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Teaching Law Day: A Senior Moment

Michael A. Mogill

Professor of Law

The Dickinson School of Law

Pennsylvania State University

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¹ [Professor of Law](#), The Dickinson School of Law of the Pennsylvania State University; B.S., University of Illinois, Champaign-Urbana; J.D., Northeastern University School of Law; LL.M., Temple University School of Law. The author wishes to dedicate this article to residents of one of our nursing homes in Carlisle, Pennsylvania, for their candid comments during the law day discussion, and his appreciation to Ian Hill for his valuable research and editing, to his son, Adam Mogill, an aspiring future law student, for his thoughtful comments and provocative questions, and to Sherry Miller for preparing this manuscript.

I have often enjoyed those moments when I have been asked to give speeches or provide remarks in various forums, whether it be in a school, cultural, or religious atmosphere.² Having lately addressed students at elementary, middle, and law school events, I was recently approached by a colleague who asked if I would share my thoughts at a local nursing home as part of that facility's speakers program. The program consisted of a monthly series of contemporary topics for its residents. As I have always viewed teaching as an opportunity to also learn from others, I quickly agreed to give a presentation and contacted the activities director at the home to get an idea regarding the interests of the residents. Noting that my remarks were to be given close to the observance of Law Day, I then developed the following lesson plan . . .

I. Opening Statements

34. The multipurpose room at the nursing home was filled with about thirty residents, most of whom were ambulatory and who were genuinely enthusiastic in their greeting. I had learned from the activities director that those attending wanted to learn about many aspects of lawyering, including how law students are taught, what skills lawyers need, what characteristics make for a “good” lawyer, and how does the legal system *really* work — in particular, the director advised that the residents were especially interested in the intricacies of the jury system. Thus I decided to begin my remarks by providing some historical perspective on both the role and growth of the legal profession in our society. I then moved on to the methodology of educating law students to serve as effective advocates, while suggesting the skills and traits that would produce a successful attorney.

35. While the residents were attentive to my remarks (making this a contrast to certain days in the classroom), I had planned to structure this presentation around their participation, rather than my lecturing. In essence, I hoped to engage them in exploring our jury system by involving them in a dialogue in which they would actively contribute to the discussion of a contemporary issue. And I decided that the best manner to do so would be to empanel them all as members of a jury, retrying

2 See Michael A. Mogill, *To Be or Not to Be . . . a Lawyer — It's Elementary*, 1 *Accord, Phx. L. Rev. Online* 5 (2012); Michael A. Mogill, *One Not-So-Dirty Word*, 11 *Whittier L.J. Child & Fam. Advoc.* 115 (2011); Michael A. Mogill, *Wait Until Next Year — Again*, 4 *DePaul J. Sports & Contemp. Probs.* 1 (2008); Michael A. Mogill, *Eight Simple Rules for Stating My Dogma*, 6 *Rutgers J.L. & Rel.* 3 (2005); and Michael A. Mogill, *Take Me Out to the Synagogue*, 14 *Seton Hall J. Sports & Entm't L.* 101 (2004).

what has become both an eye-opening and controversial decision, one that has provoked strong feelings on behalf of those who are critical of our legal system as contrasted to those who promote the idea of corporate accountability. Being a Torts professor, I had previously invoked this role-play in the classroom, which I found led to wide-ranging and at times highly charged discussions. And so we turned to *Liebeck v. McDonald's Restaurants*, a case that has simply become known as “Hot Coffee.”³

II. The Background Facts

36. The residents acknowledged that they had all heard of this case. Many instantly commented that they remembered this involved a plaintiff who had “hit the jackpot” based upon a “bogus” claim.⁴ But to make sure that we were all on the same page, I briefly refreshed their recollection by telling them that the plaintiff was Stella Liebeck, a seventy-nine year old woman who was a passenger in her grandson’s car. She had just purchased a cup of coffee from the drive-through lane, and she had tried to open the cup after her grandson had parked in the restaurant parking lot.⁵ The coffee spilled on her, and she subsequently sued McDonald’s for the injuries she had suffered. The jury returned a verdict for her of \$200,000, which was ultimately reduced to \$160,000 due to the finding that Ms. Liebeck was 20% at fault for her own conduct. It also awarded punitive damages of \$2.7 million.⁶

37. I then polled the residents as if they were the jury for the case, suggesting to them that they were truly a jury of peers for Ms. Liebeck. In essence, I asked if they agreed or disagreed with the verdict. The great majority were angry that she had been awarded any amount of money, but all were especially appalled by the amount of damages that had been given. We then discussed why they had that seemingly unanimous view in support of McDonald’s. The responses focused on either her own irresponsibility or greed, or the unfairness in holding McDonald’s culpable for selling hot coffee, a product which most assuredly must be sold in

3 [HOT COFFEE: IS JUSTICE BEING SERVED?](#) (HBO Documentary Films, 2011).

