CHAPTER THIRTEEN

SHOULD TORT LAW BE REPLACED?

Having now completed our consideration of the doctrines of tort law, we can stand back and ask: Does tort law make sense? Should tort law be wholly or partly replaced, and, if so, by what? These questions have been much discussed over the past few decades. Tort law has especially been criticized for being an unsatisfactory way of dealing with personal injuries. In some contexts, such as workers' compensation, tort law has long been completely supplanted by a statutory and regulatory compensation scheme. Other alternatives of varying comprehensiveness have been enacted or proposed for different contexts, with special attention lavished on the problem of compensation for automobile injuries.

The determination of whether tort law makes sense depends on a number of subsidiary issues that are implicit in the readings of this chapter's first section. Are the dissatisfactions that one might have with tort law capable of being remedied by local tinkering with particular institutional or doctrinal aspects? Or are they systemically inherent in tort law as a judicial mechanism for dealing with wrongful injury? In thinking about these questions we have not only to consider the details of tort law but also to work out the standpoint of criticism that is appropriate to tort law.

Even if we decide that tort law should be wholly or partly replaced, the readings in the subsequent sections of this chapter show that we must not imagine that the road is then open to instant utopian solutions. Not only does legislation operate within political constraints, but its very open-endedness (in comparison with tort law) accentuates the normative problems it presents. Once one curtails the operation of tort law's circumscribed notion of wrongful injury, what should take its place? What kinds of activities or conditions should be singled out as triggering the operation of a compensatory scheme? Given that the attempt at full compensation that characterizes tort law will not be feasible across a significantly wider set of injuries, how does one determine the level of compensation or who should pay it? And if tort law is not completely abolished, what is the relationship between what remains of it and the mechanisms of compensation that have replaced it? The question of replacing tort law is therefore a complex one that entails consideration of tort law's normative standing as a particular legal regime in the panoply of possible political responses to the inevitability of injury.

I. THE VIABILITY OF TORT LAW

BLUM & KALVEN, PUBLIC LAW PERSPECTIVES ON A PRIVATE LAW PROBLEM: AUTO COMPENSATION PLANS

(Boston: Little, Brown, 1965) at 8-15

We turn first to consider fault as a criterion of liability. We do so with only the most modest of expectations. The whole concept of fault, even in our torts system, is so closely tied to views on personal responsibility—and hence to values that have deep cultural and religious roots—that we must limit our discussion of it here to very narrow confines. We have no intention of developing an adequate brief on its behalf. Our purpose is merely to counteract the fashionable tendency to dismiss it out of hand as being an untenable principle.

There have been various objections to fault as a criterion for liability, but in oversimplified fashion they can be schematized as three general points: (1) We can never get enough facts about a particular accident to know whether fault was present or not; (2) even if we had a full history of the event we would be unable to rationally apply the fault criterion because it is unintelligible; and (3) even if we knew the history of the event and understood what fault meant, we would be deciding cases on the basis of an unsound and arbitrary criterion.

The objection based on the difficulties of proof is a familiar one in all litigation, but it is urged as presenting special and decisive difficulties for the auto accident. There is the threat of evidence deteriorating because of the time it may take to get to trial. There is the sheer absence of competent witnesses at the crucial time of the event. And there is the emphasis under the fault criterion on split-second time sequences which place extra burdens on the capacity of witnesses to perceive, recall, and narrate. These difficulties cumulate, we are told, so that the actual trial almost necessarily involves an imperfect and ambiguous historical reconstruction of the event, making a mockery of the effort to apply so subtle a normative criterion to the conduct involved. An impenetrable evidentiary screen thus makes fault unworkable as a criterion whatever its merits as a concept.

But does not this objection run the risk of proving too much? All adjudication is vulnerable to the inadequacies of evidence and the consequent exploitation of the situation by the skill of counsel. From prosecutions for murder to adjudications of the validity of family partnerships for income tax purposes the law has had to wrestle with these difficulties. Auto accidents are at least more public than many other legal situations and they almost invariably do leave physical traces. The witness to an auto accident is asked for observations likely to be well within his daily experience. The law can tolerate a goodly margin of error, and the threshold of distortion which this line of attack on liability for fault must establish before it becomes a persuasive reason for throwing over the system is high. We remain skeptical that the evidentiary aspects of the auto accident are so peculiar as to be set apart from the evidentiary aspects of all other controversies that are brought to law.

