent filed lawsuits.³⁹ In short, lumping appears widely prevalent in the United States even for injuries probably caused by negligence.

Some years ago, I had the opportunity to interview residents of a Midwestern American community about their experiences with and perceptions of the law.⁴⁰ The farmers, townspeople, and factory workers that I interviewed in "Sander County," Illinois,⁴¹ explained to me why injury victims seldom lodged claims and even less often brought tort actions. Even when someone else's negligence had clearly caused an injury, according to one farmer, "Most of us would just think it's one of life's little accidents."⁴² Another farmer added, "Farm kids, you know, are quite prone to having accidents, and they're kind of used to it, I think. Usually just pick up and go on, and that's all." Townspeople agreed with this characterization of the local ethos. A school administrator referred to the traditional attitude of the local residents "whose macho says, take care of it yourself first."

37. HENSLER ET AL., *supra* note 18, at 122.

38. Saks, *supra* note 1, at 1178-79.

39. *Id.* at 1194.

40. See GREENHOUSE ET AL., *supra* note 27, at 31-32; David M. Engel, *Cases, Conflict, and Accommodation: Patterns of Legal Interaction in an American Community*, 8 LAW & SOC. INQUIRY 803 (1983); Engel, *supra* note 27, at 557.

41. "Sander County," Illinois is a pseudonym used to protect a community and the otherwise-identifiable individuals who lived there.

42. All Sander County quotes are from interview transcripts on file with the author.

A minister agreed that a longtime resident who suffered an injury would think, "I can handle it myself." As one insurance adjuster observed, it did not occur to most people that they could even file a routine claim against the injurer's liability insurance:

We have some people that have had their kid injured on our insured's property, and they were not our insured. And we call up and offer to pay their bills, because our insured has called and said my kid Tommy cracked that kid over the head with a shovel and they hauled him off to the hospital. And I called the people and say we have medical coverage and they are absolutely floored, some of them, that it never even crossed their minds. They were just going to turn it in to their own little insurance, their health insurance, and not do anything about it whatsoever, especially if [Tommy's parents] are close friends. . . .⁴³

The views expressed by Sander County residents serve as a reminder that, even in an American setting, social norms and practices can influence the perspective of injury victims and lead them to view potentially tortious injuries as one of "life's little accidents" and as matters one should handle oneself.⁴⁴ As I have suggested elsewhere, the viewpoint expressed by many of the longtime Sander County residents derived from a particular type of individualism that emphasizes self-sufficiency rather than rights.⁴⁵ The predominance of that perspective in Sander County reflected the longstanding practices of a closely interrelated farming community as well as a reaction against newcomers to the community who did not necessarily share the views of the old-timers.⁴⁶ Even though this philosophy of self-sufficiency differs somewhat from that of the Chiangmai injury victims, it leads to a similar result: lumping, or at most settling for a token or symbolic payment by the injurer or an insurance company.

In short, discourses of lumping come in many forms in different social and cultural settings. To understand the salience and ubiquity

43. Engel, *supra* note 27, at 562.

44. *Id.* at 553. See generally SARAH S. LOCHLANN JAIN, INJURY: THE POLITICS OF PRODUCT DESIGN AND SAFETY LAW IN THE UNITED STATES 4–8 (2006) (discussing the processes through which injuries come to be seen as unexceptional aspects of normal life).

45. Engel, *supra* note 27, at 558–59.

46. *Id.*

of such discourses, we must probe more deeply into the underlying conceptions of injury and causation.

III. CULTURAL CONSTRUCTIONS OF INJURY AND THE INJURED SELF

Stories of lumping in tort cases begin with an injury, but injuries are not clearly defined social facts about which everyone would agree. An outside observer might conclude that a person had suffered an injury, but the individual in question might not share that perception. The reverse might also be true—an outsider might not perceive an injury when the individual in question is certain that he or she has suffered harm. Furthermore, the nature or essence of an injury may be viewed differently depending on one's underlying assumption about the effect of trauma, suffering, or illness on the human personality. Thus, the meaning and the very existence of an injury depends on a complex interpretive process, which in turn is linked to variable concepts about the constituent parts of the Self—what makes the person a human being and what aspects of humans are susceptible to harm? This part begins with a story told by Pinkaeo, a forty-year-old accident victim from northern Thailand, who worked with her husband in a Chiangmai sign-making business. Pinkaeo was injured while riding in the passenger seat of a motorcycle driven by her husband. They were struck from behind by a teenager, who may have been drunk. In the crash, Pinkaeo was knocked unconscious and suffered extensive head injuries requiring surgery to implant a metal plate in her skull.

Pinkaeo lives in Chiangmai City, but she was raised in a farming village in a rural area. When she was born at home, her mother presented her to the guardian spirits of the household and of the village, thereby “registering” the new addition to the family and asking the spirits to protect her from harm. In this way, Pinkaeo's personality from birth became part of the fabric of family and village relationships. According to traditional village customary law, harm to one family member or villager was believed to injure others in the close-knit farming community. When she became an adult, however, Pinkaeo left the village, and she no longer lives in a community in which all of the villagers' identities are closely connected.

As Shigeharu Tanabe and other scholars have observed, personhood among villagers in northern Thailand was traditionally

understood to be relational, rather than sharply individuated, and had “no solid boundaries,” because of the Self’s connection to and internalization of the spirits of fellow villagers.⁴⁷ The spirit to which Tanabe refers is known as the *khwan*, which is a flighty essential life force found in all living beings—and even in some natural objects, such as rice fields and mountains.⁴⁸ When a person suffers a fright or other trauma, or is attacked by a malevolent ghost, the *khwan* may fly out of the body, causing physical or psychological malaise.⁴⁹ Injuries are therefore viewed in terms of the traumatic effect of harmful experiences on the *khwan*.⁵⁰ When the *khwan* escapes, a ritual must be performed to recall it and bind it securely into the body with sacred string.⁵¹ The compensation sometimes paid by an injurer to an injury victim is known as *kha tham khwan*, or payment for the *khwan* ceremony.⁵² According to village-based customary law, the entire community has a stake in seeing that the injurer provides compensation, since relational understandings of the Self create the sense that all have been harmed by the injury. Moreover, a family member or villager whose *khwan* has flown away is a dysfunctional and potentially harmful member of the community.⁵³

Following traditional practices for recalling the *khwan*, Pinkaeo’s mother went with a friend to the accident site and performed a ceremony to scoop up Pinkaeo’s lost *khwan* with a fishnet and implore the *khwan* to stay in Pinkaeo’s body and not take flight again. Because Pinkaeo no longer lived in an integrated village community, however, it could not be said that her injury had a direct effect on a relational network of fellow villagers. The impact of her injury was individuated, affecting only Pinkaeo.