4 See Mark B. Greenlee, *Kramer v. Java World: Images, Issues, and Idols in the Debate over Tort Reform*, 26 *Cap. U.L. Rev.* 701, 709 (1997).

5 S. Reed Morgan, *Verdict Against McDonald's Is Fully Justified*, 17 *Nat'l L.J.* 8, 20 (1994); Kevin G. Cain, *AND NOW THE REST OF THE STORY . . . The McDonald's Coffee Lawsuit*, 11 *J. Consumer & Com. L.* 14, 15 (2007); RALPH NADER & WESLEY J. SMITH, *NO CONTEST: CORPORATE LAWYERS AND THE PERVERSION OF JUSTICE IN AMERICA* 269 (1996).

6 Andrea Gerlin, *A Matter of Degree: How a Jury Decided McDonald's Should Pay a Woman Millions for a Hot-Coffee Spill*, *Wall St. J.*, Sept. 1, 1994; *Liebeck v. McDonald's Rests., P.T.S., Inc.*, 1995 WL 360309 (N.M. Dist. Aug. 18, 1994).

a heated condition. Many also commented that this case should never have been given to any jury. I then asked for the members of our unanimous “jury” to keep their hands aloft while I recited various facts from the case itself, and only to lower their hands if and when they decided that they were no longer willing to return a defendant’s verdict.

III. The Evidence

38. As I began to test the resolve of our “jury,” I prefaced my remarks by noting that in my teaching of Torts, I stress that the cases we discuss are very much fact driven. While there are rules used to decide the cases, most of these rules come from the common law rather than from statutes. Therefore, the facts are extremely influential in this area, so much so that I have suggested to my students that the course makes it seem that we are in “fact school” as much as we are in law school. Thus, the details of how the injury occurred are critical in determining who should be responsible for the harm that resulted from the incident in question, with the opposing lawyers advocating for how the law should be applied to the facts. Having provided this prelude, I proceeded to direct our resident “jury” to consider the following facts from the trial itself:

1. The plaintiff’s argument was that the coffee was defective because it was served too hot;⁷
2. The coffee had been served at a temperature between 180–190 degrees;⁸
3. This temperature was at least 20 degrees hotter than that of any competitor in the fast food industry;⁹

7 *Liebeck v. McDonald’s Rests., P.T.S., Inc.*, 1995 WL 360309 (N.M. Dist. Aug. 18, 1994); S. Reed Morgan, *Verdict Against McDonald’s Is Fully Justified*, 17 Nat’l L.J. 8, 20 (1994).

8 Mark B. Greenlee, *Kramer v. Java World: Images, Issues, and Idols in the Debate over Tort Reform*, 26 Cap. U.L. Rev. 701, 718 (1997); S. Reed Morgan, *Verdict Against McDonald’s Is Fully Justified*, 17 Nat’l L.J. 8, 20 (1994); RALPH NADER & WESLEY J. SMITH, *NO CONTEST: CORPORATE LAWYERS AND THE PERVERSION OF JUSTICE IN AMERICA* 269 (1996).

9 Andrea Gerlin, *A Matter of Degree: How a Jury Decided McDonald’s Should Pay a Woman Millions for a Hot-Coffee Spill*, *Wall St. J.*, Sept. 1, 1994; Mark B. Greenlee, *Kramer v. Java World: Images, Issues, and Idols in the Debate over Tort Reform*, 26 Cap. U.L. Rev. 701, 708 (1997); RALPH NADER & WESLEY J. SMITH, *NO CONTEST: CORPORATE LAWYERS AND THE PERVERSION OF JUSTICE IN AMERICA* (1996).