The objections to fault as being an unintelligible concept also run the risk of proving too much. One needs a generous view of the meaning of a legal principle. We should be at least as charitable toward negligence as we are toward procedural due process, fraud, or gross income. All the big ideas of law are imprecise and have a core meaning which moves toward ambiguity at the margin. Except intuitively, there seems no way of measuring the relative clarity of such ideas. When we place negligence in the context of law's other big ideas, it looks at home. A simple test of

its intelligibility is whether we can put easy cases so as to compel virtually complete agreement on the presence or absence of fault. We would all readily recognize that the negligence concept could pass this test were it not for the fact that our impressions of it are derived so much from the reading of appellate decisions with their marginal fact situations. The negligence concept, after all, has been employed by generations of lawyers and judges as though it made sense. They were able to argue in terms of it and to array cases inside and outside the line. The decades of apparently rational discussion at the bar are paralleled by the decades of law school teaching. Every law student has been exposed to the experience of locating the relevant variables involved and of ranking the cases through varying a fact in one direction or the other. ...

The third objection, that even in theory fault is an unsound criterion, has several facets. The first is that the law exaggerates the contribution of the actor's fault to an accident. On a larger view the actor's role is frequently dwarfed by other causally contributing factors, such as road engineering, traffic density, car design, traffic regulations, and the performance of other cars just before the accident. The precise challenge is whether an admitted flaw in the actor's conduct, looked at in the context of the other causes, is a sufficient basis for determining whether the accident victim is to get compensation.

This challenge appears to mirror the proposition sometimes advanced in criminal law that the individual actor's contribution to the crime is overshadowed by such other contributing factors as poor education, poverty, broken home, and so forth. The difficulty with this approach either in tort or in crime is that it is hard to see what else the law could do but single out the conduct of the individual actor. Speaking statistically, we can of course say that road engineering or broken homes are significant causes of accidents or crimes. But this does not help dispose of the individual case, and the law is charging the actor for a flaw in conduct that the mass of mankind—including those who come from broken homes or drive on poorly engineered highways—could have avoided. Although never philosophical about causation, the law has clearly recognized that any actor is but one of an infinity of causes of a particular event. It has dealt with the actor because he was a reachable cause and because his contribution to the event was relevant and decisive. Even if we concede that the law always overrates the contribution of the actor, there is nothing in the auto accident field that gives this perception any special force.

The critic of the fault criterion might shift his emphasis and follow another line in pressing the point about the incommensurability of the actor's flaw and the consequences the law attaches to it. Negligence covers a multitude of sins, ranging from the grave to the trivial; and the critic can stress that there is no correlation whatsoever between the gravity of the sin and the magnitude of the damage caused. If tort damages were viewed as a system of fines, everyone would agree that the incidence of sanctions would be absurd, and it would be the rare case in which the punishment fit the crime. The difference in conduct between the negligent and the non-negligent drivers is too slight to support the huge difference in consequences that the fault principle attaches.

Does it matter for tort law that the punishment does not fit the crime? A sufficient answer is that the purpose of tort law is to compensate and not to punish; and this is well understood throughout the community and by the typical defendant. But the critic's point probably overestimates the lack of correlation between risk and damage. On the average we are likely to find that the magnitude of harm caused correlates fairly well with the magnitude of the risk taken—in fact, the magnitude of the potential harm bears a direct relationship to the magnitude of the risk taken. The critic's point in any event is especially weak in the case of auto accidents inasmuch as

virtually everyone is well aware that an auto in motion can maim or kill. ... [I]t is improper to invert the process of judgment and argue that a small amount of harm somehow indicates a small degree of negligence. The key concept for the law here is risk; and what is constant in these situations is the amount of negligent risk taken—and this is a factor which, as Holmes noted almost a century ago, is independent of the harm that actually occurs.

Another facet of the objection to fault as a principle builds on the not implausible assumption that all drivers are at some time or other clearly negligent. Most negligent conduct however, is not actionable inasmuch as it does not cause harm. Whether a given negligent act causes harm seems to be largely a matter of chance. Since all drivers are in the same boat morally and only chance distinguishes them, it has been urged that all drivers ought to pay for the damages inflicted by drivers as a class, and that it is unjustifiable to place the burden solely on those whom chance did not favor.

The popular impression that all drivers are alike in being occasionally negligent is very likely an overestimation, for it fails to take account of the many minor adjustments in conduct which are made when men engage in what seems to be essentially the same risk behavior. Driving eighty miles an hour is not a constant risk, and presumably all recognize that such a speed in the city entails a markedly higher risk than in the open country. But driving eighty miles an hour in the city does not represent a constant risk either, and those who drive at this speed under similar conditions might well do so with differing degrees of reserve or caution. It is not unlikely that there are grades of prudence even among the negligent risk takers. These minor differentiations in all probability partially account for which of the negligent drivers in fact get into accidents. And even if we grant that there is a large factor of chance as to which of the negligent drivers do cause accidents, it does not follow that the recruitment of drivers to accidents is a random process. Under the laws of chance, the drivers who take relatively more risks of a given magnitude are more likely to become involved in accidents than their fellow drivers who take relatively fewer risks of the same magnitude.