47. Shigeharu Tanabe, *The Person in Transformation: Body, Mind and Cultural Appropriation*, in CULTURAL CRISIS AND SOCIAL MEMORY: MODERNITY AND IDENTITY IN THAILAND AND LAOS 43, 48–49 (Shigeharu Tanabe & Charles F. Keyes eds., 2002).

48. *Id.* at 44. Each human is thought to possess thirty-two *khwan* located in different parts of the body. See PHAYA ANUMAN RAJADHON, *KHWAN LAE PRAPHENI KAN THAM KHWAN* [THE *KHWAN* AND CEREMONIES FOR THE *KHWAN*] (1963). In common speech, however, *khwan* are referenced collectively.

49. See Tanabe, *supra* note 47, at 44.

50. *Id.* at 45.

51. ENGEL & ENGEL, *supra* note 25, at 61–63.

52. *Id.* at 63.

53. *Id.*

In addition to the *khwan*, each human also has a more durable spiritual essence known as *winyan*, the human soul whose loss brings death.⁵⁴ When a person dies, the *winyan* leaves the body and continues its existence in ghostly form until it ascends to heaven and is reborn in another bodily incarnation.⁵⁵ When a person suffers an abnormal or traumatic death (*tai hong*), the *winyan* requires special care and must be ritually propitiated to ensure a smooth progression to the next incarnation.⁵⁶ If merit-making rituals are omitted after an abnormal death, the *winyan* lingers at the site of the accident in the form of a malevolent ghost (*phi tai hong*), posing danger to every passerby.⁵⁷ The injurer in fatal accident cases has an obligation to pay for ceremonies to propitiate and remove the *winyan* from the accident site.⁵⁸ Failure to do so threatens the entire community.⁵⁹ Pinkaeo learned that *phi tai hong* resided near the accident site. They had caused her accident and were responsible for another accident, a fatality, just two weeks later.

Pinkaeo believes that the Self is also composed of the store of karma people have accumulated in this life and in previous lives. She concluded that she must have been carrying a heavy burden of non-meritorious acts from the past, although she could not know exactly what they were. To lighten the heavy burden of bad karma, she went to a Buddhist temple and had the monks perform a merit-making ceremony. Although such ceremonies sometimes involve fellow villagers, in Pinkaeo's case, because she no longer lived in her birth village, it was an individualized event: "I did it just for myself. I presented food and gifts to the monks to make merit for myself and for my own ancestral guardian spirits. It wasn't a big life-extension ceremony [i.e., it didn't involve anyone else]. It was just for myself."

As Pinkaeo's story illustrates, the definition of an injury depends on common-sense understandings of the Self who suffers harm. In the traditional village society of northern Thailand, human personalities were closely interrelated rather than sharply individuated, but such conceptualizations have changed in recent

54. *Id.*

55. *Id.* at 63–64.

56. *Id.* at 64.

57. *Id.*

58. *Id.*

59. *Id.*

years. The most important component elements of the human personality are *khwan* and *winyan*, and most interviewees still perceived their injuries primarily in terms of the harm done to these spiritual elements and only secondarily to their body or property. Yet, now that Pinkaeo no longer lives in an integrated village setting and the loss of her *khwan* affects no one besides herself, it is not clear how her injury should be understood. Should its seriousness still be evaluated in terms of its impact on her spiritual interconnections with others? If her birth community is no longer relevant to her daily life, and if her identity has become more bounded and individuated than before, it is unclear *how* Pinkaeo has been injured or what should be done to make her whole. If no one but Pinkaeo was harmed when her facial bones were shattered in the accident, and if pursuit of a remedy would benefit her alone, it would perhaps be wiser for her to respond with meritorious acts, with forgiveness and compassion. By lumping the injury, she might be able to improve her dangerously low karmic balance and protect herself from further harm. Pinkaeo's case illustrates how changes in the social setting can produce new conceptualizations of the Self and injury that can lead injury victims to view lumping as the most logical and efficacious course of action.

When considering Pinkaeo's emphasis on the intangible and relational dimensions of her injury from an American perspective, it may be useful to remember that similar understandings once prevailed in our own sociolegal past. Historians tell us that Anglo-American common law is rooted in a similar tradition. In thirteenth century England, injuries were perceived essentially in terms of their damage to the victim's honor and social status rather than to his or her body.⁶⁰ Closely connected to this emphasis on the intangible aspects of injury was a non-individuated view of the victim.⁶¹ According to John Beckerman, "A wrong was still, in a very real way, an offense against the social group (family or lordship) to which the victim belonged."⁶² Compensation for injuries, defined in this relational sense, was aimed at readjusting and repairing relations

60. John S. Beckerman, *Adding Insult to Iniuria: Affronts to Honor and the Origins of Trespass*, in *ON THE LAWS AND CUSTOMS OF ENGLAND: ESSAYS IN HONOR OF SAMUEL E. THORNE* 159, 172–76 (Morris S. Arnold et al. eds., 1981).

61. *Id.* at 162.

62. *Id.*

within the community as a whole.⁶³ Eventually, however, this concept of injury receded and was replaced by the more individualized and physically grounded concept that is familiar to us today.