4. Coffee served at home has a temperature ranging from 158–168 degrees, and is held at 150–157 degrees after three minutes;¹⁰
5. If coffee of the temperature of McDonald's is spilled, it can cause full thickness 3rd degree burns in two to seven seconds, with these going through the skin and subcutaneous (under the skin) fat to damage muscle, tissue, and bone below;¹¹
6. The plaintiff suffered 3rd degree burns to her legs, posterior, and genital area, with 16% permanent scarring;¹²
7. The plaintiff remained in the hospital for eight days, while she underwent whirlpool debridement procedures (surgical removal of foreign material and dead tissue from a wound to prevent infection and to promote healing) to remove necrotized (dead) and contaminated tissue and then had several skin grafts. Both procedures produce excruciating pain and disfigurement and were necessary to save her life;¹³
8. McDonald's knew of this risk of injury for over ten years through 700 previous instances documented in their own files;¹⁴
9. McDonald's did not warn of the severity of the burn potential;¹⁵
10. McDonald's brewed at this temperature because this produces ten more cups of coffee from a ten pound bag of coffee;¹⁶

10 WILLIAM HALTON & MICHAEL MCCANN, [DISTORTING THE LAW: POLITICS, MEDIA, AND THE LITIGATION CRISIS](#) 190 (2006); [HOT COFFEE: IS JUSTICE BEING SERVED?](#) (HBO Documentary Films, 2011).

11 Andrea Gerlin, *A Matter of Degree: How a Jury Decided McDonald's Should Pay a Woman Millions for a Hot-Coffee Spill*, [Wall St. J.](#), Sept. 1, 1994; Mark B. Greenlee, *Kramer v. Java World: Images, Issues, and Idols in the Debate over Tort Reform*, 26 [Cap. U.L. Rev.](#) 701, 718 (1997); RALPH NADER & WESLEY J. SMITH, [NO CONTEST: CORPORATE LAWYERS AND THE PERVERSION OF JUSTICE IN AMERICA](#) 270 (1996).

12 RALPH NADER & WESLEY J. SMITH, [NO CONTEST: CORPORATE LAWYERS AND THE PERVERSION OF JUSTICE IN AMERICA](#) 269 (1996).

13 Kevin G. Cain, *AND NOW THE REST OF THE STORY . . . The McDonald's Coffee Lawsuit*, 11 [J. Consumer & Com. L.](#) 14, 15 (2007); DAVID N. HERNDON, [TOTAL BURN CARE](#) (2007).

14 Andrea Gerlin, *A Matter of Degree: How a Jury Decided McDonald's Should Pay a Woman Millions for a Hot-Coffee Spill*, [Wall St. J.](#), Sept. 1, 1994; Mark B. Greenlee, *Kramer v. Java World: Images, Issues, and Idols in the Debate over Tort Reform*, 26 [Cap. U.L. Rev.](#) 701, 718 (1997); RALPH NADER & WESLEY J. SMITH, [NO CONTEST: CORPORATE LAWYERS AND THE PERVERSION OF JUSTICE IN AMERICA](#) 269 (1996).

15 Mark B. Greenlee, *Kramer v. Java World: Images, Issues, and Idols in the Debate over Tort Reform*, 26 [Cap. U.L. Rev.](#) 701, 720 (1997); RALPH NADER & WESLEY J. SMITH, [NO CONTEST: CORPORATE LAWYERS AND THE PERVERSION OF JUSTICE IN AMERICA](#) 269 (1996).

16 [HOT COFFEE: IS JUSTICE BEING SERVED?](#) (HBO Documentary Films, 2011).

11. Mrs. Liebeck originally requested that McDonald's pay her medical expenses not covered by Medicare, totaling approximately \$11,000, and McDonald's counteroffered \$800;¹⁷
12. The lawsuit requested \$90,000 in damages;¹⁸
13. This was the plaintiff's first ever lawsuit;¹⁹
14. A mediator recommended that McDonald's settle the case for \$225,000 but McDonald's refused to do so;²⁰
15. McDonald's witnesses testified that they did not intend to turn down the heat on their coffee;²¹
16. Doctor's testified that this was one of the worst scald cases they had ever seen (I did not present the photos of the injuries²² because this exercise was not an actual trial, and I feared these elders might be too uncomfortably shocked and unsettled by the images);²³
17. Most consumers do not know that coffee this hot causes such severe burns, nor of McDonald's practice of serving coffee this hot;²⁴

17 Kevin G. Cain, *AND NOW THE REST OF THE STORY ... The McDonald's Coffee Lawsuit*, 11 J. Consumer & Com. L. 14, 15 (2007); Andrea Gerlin, *A Matter of Degree: How a Jury Decided McDonald's Should Pay a Woman Millions for a Hot-Coffee Spill*, Wall St. J., Sept. 1, 1994; Mark B. Greenlee, *Kramer v. Java World: Images, Issues, and Idols in the Debate over Tort Reform*, 26 Cap. U.L. Rev. 701, 719 (1997); RALPH NADER & WESLEY J. SMITH, *NO CONTEST: CORPORATE LAWYERS AND THE PERVERSION OF JUSTICE IN AMERICA* 269 (1996).