The last challenge of fault as a principle echoes the recurring suggestion in much contemporary writing about tort law that a proper criterion for choice between competing rules is the sheer number of losses that would be shifted. We should always prefer, we are told, the rule that results in shifting the largest number of losses off victims. Using this criterion at the most general level, it could be said that the basic difficulty with the common law fault rule in the world of the auto is that it leaves too many victims of auto accidents uncompensated. And we are offered empirical studies to prove that this is indeed the case.

If the earlier objections to fault run the risk of proving too much, this one runs the risk of begging the question. It should be abundantly clear that the common law never has had information about the incidence of recovery which would follow from the application of its liability rules. What is more important, it has had no expectations about incidence of recovery, and could not have cared less. Its commitment to fault as a basis for shifting losses is independent of any estimates of how many losses will thus be shifted. No empirical study of gaps in loss shifting, insofar as they rest on the absence of liability, can be relevant. The striking point is that under the common law system it is intended that some victims will have to bear their own losses.

As familiar as all this is, it marks a critical point of departure. The question frequently now heard is: "By what arrangement can we most expeditiously maximize the shifting of losses?" There is a profound difference between this and the old-fashioned question: "What losses should be shifted and what losses should the victim bear?" Under the logic of the common law, there is no meaningful way of answering the first question unless the second question has already been answered. We agree with that logic.

FRANKLIN, "REPLACING THE NEGLIGENCE LOTTERY: COMPENSATION AND SELECTIVE REIMBURSEMENT"

(1967) 53 Va L Rev 774 at 778-95

There can be no doubt that the *theory* of the fault system today is the same as it was in 1850, when it was first announced in this country. That theory disregards the incidence of recovery and assumes that some innocent victims will have to bear their own losses. Studies indicate that under the fault system today some twenty-five per cent of victims recover nothing. Whether this is because of the rules of the fault system, personal attitudes towards lawsuits or the insolvency of potential defendants is not clear. But one may suspect that most of these victims fail to recover because of failure to prove fault on the part of the defendant or because of contributory fault on their own parts, or both. Even so, the fact that seventy-five per cent of the victims do recover something is surprising in view of the two fault requirements until one realizes that to say victims recover "something" is to say nothing about the adequacy of their recoveries. The existence of fault and contributory fault are usually speculative issues that cannot be resolved definitively by resort to precedent but must be left to juries. This uncertainty on both sides is conducive to negotiation and compromise. Indeed, over ninety-five per cent of those who do recover something do so through the settlement process, whereby the severity of the injury is roughly discounted by the defendant's chances of total success at trial.

A sound reason for compromise settlements may be the victim's dire need—especially in the big cases—for some immediate compensation. The defendant's ability to delay final disposition of the case, particularly where there is an honest dispute as to the amount of damages, may lead the plaintiff to settle quickly for less. A recent study suggests that the fault system tends toward over-compensation in the small cases, while in big damage cases very few victims get as much as twenty-five per cent of their real economic loss. This facet of the personal injury law takes on added importance when it is realized that the overwhelming majority of personal injury cases today are litigated within the framework of the fault doctrine. The question to which I now turn is the place that such a system should have in today's law. ...

[O]ne is struck by the fault system's initial preoccupation with the defendant and his conduct, and its lack of concern for the social problem of victims. Perhaps when personal injury law became important, during the early stages of the Industrial Revolution, the fault system was a reasonable compromise that permitted reparation under the guise of "punishing" those who had acted "carelessly" at a time when any broader liability was politically impossible. But given today's criminal and administrative law, the development of the insurance industry and current attitudes toward appropriate government conduct, should we retain the fault system?

The fault system is not needed to create deterrence. While it may be true that in order to deter carelessness something must be done to the transgressor, there is no logical reason why treatment of the transgressor should be tied inexorably to treatment of the victim. We already regulate conduct through our relatively mature system of criminal sanctions and our rapidly developing structure of administrative law. Moreover, there is no reason to think that separating liability from fault would in any way undermine the deterrent goals of society. A defendant who is held liable without regard to fault will certainly take care to avoid fault and may also take "super care" to avoid harming others.

A more substantial reason for requiring fault before shifting a loss is that operating adjudicatory machinery costs society money that should not be spent unless the shift will yield some social gain. When the defendant has been at fault and his victim has not, shifting the loss will achieve both compensation and deterrence, but when

neither party has been at fault, the underlying premise of the fault system is that there is no social gain in shifting losses from an innocent plaintiff to an innocent defendant. This position is bolstered by Holmes' affirmative argument that "the public generally profits by individual activity. As action cannot be avoided, and tends to the public good, there is obviously no policy in throwing the hazard of what is at once desirable and inevitable upon the actor."