Yet, even our own contemporary tort law system recognizes some forms of injury that are both intangible and relational. Indeed, some tort law experts objected when the 1999 Discussion Draft of the *Third Restatement of Torts* referenced only tangible harms—“accidental personal injury and property damage”⁶⁴—in its “General Principles” of American tort law and explicitly stated that intangible harms such as emotional distress and economic harm fell outside “the core of tort law.” Martha Chamallas, for example, challenged the tendency to relegate emotional and relational injuries to an inferior status in the imagined hierarchy of American tort law. She noted that this unfounded distinction between injury to the body and injury to intangible interests of the person “disproportionately harms women and has meant that law does not recognize many of the important, recurring injuries in the lives of women.”⁶⁵ These objections proved persuasive and led to an expanded conceptualization of “injury” in the final version of the Restatement, which included, even in its title, both “physical and emotional harm.”⁶⁶

This particular fault line runs through much of the terrain of American tort law. Consider, for example, one type of tort in which the alleged injury is both intangible and relational: the claim for emotional distress brought by an onlooker (typically a close relative or spouse) who witnesses negligently inflicted physical harm to a third party.⁶⁷ In the late 1960s the highest courts of New York and

63. See *id.* at 165–70.

64. RESTATEMENT (THIRD) OF TORTS: GENERAL PRINCIPLES, reporter’s introductory note (Discussion Draft 1999).

65. Martha Chamallas, *Removing Emotional Harm from the Core of Tort Law*, 54 VAND. L. REV. 751, 752 (2001). Goldberg and Zipursky lodged a related objection, noting that the treatment of “duty” was too narrow and had the effect, among other things, of excluding intangible and relational injuries. See John C.P. Goldberg & Benjamin C. Zipursky, *The Restatement (Third) and the Place of Duty in Negligence Law*, 54 VAND. L. REV. 657, 659–63 (2001).

66. RESTATEMENT (THIRD) OF TORTS: LIAB. FOR PHYSICAL AND EMOTIONAL HARM, at 1 (2010) (discussing the legally cognizable harms addressed therein).

67. For a discussion of the relational and gendered aspects of so-called “bystander” claims for emotional distress, see CHAMALLAS & WRIGGINS, *supra* note 7, at 113–17.

California famously split over the question of recognizing such claims. The California Supreme Court in *Dillon v. Legg*⁶⁸ permitted recovery as long as the plaintiff, in this case the victim's mother, could prove that her emotional harm (with accompanying physical manifestations) was foreseeable to the negligent actor.⁶⁹ The *Dillon* court set forth three factors to consider in establishing foreseeability: (1) location near the scene of the accident; (2) shock resulting from "a direct emotional impact upon plaintiff"; and (3) close relationship between plaintiff and victim.⁷⁰ At roughly the same time, however, the New York Court of Appeals denied a similar claim in *Tobin v. Grossman*,⁷¹ a case brought by a mother who witnessed an automobile accident in which her child suffered serious physical injuries.⁷² Although the *Tobin* court did not doubt the genuineness of the mother's anguish, it refused to hold a negligent actor liable for the emotional repercussions on a third party of the physical injuries the defendant had inflicted on a direct victim, even when the plaintiff suffered accompanying physical manifestations.⁷³ Expressing concern over the endless ripple effects of negligently caused injuries throughout the direct victim's relational network, the court concluded:

The risks of indirect harm from the loss or injury of loved ones is pervasive and inevitably realized at one time or another. Only a very small part of that risk is brought about by the culpable act of others. This is the risk of living and bearing children. It is enough that the law establishes liability in favor of those directly or intentionally harmed.⁷⁴

68. 441 P.2d 912 (Cal. 1968).

69. *Id.* at 920.

70. *Id.* Subsequent decisions by the California Supreme Court varied in their treatment of these three factors, sometimes treating them merely as illustrative of the analysis of foreseeability, as in *Ochoa v. Superior Court*, 703 P.2d 1 (Cal. 1985), and other times treating them as fixed prerequisites for recovery, as in *Thing v. La Chusa*, 771 P.2d 814 (Cal. 1989). Chamallas and Wriggins observe that "some variation of *Dillon* is now in force in twenty-nine states." CHAMALLAS & WRIGGINS, *supra* note 7, at 114.

71. 249 N.E.2d 419 (N.Y. 1969)

72. *Id.* at 424.

73. *Id.* at 423–24. In *Bovsun v. Sanperi*, 461 N.E.2d 843, 844 (N.Y. 1984), this rule was modified to allow recovery if the plaintiff was within the zone of danger and observed "serious physical injury or death inflicted by the defendant's conduct on a member of the plaintiff's immediate family in his presence."

74. *Tobin*, 249 N.E.2d at 424.

In short, the *Tobin* court viewed the mother's emotional harm as an inevitable part of life, as a cost of having children who are vulnerable to harms of many kinds. The plaintiff in *Tobin* did not, legally speaking, suffer an injury at the hands of the defendant; she merely experienced the anguish that inevitably accompanies the vicissitudes of a close and loving relationship such as that of parent and child. If we could even label her suffering as an "injury," it was, in the eyes of the New York Court of Appeals, an injury without a remedy.

The *Tobin* decision signals a view of injury and the Self that is quite different from that which traditionally prevailed in northern Thai village society. There, the essence of any harm was understood to be its impact on the victim's spiritual essence, not merely her body, and damage to the spirit by definition harmed not only the individual but also the relational network in which she was embedded. Members of the family and the community—if one still existed—had a direct stake in making sure that the injurer paid compensation and that the proper rituals were performed. In *Tobin*, by contrast, the court viewed harms to the intangible aspects of the Self with suspicion—how could they be distinguished from the ordinary stresses and anxieties of human existence? In addition, the case was also weakened by the perceived piggy-backing of the plaintiff's claim on a physical injury suffered by another person to whom she was closely related. A more sharply individuated concept of the human personality, and one that was more grounded in the body itself, led the *Tobin* court to conclude that this was not the sort of injury that tort law should compensate, if indeed it was properly viewed as an injury at all.