18 Mark B. Greenlee, *Kramer v. Java World: Images, Issues, and Idols in the Debate over Tort Reform*, 26 Cap. U.L. Rev. 701, 719 (1997); S. Reed Morgan, *Verdict Against McDonald's Is Fully Justified*, 17 Nat'l L.J. 8, 20 (1994).

19 Kevin G. Cain, *AND NOW THE REST OF THE STORY ... The McDonald's Coffee Lawsuit*, 11 J. Consumer & Com. L. 14, 15 (2007); Andrea Gerlin, *A Matter of Degree: How a Jury Decided McDonald's Should Pay a Woman Millions for a Hot-Coffee Spill*, Wall St. J., Sept. 1, 1994.

20 Andrea Gerlin, *A Matter of Degree: How a Jury Decided McDonald's Should Pay a Woman Millions for a Hot-Coffee Spill*, Wall St. J., Sept. 1, 1994; Mark B. Greenlee, *Kramer v. Java World: Images, Issues, and Idols in the Debate over Tort Reform*, 26 Cap. U.L. Rev. 701, 719 (1997); RALPH NADER & WESLEY J. SMITH, *NO CONTEST: CORPORATE LAWYERS AND THE PERVERSION OF JUSTICE IN AMERICA* 269 (1996).

21 Kevin G. Cain, *AND NOW THE REST OF THE STORY ... The McDonald's Coffee Lawsuit*, 11 J. Consumer & Com. L. 14, 17 (2007); Andrea Gerlin, *A Matter of Degree: How a Jury Decided McDonald's Should Pay a Woman Millions for a Hot-Coffee Spill*, Wall St. J., Sept. 1, 1994.

22 Mrs. Liebeck's injuries are candidly presented in the *Hot Coffee* DVD. *HOT COFFEE: IS JUSTICE BEING SERVED?* (HBO Documentary Films, 2011).

23 S. Reed Morgan, *Verdict Against McDonald's Is Fully Justified*, 17 Nat'l L.J. 8, 20 (1994).

24 S. Reed Morgan, *Verdict Against McDonald's Is Fully Justified*, 17 Nat'l L.J. 8, 20 (1994).

18. McDonald's daily revenue from the sales of coffee alone was \$1.35 million;²⁵
 19. The award of punitive damages represented two days of McDonald's nationwide coffee sales;²⁶
 20. The trial judge, a conservative Republican, commented that McDonald's acted with wanton recklessness and with an indifference to the consequences of its conduct;²⁷
 21. The trial judge ultimately reduced the total verdict, including compensatory and punitive damages, to \$640,000;²⁸
 22. The plaintiff never fully recovered her health after the injury.²⁹
39. During my previous career as a trial attorney, I would try to be sure to keep one eye on the witness, another on the judge, and a "third" (actually, that "floating" second eye) on the jury. I maintained that it was essential for the advocate to observe the jury's reaction in order to sense how its members were perceiving the evidence that was proffered. One accurate indicator tended to be whether their body language revealed that they understood the importance of the evidence or if they portrayed confusion. I have continued to mimic that practice in the classroom, with my students acting as my "jury" to provide feedback, however subtle it may be, via their own body language, confused looks, or simply unconscious nodding to indicate if they have been following our dialogue. Thus, as I presented each of the above facts to our "jury" that day, I continued to gaze at the residents to note their reactions. As each of the facts was read, there were murmurs and surprised looks among them, heads shaking, and a hand occasionally went down. By the time that I had finished my recitation, there was not a single hand still raised. After I was assured by each of them that this was not at all the result of their own weariness, we discussed why they had changed their initial "verdict."

25 Mark B. Greenlee, *Kramer v. Java World: Images, Issues, and Idols in the Debate over Tort Reform*, 26 *Cap. U.L. Rev.* 701, 722 (1997); S. Reed Morgan, *Verdict Against McDonald's Is Fully Justified*, 17 *Nat'l L.J.* 8, 20 (1994).