Today, as we approach the final third of the 20th century, I think a persuasive case can be made that worthwhile "social gain" is achieved by shifting losses from innocent victims. Whether losses should be shifted to innocent defendants or elsewhere is a separate question that will be discussed in detail. Two factors make alternative treatment possible: (1) the development of insurance to "socialize" what has been a dispute between one plaintiff and one defendant; and (2) society's willingness to use government facilities to the same end.

The development of insurance influenced personal injury law directly. Insurance permits individuals and firms to spread their risks both interpersonally and temporally, thus avoiding disastrous sudden losses. Though insurance *could* have developed in such a way that it first became readily available to victims, the fact is that liability insurance came first—perhaps because those who were likely to cause actionable harm were more likely than potential victims to have the money to pay premiums. As a result, the legal pressures have been exerted in the direction of broadening liability rather than the other way.

Perhaps because of this, or perhaps just as a matter of insurance industry growth first party insurance has developed more slowly and is still less pervasive than liability coverage. Persons engaged in potentially harmful activities are more likely to be insured against liability than their victims are to have first party insurance. Courts and juries have learned that they can award compensation to a victim without at the same time destroying the defendant. That insurance was only spreading costs, and not eliminating them, was not enough to prevent the trend. Relief from the individual case's "either-or" dilemma was sought, and liability insurance provided it.

This insurance structure supports another argument that has been made to justify shifting losses from innocent victims to innocent defendants. This is the contention that activities in our society should show their "true social costs" by being forced to pay for harm they cause. In this way prices will reflect the added social cost, and consumers can decide whether they wish the product at its higher, and presumably more "accurate," price. While there is some dispute over whether this is better achieved by initially placing losses on the business or on the consumer, I find the former view more persuasive. Today's liability insurance structure suggests that greater efficiency and internalization will be achieved if losses are placed initially on defendants rather than on victims and then shifted partially to welfare or charity sources. If one accepts the view that better resource allocation can be achieved by imposing initial losses on innocent defendants rather than on innocent victims, a social gain is achieved by that shift, even if first party insurance is utilized.

Even if first party insurance were as readily available as liability insurance and covered as wide a range of losses, there would still be the problem of those potential victims unable or unwilling to acquire it. In a society as concerned as ours with security and the welfare of its poor as well as its ill and lame, voluntary first party insurance is not a viable alternative.

The path was also cleared by "socialization" of the accident problem by the acceptance of expanded notions of appropriate government spending and a willingness to pay taxes to socialize injury and welfare costs. The "pure" social insurance view emphasizes smooth compensation at the expense of resource allocation and deterrence. The emergence of this long-latent philosophy has not been manifested

through changes in tort law, but rather in social insurance programs associated with a "welfare state" philosophy, such as Social Security and Medicare. In common, they share a primary concern for the financial problems of victims.

We can thus see how insurance and government programs, though operating by different legal routes and stressing different premises, each provided a coherent approach to the accident problem. The most that can be said for the fault system is that sometimes it compensates, sometimes it deters and sometimes it furthers good resource allocation, not from any general philosophy, but rather because it is incapable of operating beyond the individual case.

Not only are the tools at hand to shift the focus in personal injury cases from the individual posture to a broader perspective but Professor Gregory has highlighted a major reason to take advantage of these tools—recognition of a deep-seated desire to treat alike victims who suffer like harm. One is immediately struck by the spectacular legal lottery into which the fault system thrusts the plaintiff. We may posit several identical victims suffering identically disabling injuries, yet one may recover thousands of dollars under the fault rules while an equally innocent victim may recover nothing. ...

When we move from the tort area to the other parts of the legal system, we note the strong legislative emphasis on security for victims of accidents and illness in such measures as workmen's compensation, Social Security, disability insurance, unemployment compensation, and most recently, Medicare. In all of these systems, fault in the causation of harm is irrelevant. They stress instead the loss inflicted upon the victim and his family by his misfortune. ...

It may be argued that with all these nonfault social devices to aid accident victims, the need to compensate for personal harm is so reduced that tort law need no longer worry about compensation. There are two answers to this argument. First, the compensating schemes have coverage gaps, and we cannot be sure that all victims are covered, but the second and more crucial point is that the tort system would still treat differently victims who suffer identical injuries. ...