In the American setting, the ambivalent view of claims for intangible harms is not confined to appellate judges. The popular media, policymakers, and members of the general public often express skepticism or even dismay over claims for emotional or psychological suffering.⁷⁵ Indeed, the movement to cap damage awards has achieved its greatest success in the area of pain and suffering.⁷⁶ There is a widespread—but by no means unanimous—

75. See, e.g., Finley, *supra* note 7, at 850–51; Robert S. Peck, *Violating the Inviolable: Caps on Damages and the Right to a Trial by Jury*, 31 U. DAYTON L. REV. 307, 307 (2006).

76. Cf. *Noneconomic Damages Reform*, AM. TORT REFORM ASS'N, <http://www.atra.org/issues/index.php?issue=7340> (last visited Sept. 26, 2010) (listing state-by-state limitations on noneconomic damage awards).

perception in American society that such intangible injuries are less real or that they are impossible to distinguish from the ordinary traumas that every person suffers in daily life.⁷⁷ A more individuated sense of the Self supports the position that we should bear the cost of emotional traumas ourselves rather than blame others.⁷⁸ The use of the courts to enforce such claims, from this perspective, symbolizes the overreaching and greed that have caused American tort law to spin out of control.⁷⁹

This consideration of intangible and relational harms illustrates a broader point: the very concept of an “injury” is a cultural construct and is inextricably linked to prevalent understandings of the Self who suffers harm.⁸⁰ Many other examples could be cited to illustrate how common-sense understandings produce shared perceptions of the injured—or non-injured—Self. Sarah S. Lochlann Jain, in her study of injuries associated with product design, offers one such example.⁸¹ She describes how serious back injuries suffered by Mexican farm workers using the short-handled hoe came to be characterized as non-injuries or as inevitable side effects of farm labor explainable in large part by a supposed racially based “congenital pre-disposition . . . to back injury.”⁸² Racist and class-based perceptions of the farm workers led to the conclusion—by others, of course—that the laborers had not been injured but that their suffering was the inevitable byproduct of who they were and of the work that was their lot to perform.⁸³

If lumping is indeed the default mode for handling injury cases, an explanation of its predominance must surely take into account this sort of interpretive process by which human suffering gets explained. Concepts of injury and the Self may be imposed by others, may emanate from the individual or groups who suffer harm, may be contested, or may emerge from a mutually constitutive process of

77. See, e.g., Chamallas, *supra* note 65, at 755–56.

78. Engel, *supra* note 27, at 559. See generally ENGEL & ENGEL, *supra* note 25 (noting that Thai injury victims who have left their integrated village communities tend to view their mishaps in terms of their own moral and financial responsibility and do not aggressively pursue remedies from their injurers).

79. See, e.g., Peck, *supra* note 75, at 307.

80. See ENGEL & ENGEL, *supra* note 25, at 10.

81. JAIN, *supra* note 44.

82. *Id.* at 78.

83. *Id.* at 77–78.

give-and-take involving the victims, injurers, and other groups.⁸⁴ As a result, harms that are technically caused by torts may not be perceived as injuries at all or may come to be perceived as injuries only with the passage of time. If and when they are perceived as injuries, common-sense understandings of the Self may nonetheless lead the injury victim, her social network, or third parties to view them as relatively trivial or inevitable. And even when injuries are not considered trivial, assumptions about the makeup of the human personality may lead to the conclusion that the injured Self cannot be made whole by requiring that the injurer pay compensation. This was the conclusion reached by Pinkaeo (who received only 5,000 *baht* for her devastating injuries), by Prayat, and by many other interviewees in Thailand, who explained that the aggressive pursuit of a remedy would create more bad karma and increase the risk of future harm to themselves and their families.

IV. CULTURAL CONSTRUCTIONS OF CAUSATION AND RESPONSIBILITY

The preceding part examined connections between lumping and concepts of injury and the Self. This part explores connections between lumping and the cultural construction of causation. I will suggest that ideas about causation are, in practice, linked to ideas about moral responsibility for injury, even though causation and responsibility are theoretically distinct and independent of one another. The starting point again is an injury narrative from northern Thailand. Here, the interviewee is a thirty-eight-year-old farmer named Thipha, who was involved in a serious motorcycle accident while traveling with her husband to the market where they planned to sell their newly harvested vegetables. Thipha's injury cost her a great deal of money, particularly because she and her husband could not harvest and sell their crop of green beans. She also suffered potentially compensable pain and suffering. Yet, Thipha and her husband felt sorry for the other driver and eventually settled with him for a token payment of only 3,000 *baht* (then approximately \$75).

84. See generally David M. Engel, *Injury and Identity: The Damaged Self in Three Cultures*, in *BETWEEN LAW AND CULTURE: RELOCATING LEGAL STUDIES* 3 (David Theo Goldberg et al. eds., 2001) (discussing the related conceptualizations of individual identity and responsibility for the infliction of injury in three different cultural settings).

One of the remarkable features of the stories told by all the Thai interviewees is the multiplicity of causes they cited. Living as they did in a complex world marked by contending, conflicting, and sometimes overlapping belief systems and interpretive frameworks, the interviewees shifted readily from one causal explanation to another, seemingly untroubled by any apparent inconsistency. Each causal explanation carried with it a different set of assumptions about the attribution of responsibility for injuries. With the breakdown of village-level customary law during a period of dramatic socioeconomic change in the late twentieth century, these multiple interpretive frameworks had become increasingly fragmented.⁸⁵ Rather than pointing collectively to the injurer's obligation to pay *kha tham khwan*, they seemed individually to lead injury victims to the conclusion that they were responsible for their own mishaps and that no other party should pay compensation.

Causal Role of a Ghost by the Side of the Road

As we have seen, when individuals experience a traumatic or abnormal death, their souls may linger at the scene of the accident in the form of malevolent ghosts unless proper rituals are performed. These ghosts, known as *phi tai hong*, are often cited as the causes of accidents and injuries, for they attempt to kill passersby so that new souls will fall by the roadside and release the *phi tai hong* to resume their progression toward reincarnation.⁸⁶ Theories of causation and responsibility that point to a malevolent ghost, disconnected nowadays from the broader structure of customary village law, tend to contradict the idea that the other party to the accident owes compensation.⁸⁷ If the injury has any remedy at all, it is one that the victims themselves should provide.