26 Mark B. Greenlee, *Kramer v. Java World: Images, Issues, and Idols in the Debate over Tort Reform*, 26 *Cap. U.L. Rev.* 701, 718 (1997); S. Reed Morgan, *Verdict Against McDonald's Is Fully Justified*, 17 *Nat'l L.J.* 8, 20 (1994).

27 RALPH NADER & WESLEY J. SMITH, *NO CONTEST: CORPORATE LAWYERS AND THE PERVERSION OF JUSTICE IN AMERICA* 269 (1996) (quoting from the transcript of proceedings in *Liebeck v. McDonald's Rests., P.T.S., Inc.*, 1995 WL 360309 (N.M. Dist. Aug. 18, 1994)).

28 Kevin G. Cain, *AND NOW THE REST OF THE STORY ... The McDonald's Coffee Lawsuit*, 11 *J. Consumer & Com. L.* 14, 17 (2007); Mark B. Greenlee, *Kramer v. Java World: Images, Issues, and Idols in the Debate over Tort Reform*, 26 *Cap. U.L. Rev.* 701, 723 (1997).

29 *HOT COFFEE: IS JUSTICE BEING SERVED?* (HBO Documentary Films, 2011).

IV. The Post-Deliberation Deliberation

40. I began our discussion by reminding the residents that almost all of them had only minutes earlier favored a verdict for the defendant McDonald's but now they were unanimous in believing that the damages were justified. This mimicked the initial view of some of the actual jurors who had decided the case.³⁰ I then asked why the sudden reversal. And now the anger had shifted. One resident commented that they now truly knew the facts. This was not surprising given that the story became a matter of household conversation and most of the facts from the case were discarded in favor of sound bites, which had been perpetuated from the initial AP wire reporting through the late night comedy and talk show circuit.³¹ The resident had previously only known the inaccuracies and exaggerations that had been portrayed via the media and prolonged by various "public interest" groups spending millions of dollars on advertising. These included groups such as the American Tort Reform Association, APCO (a public relations firm owned by Philip Morris), and the U.S. Chamber of Commerce, among others.³²

41. Another resident stated that McDonald's should be made accountable for its conduct, especially given its prior knowledge of burning incidents and its "arrogance" in refusing to alter its practices. Still a third resident offered that McDonald's conduct was indeed more culpable because they had taken advantage of a fellow senior citizen, and that he would have returned even a higher amount of damages on Ms. Liebeck's behalf. Similar comments followed.

42. I then queried whether it was truly fair to have a jury decide cases like this, given the explosive and possibly prejudicial nature of the facts as they now understood them. A resident, one of a few who admitted to ever having previously served as a real life juror, responded that it was her belief that we should trust the jury. It was her view that only those people who served on the panel truly knew the facts of the case, while the general public only heard what was publicized or propagandized. A second resident followed by stressing the importance of victims having access to the courts to seek redress; he stressed that victims would otherwise lose their freedom to have cases decided by their peers. The end result would then

30 RALPH NADER & WESLEY J. SMITH, [NO CONTEST: CORPORATE LAWYERS AND THE PERVERSION OF JUSTICE IN AMERICA](#) 268 (1996).

31 Jay Leno eventually stopped using the case for comedic or rhetorical effect after he learned the actual facts of the case. Mrs. Liebeck's attorney reported that Leno called him to convey his appreciation for a strong justice system that would hold corporations accountable for their wrongdoings. See WILLIAM HALTON & MICHAEL MCCANN, [DISTORTING THE LAW: POLITICS, MEDIA, AND THE LITIGATION CRISIS](#) 183–224 (2006); RALPH NADER & WESLEY J. SMITH, [NO CONTEST: CORPORATE LAWYERS AND THE PERVERSION OF JUSTICE IN AMERICA](#) 273 268 (1996).

32 ABC John Stossel Special, *The Blame Game: Are We a Country of Victims?* August 17, 1995.

be decisions being determined by a jury of one, that “one” being the judge rather than the proverbial cross-section of the community. And another resident acknowledged that perhaps the public had overreacted to the *Liebeck* verdict, suggesting that Ms. Liebeck’s fate could have been that of any one of the residents sitting in that multipurpose room. Again, other residents expressed their agreement.