In a clumsy and inefficient way, the fault system attempts to achieve two distinct goals by one payment of money: to punish the defendant for his carelessness and to compensate the victim for his losses. [When dealing with the amount of recovery the system] abruptly forgets its preoccupation with the defendant and turns wholeheartedly to the plaintiff, perhaps concluding that once the defendant is found to be at fault he deserves little further attention. But just as the single focus on the defendant led to serious questions at the fault stage, so does the single focus on the plaintiff produce problems at the damage stage. Two defendants who commit identical careless acts may find themselves liable for vastly different amounts depending solely on the fortuitous nature of the harm that results. This is the defendants' lottery. ...

In addition to the problems already discussed, the fault system is so spectacularly expensive to administer that even its disinterested adherents must doubt whether it is worth the cost. The recent Michigan study of automobile accidents reveals that to get $1.00 of actual benefits to the victim requires an input of $2.20 of liability insurance premiums. The difference is attributable to litigation costs and insurance administration expenses. Comparable figures developed by that study indicate that the same $1.00 of benefit can be obtained for an input of $1.44 through workmen's compensation, $1.22 through private first party insurance, $1.07 through group first party insurance, and $1.02 through Social Security.

The fault system is even more expensive when we consider non-economic costs. Recent studies have suggested that psychic harm is generated by the fault system's long delays and uncertainties. One might also consider the attitudes toward law engendered among the many citizens whose principal encounter with the judicial

system is as a party, juror or witness in a personal injury case. When, moreover, the apparent sentiments of society today run so strongly in the direction of compensation and away from the haphazard operation of the fault system, what justification remains for adherence to such a costly system?

LITTLE, "UP WITH TORTS"

(1987) 24 San Diego L Rev 861 at 864-76

In keeping with the basic premise of freedom, the purpose of the law of torts is to serve as a lawful civil mechanism to separate intolerable extremes of human behavior from the vast bulk of behavior that society tolerates. As Holmes put it, "[t]he business of the law of torts is to fix the dividing line between those cases in which man is liable for harm which he has done, and those which he has not." By and large the truncation is based upon notions of wrong. "Negligence," asserted Cardozo in *Palsgraf*, "is not a tort unless it results in the commission of a wrong, and the commission of a wrong imports the violation of a right. ..." Moreover, what makes an action wrongful, according to Lord Atkin in his venerated *Donoghue v. Stevenson* judgment, is "based upon a general public sentiment of moral wrongdoing for which the offender must pay." Defined in the light of these premises and thousands of cases applying them, tortious wrongs comprise intentional, wanton and malicious acts, negligent acts (as in *Palsgraf* and *Donoghue*), and also "non-natural" acts that are inherently perilous to neighbors (*Rylands v. Fletcher*). By virtue of its civil character, tort law is activated by private citizens. It supplies the procedural and substantive wherewithal for ordinary people to initiate actions to ascertain whether others have overstepped these bounds to the detriment of the suitors. In sum, the purpose of the law of torts is to place civil self-help restraints on human behavior within the context and limits of individual responsibility and personal accountability in a democratic society.

After the law of torts has "fixed" that line between liability and impunity, what then? In a civil law system that depends upon the initiative of wronged citizens to bring culpable citizens to account, employing remedies that put things right between the disputing parties makes sense, and putting things right naturally seems to call for restoring things as they were before the harm was done. This remedy possesses the twin virtues of having a direct relationship to the wrongful act and being true to the private nature of the process (as opposed to, for example, some form of punishment or social retribution). It is no wonder, then, that restoring the status quo is the target of the tort remedy after liability has been established. It likewise is no wonder, given the absence of *in specie* restorative powers in judicial decrees, that compensation by the award of money has become the typical tort remedy in actions involving injury to person and property.

The nub of this argument is to show that compensation is not the goal of tort law, but merely is the most practical remedial expression yet discovered. Nevertheless, the remedy is subordinate to the true operational goal of the law of torts, which remains to serve as a civil law method of truncating unacceptable extremes of human behavior from the remainder that must be left unfettered in a democratic free society. ...

In the same vein as keeping tort law true to its essential purpose, much can be said both for instituting a legitimate comprehensive compensation system for all victims of accidental injury ... as well as for imposing a regulatory framework ... to impose economic and criminal incentives upon institutionalized activities that pose endemic threats to segments of the general public. Although these propositions may

seem to be at odds with certain of the basic premises that I have extolled, particularly minimal government, the inconsistency vanishes upon close inspection. What is minimal depends upon context. In deciding how far governmental intervention should go, we must assess, first, the capacity of ordinary members of society to perceive, understand and protect themselves against risks, and, second, their capacity to obtain redress through the self-help law of torts.