Thipha acknowledges the existence of such ghosts, and she even describes the ritual that is performed to propitiate the souls of accident victims so they do not become *phi tai hong*:

They take sand and place it on a tray, or on some other object, and shape it into one hundred mounds, which they

85. See generally ENGEL & ENGEL, *supra* note 25, at 33–46 (discussing globalization in Chiangmai from 1975 to the present with particular attention to demographic, economic, technological, and ideological transformations).

86. *Id.* at 64.

87. *Id.* at 70.

call “sand stupas.” Then they place a flag with red cloth just at that spot: “Here a person died from an accident.” They say that if they do this, the one who died will be able to leave and won’t have to stay at that spot. The dead person, that is, the ghost, should not just stay there. It should be released and allowed to go ahead to seek food and make merit [Otherwise] people will die there where the original death occurred. Others will die as well. They say that the first person to die, he wants to change places. If someone else dies, he will be able to leave. He won’t have to stay there.

Thipha was not surprised that onlookers blamed a ghost by the roadside for her accident after a drunk motorcyclist tried to turn directly in front of her and her husband. The fact that the accident took place near the entrance of a slaughterhouse, a place of death and—from a Buddhist perspective—of sinful activity, made it all the more plausible that a ghost might be the cause: “The people at the slaughterhouse said, ‘Oh, it’s happened again. The ghost blocked the view.’”

The ghost’s role was confirmed by a spirit medium after the accident. The spirit medium told Thipha’s mother that the ghost in front of the slaughterhouse was hungry because no one had recently offered any *lap* (spicy minced pork, a food typically offered to ghosts): “It wants to eat *lap*, let it eat! It can’t eat by itself.” Thipha’s mother followed the instructions of the spirit medium, prepared the offering, and presented it to the ghost at the accident site. Thipha observed that propitiating the ghost brought reassurance and restored her energy. The “remedy” in this sense was provided by Thipha and her mother, and not by the other driver.

Nevertheless, Thipha expresses some skepticism about this supernatural causal explanation. She acknowledges, “Yes, there are ghosts. I believe in them. There are ghosts.” In her case, however, she thinks the ghost played a minor role at most, because it obscured the vision of the oncoming driver but not Thipha’s husband, who asserted that he could clearly see the oncoming vehicle. Thipha therefore concludes that other causal factors had greater importance.

Negligence as a Cause of Injury

Thipha states at several points in the interview that her accident was caused by negligence. One might think that this causal explanation would point to the responsibility of the other driver, and that lumping would therefore seem inappropriate, but Thipha's understanding of the concept of negligence differs from that of American tort law. Thipha assumes that negligence means lack of "mindfulness" (*sati*) by *both* parties and particularly by her own husband, who was inattentive and speeding.⁸⁸ Negligence, for Thipha and other interviewees, is more consistent with attribution of responsibility to oneself than to the other party. In a distinctive version of what we might call contributory negligence, Thipha and others express the assumption that, in a world of careless actors, one can and should protect oneself from harm by exercising the Buddhist virtue of mindfulness:

A vehicle approaches, and if we aren't negligent we will see that it is coming and we will stop. Then we won't be injured. That's what they say. To do something incorrect and not to exercise care for our own safety, that's negligence. We may be injured, we may lose our life because of our negligence.

Thus, even causal explanations premised on the other party's negligence do not in themselves lead to the conclusion that he or she should provide a remedy.

Karma as Causation

Thailand is a predominantly Buddhist country, but at the village level Buddhism is extensively mixed with non-Buddhist elements, including spirit worship and astrology.⁸⁹ Thipha, like all the other interviewees, cited karma as a primary cause of her injury. Although karma (in Thai, *kam*) is a central tenet of Buddhism, villagers tend to refer to it as *khro-kam*, literally fate-karma. This term refers not only

88. *Sati*, or mindfulness, is one of the components of the Eightfold Path leading to the cessation of suffering according to Buddhist teaching. See SULAK SIVARAKSA, SEEDS OF PEACE: A BUDDHIST VISION FOR RENEWING SOCIETY 63–64 (1992). "*Sati* denotes self-watchfulness, which is to distance or detach oneself from one's thoughts and actions and so attain mental and moral equilibrium." PETER A. JACKSON, BUDDHADĀSA: THERAVADA BUDDHISM AND MODERNIST REFORM IN THAILAND 135 (2003). A more detailed discussion of the connection between negligence and *sati* appears in ENGEL & ENGEL, *supra* note 25, at 73.

89. ENGEL & ENGEL, *supra* note 25, at 6, 61.

to the victim's insufficient store of merit but also to the role of the stars.⁹⁰ In Thipha's causal explanation, therefore, we see both Buddhist and non-Buddhist elements seamlessly combined:

Some people go to consult [specialists], they have their palms read. They can avoid injuries. The palm reader tells them, "You have *khro*. You shouldn't travel." If they know this, then they don't go out. They can avoid any mishap. But if we don't have our palms read or our fortunes told, then we don't know that our *khro* is just ahead. We don't know where and when it will find us. Without knowing, we go ahead and we encounter it.

Khro comes from things we've done in the past. We don't know who was involved, or what we did. We don't know this. What we did follows us into the present We worked in the vegetable fields. We tilled the soil and uprooted the plants, and we may have harmed insects or other creatures. It seems that our *khro* attached itself to us without our knowing it Those insects didn't die, but we didn't see them. We caused them some injury. . . . Those creatures, whatever they were, we injured them without killing them. Then we left them alone. That bad karma attached itself to us.

An implicit assumption about responsibility emerges from Thipha's discussion of *khro-kam*. The accident was caused by her own misdeeds, by the bad karma she and her husband acquired when they unwittingly injured or killed tiny creatures while tilling the soil, and by their failure to learn their fortunes and stay home when there was great risk of harm. Nowadays, with the breakdown of traditional village-level remediation procedures, injury victims view this theory of causation as inconsistent with an attribution of responsibility to the other driver. In order to avoid creating more bad karma, they conclude that lumping is a more appropriate response than aggressively seeking a remedy.