43. I then pushed further by suggesting that the concept now familiarly known as “tort reform” is premised on the notion of eliminating frivolous lawsuits and limiting punitive damages. I advised that those favoring such reform argue that this will ultimately hold down the costs to businesses, which will allow them to operate more efficiently, thus benefiting the public in the form of lower prices. As a result, limiting access to the courts for those who would seek to benefit from what has been characterized as “jackpot justice” or “litigation lottery,” or placing caps on non-economic damages (such as punitive damages or pain and suffering) would ensure that companies are therefore able to accurately predict the economic impact likely to occur if they were to harm someone.³³

44. Now the room was really astir, as the residents reacted nearly as one in voicing that the public reaction to *Liebeck* was an example of the zeal for tort reform gone wrong. They had come to see the myth of that concept, that tort reform does not help those people who have been wronged. But instead, I asked, is it not possible that there are people who might try to “game” the system and bring unjustified suits, thereby taking advantage of the legal process? I added that this could be potentially disastrous to a small business owner, one who lacks the resources to repeatedly defend herself or her company in court. Several of the residents responded by indicating that, while that was possible, they trusted that a well-informed jury would prevent that from happening, and that they would rather trust the common sense of the jury to make socially responsible decisions, instead of relying on the economic incentive of corporations to avoid doing so.

45. As our discussion wore down, it was clear that the tenor in the room had indeed changed. The recognition that each of us is potentially vulnerable to injury and that those causing the harm should be made accountable for those harms led our “jurors” in the end to conclude through their *own* sense of advocacy that “tort respect” would better protect victims. Indeed, in the eyes of the residents, the need to protect and recompense individuals from harm, while holding defendants culpable for their conduct, trumped “tort reform” (or the injustices that are created to those injured, such that “tort reform” has in effect become “tort deform”) once the facts were known.

46. As our session concluded, one of the residents asked if I knew what ultimately

³³ W. Kip Viscusi, *The Social Costs of Punitive Damages Against Corporations in Environmental and Safety Torts*, 87 *Geo. L.J.* 285 (1998).

happened to the verdict by the jury, especially after the judge had issued his remittitur. I responded that the case was subsequently settled prior to appeal via a sealed agreement, such that we will not be able to know the amount of the final “bill” paid by McDonald’s.³⁴ But I also added that immediately after the jury’s verdict, McDonald’s restaurants in Albuquerque were selling their coffee at a comparatively cool 158 degrees.³⁵ However, as an aside, I hasten to note that one commentator suggested that this might not have been the result of a retooling of McDonald’s corporate policy. Instead, as a matter of general industry practice, cups that contain hot beverages are now stronger and easier to handle than in 1994. Moreover, most cars now include beverage holders. Yet, it is still contended that sellers should warn customers that the coffee is not merely hot, but scalding.³⁶ And, now knowing of the actual facts of the case, several of the residents smiled their approval of the ultimate result, convinced that they themselves, through our role-play that day, had made a real and positive difference in the lives of others.

I thanked the residents for their “service” and for being active participants during our role-play. Several asked me to stay afterward to share in their mid-afternoon snack and to continue our discussion. Delighted by the warmth of the invitation and forever eager to learn through my encounters with others, I obliged. The residents commented that our exercise that day had shaken up their belief systems, that Ms. Liebeck represented all of them as potential victims, and that they were no longer so readily disposed to believe whatever was conveyed by interested “others” about cases at trial. Many of them shared their belief about the importance of juries and of their own longing to serve on a jury panel, so that they would decide matters based upon what they personally heard and observed, not on the reporting of those “others.” And in expressing their gratitude for the time I spent, an occasion which to me was a mutual learning experience, they asked that I offer my own comments, as an impartial participant that day, to my peers, practitioners, and aspiring law students. In doing so, they suggested that these professionals might benefit from being reminded of the importance of questioning others and even ourselves at times. And in deference to the advocacy of those elders, and having enjoyed that mid-afternoon snack, I agreed to do so...

34 RALPH NADER & WESLEY J. SMITH, [NO CONTEST: CORPORATE LAWYERS AND THE PERVERSION OF JUSTICE IN AMERICA](#) 272 (1996).

35 Andrea Gerlin, *A Matter of Degree: How a Jury Decided McDonald’s Should Pay a Woman Millions for a Hot-Coffee Spill*, [Wall St. J.](#), Sept. 1, 1994.

36 Matt Fleischer-Black, *One Lump or Two*, [The American Lawyer](#), June 1, 2004.