The first point largely is one of proportionality and mutuality. In a free democracy the ordinary person with self-help as his only remedy legitimately may be expected to confront the risks that are proportional to his capacity to protect himself against and that also are proportional to the risks of the sort he has the capacity to expose others to. This is what I mean by proportionality and mutuality. The more complex, interdependent, technical and institutional a society becomes, the more likely large sectors of organized human activity are to fall outside those bounds.

As to the second point, the more institutionalized activities become, the less likely is there to be a single human being who individually and personally is accountable for the institutional harm done to a particular accident victim. The adequacy of self-help tort remedies fades as flesh and blood defendants are replaced by phantom institutions. Hence, basic notions of individual responsibility ("I can take care of myself") and personal accountability ("Or hold the wrong-doer accountable") lose much of their force. This justifies more state intervention under the premise of minimal government. Indeed, government stands to lose its legitimacy when it provides inadequate protection and relief from risks that are beyond the self-help coping power of the typical citizen. Many risks in modern American life fall into that category. ...

None of this, however, makes it a good idea to bend the law of torts out of shape in an effort to make it do things it was never meant to do, or, after you have deformed it, to scrap it altogether. Not only are the revered aspects of self-government offended by it, but so are some elemental aspects of human nature that find legitimate expression in tort law.

A fundamental cultural point undervalued by "down with torts!" proposals is the sense of moral culpability that lies at the heart of the common law of torts. Damaged people want compensating; there is no denying that. They also want accountability, which in a civilized society means access to a forum and a set of rules by which they may publicly prove themselves right and someone else wrong. This aspect of torts is wholly in keeping with the attribution of moral blameworthiness to acts that the common law deems to be out of bounds. Again, as Lord Atkin put it, "[t]he liability for negligence, whether you style it such or treat it as in other systems as a species of 'culpa,' is no doubt based upon a general public sentiment of moral wrongdoing for which the offender must pay." ...

What's wrong with [tort law]? Perhaps the worst thing is that it has been forced to be something it is not. But apart from that, the tort law system indeed may cost too much when evaluated solely in the light of valid compensatory goals, and, as has been demonstrated time and again, its compensation is extravagant in a handful of cases and parsimonious in others. In addition, the law provides no compensation to injuries not caused by legal wrongs. As argued throughout this paper, the last point may be a fault in our society, but it is not a fault of the law of torts. ...

The law of torts is a big brick in our foundation of democratic governance based upon tenets of minimal government, individual responsibility and personal accountability. Where it expresses these premises well, it ought to be preserved and nurtured in doing its job of regulating behavior by civil self-help means. Its cultural and political values far exceed whatever its apparent economic cost may be. ...

By the same token, the law of torts may be revivified by eliminating its excesses, and needed nontort regulatory and compensation programs, serving ends not within

the reach of tort law, may be instituted. These goals are mutually supporting. Tort law cannot adequately regulate modern industry and perhaps other highly sophisticated activities, and it cannot be made to function reasonably as a comprehensive accident compensation plan.

II. COMPENSATION SCHEMES: SOME EXAMPLES

CHAPMAN & TREBILCOCK, "MAKING HARD CHOICES: LESSONS FROM THE AUTO ACCIDENT COMPENSATION DEBATE"

(1992) 44 Rutgers L Rev 797 at 799-810

In surveying the spectrum of accident compensation schemes for personal injuries, some striking features stand out when one examines how we have collectively treated different sources of injuries. In most parts of the industrialized world, from the turn of the century onwards, the tort system has been largely displaced with respect to workplace injuries by no-fault workers' compensation schemes. Because liability attaches to injuries caused by workplace activities by applying a form of but-for causation test, these schemes entail a form of absolute liability for employers or their insurers. Benefits typically cover a high percentage of economic losses, health care expenses, and rehabilitation costs, but minimal non-pecuniary losses. On the other hand, in most parts of the industrialized world, with respect to injuries or disabilities resulting from medical malpractice or product use, the tort system remains the primary compensatory vehicle for most victims. ...

With respect to auto-related accidents, a very different picture emerges. While the tort system enjoyed a preeminent role in most industrialized jurisdictions until the late 1960's, from about 1970 onwards massive diversity in policy choices has emerged. For example, between 1970 and 1980, twenty-four states in the U.S. adopted some form of compulsory no-fault insurance regime, while the remaining states have retained the traditional third-party tort liability insurance regime. Moreover, among the twenty-four states that have adopted some form of no-fault auto insurance regime, design features vary widely. Sixteen states have adopted some form of threshold system, which generally precludes tort suits below a defined threshold. These thresholds, however, vary dramatically in form and stringency. Some thresholds are monetary and relate to some level of medical expenditures that have been incurred by the claimant as a result of the accident. In other jurisdictions, the thresholds are verbal and relate to the severity of the injuries sustained, although again, these thresholds vary widely. In the other eight no-fault states, the no-fault regimes are add-on regimes that provide no-fault benefits in addition to tort entitlements. In the case of both threshold and add-on regimes, the no-fault benefits available also vary widely from jurisdiction to jurisdiction. In some jurisdictions, these benefits must be subtracted from subsequent tort damages received, while in other jurisdictions no such subtraction is required. Since the early 1980's, no additional states have adopted no-fault regimes. Like workers' compensation schemes, the no-fault component of these various schemes entails a form of absolute liability on the part of first party insurers for the consequences of accidents arising out of motoring activity, while in some range of cases, tort liability contingent on proof of negligence is reformed.