Causal Role of Unheeded Premonitions

Consistent with the theory of *khro-kam* just discussed, Thipha and many other interviewees cite important signs and premonitions

90. *Id.* at 74.

of harm that preceded their injuries. In this sense, the cause of Thipha's accident was her own failure to heed these signs. One such sign was her husband's severe headache: "He must have had *khro* that day. His *khro* was very bad then. [The headache] was a sign, it was a premonition. It was a warning to us, because we weren't aware at that point." A second sign was her husband's uncharacteristically reckless driving and his irritability. On his way home from work, before they left for the market with their load of green beans, he had nearly struck an old man. After they loaded the motorcycle and began their journey to the market, Thipha warned him to slow down. Normally he would respond with a good-natured joke, but that day he answered ominously: "Oh, are you afraid to die?"

Both of these signs should have alerted Thipha and her husband that misfortune was about to strike. She should have stayed home, performed merit-making ceremonies, or exercised special care. Instead, she ignored the signs and proceeded to the location where the accident occurred. The cause of her mishap in this sense was her own failure to heed the warnings. Thipha concluded that she herself bore primary responsibility for the injury.

Two aspects of Thipha's story are especially striking. First, the multiplicity of causation reveals the fractured conceptual world in which she lives, where different reality frames contend, overlap, and intermingle. In this world, causation is overdetermined.⁹¹ Different explanations draw on different practices and belief systems and serve different functions. Second, each causal explanation is associated with a particular set of ideas about the attribution of responsibility. In Thipha's case—and her narrative is typical of most of those we heard in the course of our fieldwork—none of the causal explanations leads to the conclusion that the other driver is primarily responsible for her injury. Whether the cause was fate, karma, negligence, a ghost, or the failure to heed a premonition, the ultimate responsibility rests with Thipha and her husband, because their carelessness, inadvertence, inattention, or lack of mindfulness made the injury inevitable. When the injury victim considers herself responsible for her own misfortune, lumping may seem the most obvious and appropriate response.

91. See ENGEL & ENGEL, *supra* note 25, at 24–28.

The cultural construction of causation helps to explain the widespread practice of lumping. When causal explanations point back to the injury victim, as they did in Thipha's case, there appears to be no justification for demanding a remedy from someone else. But causation is a notorious black hole. In the American tort law tradition, causation is usually considered a necessary element that must be established independently, without regard to evidence of culpability or moral responsibility.⁹² Courts should treat "actual" causation, or "causation in fact," as a straightforward empirical question, as a trail of objectively verifiable breadcrumbs that either does or does not lead to the defendant's door. Yet some commentators have observed that causation is anything but straightforward and is by no means susceptible to simple objective tests. The determination of causation, as Wex S. Malone pointed out many years ago, inevitably conflates objective factual inquiries with underlying theories about responsibility for injury.⁹³ It is perhaps inescapable that humans conduct their causal inquiries within a framework of assumptions about moral responsibility for injuries and injury prevention. As Ann Scales has observed, "In U.S. legal culture, causation has been the justifying glue that sticks a defendant to a plaintiff."⁹⁴

American tort law is full of examples illustrating the conflation of ideas about responsibility and causation, notwithstanding the fact that causation is theoretically a separate and independent element of an injury case. One example appears in the diethylstilbestrol (DES) cases and, in particular, the New York case of *Hymowitz v. Eli Lilly & Co.*⁹⁵ As in most of the DES lawsuits, the plaintiff in *Hymowitz* was unable to prove by a preponderance of the evidence that the negligence of any of the DES manufacturers caused her injury because she could not determine which pills her mother had taken when pregnant.⁹⁶ The New York Court of Appeals adopted a distinctive version of market-share liability in response to this

92. See RESTATEMENT (THIRD) OF TORTS § 26 (2010); W. PAGE KEETON ET AL., PROSSER AND KEETON ON THE LAW OF TORTS § 30, at 164–65 (W. Page Keeton ed., 5th ed. 1984).

93. Wex S. Malone, *Ruminations on Cause-In-Fact*, 9 STAN. L. REV. 60, 97 (1956).

94. Ann Scales, "Nobody Broke It, It Just Broke": Causation as an Instrument of Obfuscation and Oppression, in *FAULT LINES: TORT LAW AS CULTURAL PRACTICE*, *supra* note 4, at 269, 272.

95. 539 N.E.2d 1069 (N.Y. 1989).

96. *Id.* at 1075.

dilemma, ruling that the plaintiff could recover a percentage of her damages from each pharmaceutical company that sold DES for use by pregnant mothers based on the share of the national market the company controlled.⁹⁷ In this approach, the question of causation was explicitly merged with the question of moral responsibility rather than regarded as an independent element of plaintiff's prima facie case: "[W]e choose to apportion liability so as to correspond to the over-all culpability of each defendant, measured by the amount of risk of injury each defendant created to the public-at-large."⁹⁸ To make it unmistakably clear that the new theory of causation had been fashioned to reflect a prior determination of moral responsibility, the court went on to hold that a defendant could be liable even if it could prove conclusively that it was *not* the cause of plaintiff's injury:

[T]here should be no exculpation of a defendant who, although a member of the market producing DES for pregnancy use, appears not to have caused a particular plaintiff's injury. It is merely a windfall for a producer to escape liability solely because it manufactured a more identifiable pill, or sold only to certain drugstores. *These fortuities in no way diminish the culpability of a defendant for marketing the product, which is the basis of liability here.*⁹⁹

A similar example of the conflation of theories of causation and responsibility in contemporary American tort law is found in the controversial doctrine of "lost chance." In these cases, thus far confined to medical malpractice claims, the plaintiff is by definition unable to prove as a factual matter—by a preponderance of the evidence—that the negligent doctor was a but-for cause of his or her injury, yet the plaintiff is able to prove that the negligent act reduced the odds for a favorable outcome in a case involving a preexisting condition.¹⁰⁰ Courts that have adopted the lost chance theory allow the plaintiff to recover a percentage of his or her damages based on the percentage likelihood of a better outcome that was lost due to the

97. *Id.* at 1078.

98. *Id.*

99. *Id.* (emphasis added).

100. See, e.g., *Falcon v. Memorial Hosp.*, 462 N.W.2d 44 (Mich. 1990); *Alberts v. Schultz*, 975 P.2d 1279 (N.M. 1999).

negligent act.¹⁰¹ Even though the doctor's negligence probably did not cause the plaintiff's injury, it did cause something. It caused a window of opportunity to close and therefore deprived the plaintiff of a chance to avoid harm.¹⁰² The plaintiff is entitled to sue for the lost chance, even if she cannot sue for the injury itself.¹⁰³ Yet surely this causal explanation is no more than a verbal smokescreen. The plaintiff is not really awarded damages for the lost chance in itself, since he or she can recover nothing under this theory if a doctor negligently reduces the plaintiff's odds and yet the plaintiff somehow manages to avoid injury. Lost chance theory is really a roundabout way of using causal language to express a theory of moral responsibility for injuries: even when the prognosis is not good and a bad outcome is likely no matter what treatment is provided, a doctor still has an obligation to provide the usual professional standards of care and may be held liable for failing to do so if an injury does occur despite the lack of a preponderance of evidence establishing but-for causation.

Both of these examples illustrate the tight connection between theories of causation and theories of responsibility. Indeed, in some cases, theories of responsibility come prior to, trump, or distort the causal explanations offered by judges and commentators. The supposedly simple, neutral, and factual causal inquiries that link a particular defendant to a particular plaintiff actually make up a broader moral inquiry that is anything but simple and is often hidden from view. Conclusions about causation and responsibility for injuries are culturally constructed, and they can take on the appearance of common sense. If, as in Thipha's case, common sense does not attribute causation or moral responsibility for an injury to another person or entity, then it may seem completely unremarkable that an injury victim should settle for lumping rather than aggressively pursue a remedy.

Jain, in the study of product-related injuries discussed above, further illustrates how the cultural construction of causation reinforces lumping as the predominant outcome when individuals

101. See *Falcon*, 462 N.W.2d at 48.

102. See Joseph H. King, Jr., *Causation, Valuation, and Chance in Personal Injury Torts Involving Preexisting Conditions and Future Consequences*, 90 YALE L.J. 1353, 1354 (1981) (stating an early version of the lost-chance theory).

103. See *id.* at 1365.

suffer product-related injuries.¹⁰⁴ She suggests that such injuries are not anomalous accidents but that harmful interactions between humans and products are built into the system of production and consumption.¹⁰⁵ Injuries result from an unspoken common-sense distribution of risk and suffering to particular groups in society.¹⁰⁶ From this perspective, lumping should not be understood as a rational, or even a conscious, choice made by individuals who are injured by defective products. Rather, lumping flows inevitably from the construction of a shared common sense about injuries that creates “of course” meanings around concepts such as causation and responsibility.¹⁰⁷ To follow any path other than lumping appears absurd.

In Jain’s view, tort law plays a key role in the social construction of injuries. The law is “a crucial discourse in rationalizing the distribution of the inevitable and integral costs of commodity culture.”¹⁰⁸ In terms of the analysis offered in this Article, Jain would appear to suggest that tort law helps to shape societal understandings of causation and responsibility and, by logical extension, the rules of tort law lead many injury victims to accept lumping as a matter of common sense: “[I]njury laws constitute the terms for understanding human wounding in the United States and continually reset the terms of its acceptability.”¹⁰⁹ It is no doubt true that legal doctrine can influence the interpretive frames through which ordinary people experience everyday harms, but this is not invariably the case.¹¹⁰ As the Thai examples illustrate, popular perceptions of causation and responsibility may bear little, if any, relationship to official legal categories and may not be influenced by legal doctrine in any perceptible way. The professional discourse of Thai tort law and the language used by lawyers and judges in formal institutional settings are almost totally disconnected

104. JAIN, *supra* note 44, at 151–55.

105. *See id.* at 56.

106. *See id.* at 151–53.

107. *See id.* at 28–29.

108. *Id.* at 155.

109. *Id.* at 151.

110. *See* David M. Engel, *Discourses of Causation in Injury Cases: Exploring Thai and American Legal Cultures*, in *FAULT LINES: TORT LAW AS CULTURAL PRACTICE*, *supra* note 4, at 251, 252–54.

from the discourses of injury that are familiar to ordinary people in Chiangmai and seem to have little, if any, constitutive effect.¹¹¹

In addition to suggesting, as Jain does, that formal law can shape the perceptions of ordinary people, it is crucially important to ask how popular understandings of causation and responsibility affect the tort law system. The fact that only sixty-six personal injury cases were filed in the Chiangmai Provincial Court over the six-year period from 1992 to 1997—an average of only eleven cases per year in a population of more than 1,330,000 people—is certainly connected to the popular perception that most injuries are caused by the victims themselves. The predominance of causal explanations pointing away from the injurer contributes to the widespread popular view that tort litigation is irrelevant and unnecessary, which in turn leads injury victims toward lumping. The roots of these common-sense views of causation, responsibility, and lumping are not to be found primarily in Thai tort law but in the social, economic, and ideological transformations northern Thailand has experienced during the past several decades.

Randolph E. Bergstrom is one of the few writers who have attempted to show how shifts in popular ideas about causation in a particular social setting can affect the behavior of the tort law system as a whole.¹¹² Bergstrom contends that changing views of causation in New York City from 1870 to 1910 produced a sharp increase in tort litigation at the turn of the twentieth century.¹¹³ In the earlier years of this time period, according to Bergstrom, New Yorkers tended to view accidents as inevitable and their own suffering as fate—a view of causation that in some ways resembles that of the accident victims in northern Thailand.¹¹⁴ This distinctive perspective on the issue of causation discouraged New Yorkers from attributing responsibility for injuries to other people and therefore rendered tort law irrelevant for most injury victims.¹¹⁵

Bergstrom suggests, however, that by 1910 New Yorkers tended to embrace a broader concept of causation and were more inclined to

111. See ENGEL & ENGEL, *supra* note 25, at 47–66.

112. See RANDOLPH E. BERGSTROM, *COURTING DANGER: INJURY AND LAW IN NEW YORK CITY, 1870–1910*, at 167 (1992).

113. See *id.* at 167–75.

114. *Id.* at 168–69.