This pattern of massive diversity in the U.S. is replicated elsewhere. In Canada, for example, the four Maritime provinces and Alberta retain the traditional

third-party tort liability insurance regime, with modest first party no-fault benefits. Since 1978, Quebec has operated a pure, state-run, no-fault auto compensation scheme that precludes all tort actions with respect to personal injuries. In 1990, Ontario adopted a threshold system rather similar to that previously adopted by Michigan, with relatively generous no-fault benefits for economic losses and rehabilitation expenses. No-fault entitlements did not exist, however, with respect to non-pecuniary losses and all tort claims were precluded unless they exceeded a very stringent serious injury threshold. The regime was adopted after the government of the day had rejected the recommendations of a Task Force (the Osborne Commission) it had appointed to study the question. The Osborne Commission favored an enhanced add-on regime. Ontario's recently elected social democratic government campaigned on a platform of restoring the right to sue but with public provision of liability insurance. It has now renounced its commitment to public provision of insurance, however, raised the income ceiling on no-fault benefits for wage losses, and prohibited all tort claims for economic losses. Tort claims for non-pecuniary losses will be permitted subject to a $15,000 deductible and a judicially-imposed ceiling on such claims of about $210,000 (1991 $Can.). The Prairie provinces of Saskatchewan, Manitoba, and British Columbia all operate state-run auto insurance schemes, but entitlements continue to be resolved as a matter of tort law, with reasonably generous add-on first party no-fault benefits. ...

In considering alternatives to the traditional tort system in the auto accident context, it is useful to think of the alternatives as entailing either the supplementation of the tort system or the replacement of it. Add-on no-fault schemes fall into the first category. Threshold, elective, and pure no-fault schemes fall into the second category. While each of these options is susceptible of almost infinite variation, for clarity of exposition and comparison we adopt one concrete version of each option in the review that follows. In each case we adopt a strong-form version of the option, so that contrasting characteristics of the options are highlighted.

A. ADD-ON NO-FAULT

The option we adopt in this context is modelled on proposals recently advanced by the Ontario Osborne Commission. The Osborne Commission's proposal envisaged a benefits package similar to that obtained under workers' compensation regimes in many jurisdictions. The benefit schedule envisaged first party no-fault coverage of 80 percent of gross income to a maximum of $450 a week, very generous benefits for rehabilitation and long term care ($500,000 in each case), and relatively modest death benefits. No no-fault benefits for non-pecuniary losses would be provided. In all cases, however, claimants would retain the right to sue negligent third parties in tort for the full tort measure of damages, including non-pecuniary losses, although they would be required to subtract no-fault benefits from tort awards. Collateral benefits would also be subtracted from tort awards.

B. THRESHOLD NO-FAULT

The option that we adopt as exemplary of this option is the 1990 Ontario threshold no-fault scheme. Although it covers forgone earnings up to $600 per week (compared to $450), this regime adopts a very similar no-fault benefit package to the Osborne add-on no-fault proposal. All tort claims would be precluded, however, except in the case of death, permanent serious disfigurement, or permanent serious impairment of an important bodily function caused by continuing injury which is physical in nature. Collateral benefits would be deducted from no-fault benefits and tort recoveries.

C. PURE NO-FAULT

The next option is a pure no-fault option with the right to sue in tort foreclosed to all accident victims regarding personal injuries, and with victims restricted to a schedule of first party no-fault benefits. The model that we adopt as exemplary of this option is the no-fault regime currently in place in Quebec. The benefits provided under the Quebec regime are in many respects similar to those envisaged by both the Osborne proposal for an add-on no-fault regime and the Ontario government's 1990 threshold no-fault scheme. In addition, the scheme provides for lump sum payments for permanent after-effects of injury—in effect non-pecuniary losses—of up to $75,000 per claim, based on an injury schedule. This ceiling was increased to $100,000 in January 1991 and further increased to $125,000 in January 1992.