115. See *id.*

search for remote causes that originated in the misdeeds of other human actors.¹¹⁶ This new view of causation, significantly, was associated with new views about moral responsibility, or in Bergstrom's words, with a "great surge in society's sense of duty to others . . . a moral regeneration."¹¹⁷ Abandoning their earlier tendency to view accidents as inevitable and lumping as the appropriate response in most cases, New Yorkers increasingly viewed their suffering in terms of the moral responsibilities citizens owed one another in what Bergstrom terms an "interdependent" society.¹¹⁸ The transformation in ideas about causation and moral responsibility resulted in a reduced tendency for New Yorkers to settle for lumping as an outcome and an increased tendency to invoke tort law.

If such a shift in accident perception actually took place in New York at the turn of the twentieth century, it appears that the opposite trend may now be underway in northern Thailand. There, transformations in ideas about causation and moral responsibility have increased the tendency for injured persons to settle for lumping. Before the economic and demographic dislocations associated with extensive global influences in the late twentieth century, injured villagers expected and usually received a remedy. Injuries were understood to affect a network of villagers and not just the person who suffered direct physical harm. The good of the village required that the injurer pay compensation to ensure that the necessary rituals were performed. A well-established customary law operated at the village level to define and enforce such obligations, and local authority figures—particularly the village and the subdistrict chief—made sure that injurers and victims usually followed customary procedures. When injurers refused to satisfy their obligations to injury victims, however, cases were sometimes brought to the Provincial Court. In those instances, the formal legal system exerted pressure on the injurer to pay compensation, which was measured by the norms of customary law rather than state law, and the lawsuits were generally withdrawn as soon as traditional obligations were satisfied.

116. *Id.* at 168.

117. *Id.* at 182.

118. *Id.* at 175–76.

During the final decades of the twentieth century, however, Thai villagers tended increasingly to live and work outside their home communities. Injuries occurred beyond the jurisdiction of traditional village leaders, and the customary laws and rituals themselves grew dim in the memories of those who suffered injuries. Instead of interpreting their injuries through the frameworks that had been familiar to their parents and grandparents, injury victims relied on a new, delocalized form of Buddhism that was stripped of its close connection to village spirit worship. As our interviewees told us, their understanding of Buddhism in its reconstituted form counseled them to absorb the harm rather than pursue a remedy, and there was no village community to persuade them otherwise. The descriptions of causation and responsibility that Prayat, Pinkaeo, and Thipha provide in their injury narratives are typical in this regard. Although fragmentary elements of longstanding belief systems are still present, they no longer have any connection to customary remedial practices that had long prevailed at the village level. For the three of them, as for other interviewees, responsibility for suffering rests primarily with the victim. The formal legal system is more irrelevant than ever, since there is no village customary legal system for which Thai tort law might serve as a forum of last resort. Social and demographic changes have spawned new ways of thinking about causation and responsibility for injury. Unlike the situation Bergstrom describes in late nineteenth-century New York, the result in Thailand is an increase in lumping and a decrease in tort litigation almost to the vanishing point.

V. CONCLUSION

This Article has addressed the most prevalent outcome in injury cases—lumping. A better understanding of lumping may shed light on the broader issue of injuries without remedies, since individuals who respond to injuries by absorbing the burden of the harm they have experienced, or who settle for mere token payments by the injurer or others, have by definition gone without a remedy. I have argued that lumping can be understood not just as an early yes-or-no decision point in the injury pyramid but as a form of socially constructed common sense. Drawing on the case studies of Prayat, Pinkaeo, and Thipha in northern Thailand, I have proposed a methodology for analyzing lumping as cultural practice.

Specifically, I have suggested that lumping can be understood through the intersection of ideas and practices concerning injuries and causation. I have argued that both injuries and causation should be viewed not simply as objectively ascertainable facts, but as social constructs that vary across time, place, and circumstance. I have urged in particular that injuries should be considered in relation to common-sense understandings of the Self, and that causation should be considered in relation to common-sense understandings of moral responsibility. Injury and the Self, causation and responsibility, are not, however, monolithic concepts. There is no such thing as a Thai view of such matters, or an American, a Japanese, or a German view. Within any society, multiple and contested viewpoints can be identified, and the production and distribution of knowledge systems across different social groups must always be considered. To invoke “culture” is a risky business these days, and one must explicitly avoid—and disclaim—essentialism. But for lawyers, who too often dismiss the value of ethnographic insights, there is more to be lost by ignoring the cultural dimensions of tort law than by treading too close to the pit of essentialism or orientalism.¹¹⁹ As I have tried to demonstrate in this Article, we cannot get very far in understanding lumping if we assume that it is enough to examine the costs and benefits facing injury victims at each decision point, without paying close attention to the local practices, belief systems, conceptual categories, and ideologies on which the relevant actors rely as they interpret and give meaning to their experiences.

Any map of lumping as a form of social practice must be attentive to the constitutive processes that give common-sense meanings to “injury” and “causation” in particular social circumstances. The map of lumping becomes three-dimensional as it takes into account the different ways in which these concepts can be framed, not just by different social groups, but by each individual injury victim who must cope with a number of overlapping and sometimes conflicting frameworks for interpreting his or her experiences. A fourth dimension is added to the map of lumping when it is recognized that these frameworks evolve over time and that they interrelate differently with one another as social circumstances change. Exploring these maps, indeed simply

119. See Teemu Ruskola, *Legal Orientalism*, 101 MICH. L. REV. 179, 204–05, 233–34 (2002).

recognizing that they exist, should improve our understanding of lumping as the default mode of handling injury cases and should help to explain why most injuries go without remedies.