FLEMING, THE LAW OF TORTS, 8TH ED

(Sydney: Law Book Co, 1992) at 405-7

Following the famous Woodhouse Report, New Zealand launched in 1974 a comprehensive system of exclusive compensation, replacing tort recovery not only for traffic and industrial accidents but for all "personal injury by accident," including certain industrial diseases and criminal injuries. The decision to embrace all accidents was based as much on the difficulty of justifying special treatment for road casualties as on the practical problems of demarcation and the manageable extra costs of covering the residue.

The guiding principle of the scheme is to replace financial loss rather than the social welfare philosophy of assuring a minimally adequate living standard. Accordingly benefits are not flat but earnings-related and fixed at a level which the public could fairly accept in exchange for their common law rights. The standard is 80 percent of pre-accident earnings, payable in weekly instalments up to NZ $1,179 in 1992. There is a waiting period of one week, during which the employer is responsible for work-related accidents.

Lump sums also used to be payable for permanent incapacity up to $17,000 and up to $10,000 for loss of "amenities or capacity for enjoying life, including loss from disfigurement" and for "pain and suffering, including nervous shock and neurosis." Both evoked memories of common law damages, the one for loss of faculty, the other for pain and suffering. But these awards imposed too heavy a financial and administrative burden on the system and were abolished in 1992. Instead an "independence allowance" is now available for claimants with a disability of at least 10 per cent. ...

Although coverage of all "personal injury by accident" (*piba*) appears very inclusive, it has not been spared problems of demarcation. A thoroughgoing reform in 1992 made a new start of clarifying and narrowing the definition. It consists of two elements, accident and personal injury. The legacy of workers' compensation has been retained in construing "accident" in the popular sense of an unlooked-for mishap or untoward event, unexpected and undesigned by the victim. Intentional acts like battery and rape are covered, being an "accident" to the victim; and so is pregnancy, like actual bodily harm, arising from a criminal act. Personal injury narrowly includes "mental or nervous shock" as the outcome of any act in relation to the claimant or of any criminal act against him. Injury to third persons is not covered.

The most troublesome problem has been around the inclusion of "medical misadventure," now defined as "personal injury from medical error or medical mishap." Medical error covers medical negligence as interpreted at common law, but the

scheme is expressly not intended to ensure the success of medical treatment. Medical mishap is determined on the basis of rarity (more than 1 per cent) or severity of outcome (hospitalisation of more than 14 days or incapacity for more than 28 days). The selection of such objective criteria may in the future mitigate the difficulties encountered under prior versions of the Act, in particular in drawing a line between iatrogenic causes and "disease, infection, or the ageing process." Occupational disease qualifies under certain conditions when arising out of the course of employment. Also resolving prior uncertainties, the Act now specifically provides that medical misadventure does not include failures of diagnosis or to provide treatment or to obtain informed consent (omissions), unless such failure is negligent. A formerly much criticised feature was the failure to provide deterrence to health care providers; this has now been corrected by exacting contributions from them to the fund and by experience rating and no-claim bonuses. ...

The financing of the scheme reveals a tension between the philosophies of social welfare and resource allocation. Dominated primarily by the desire to capture the same funds available to the old system and to avoid general taxation, the original proposal of raising a flat levy from employers of 1 per cent of all wages was abandoned in favour of establishing two separate funds. The Motor Vehicle Fund is fed by levies on motor vehicles and covers the whole population; the Earners' Fund derives from levies on employees (paid by their employer) and the self-employed at differential rates according to occupational risks, and covers only these segments of the population. As already mentioned, experience rating has now been introduced as a deterrent and means to achieve some measure of internalising costs in place of the original philosophy of regarding compensation as a community responsibility.

At the heart of the scheme is the complete elimination of tort recovery for those covered by its benefits. Though now that coverage has been somewhat reduced by the recent reform of 1992, resort to tort law has correspondingly become more available. In particular, exemplary damages have survived, not being "damages arising directly or indirectly" out of *piba*, inasmuch as they focus on the defendant's conduct not the plaintiff's injury (as to aggravated damages). The substantial savings resulting from reduction of administrative costs and channelling funds away from minor claims permit the considerable expansion of benefits for hitherto uncompensated major injuries, without noticeably increasing the total previous cost of workers' compensation and third party insurance for motor vehicles. To the same end, the administration is taken out of the hands of private insurance companies and vested in an Accident Compensation Corporation, which uses the Post Office for collecting premiums. Appeals from the Corporation lie to an Appeal Authority and thence (with leave) to the High Court.

III. THE SOCIAL INSURANCE PERSPECTIVE

SUGARMAN, "A RESTATEMENT OF TORTS"

(1992) 44 Stan L Rev 1163 at 1169-72

Tort law and its alternatives may be categorized in many ways. In this section, I offer five competing institutional arrangements for handling accidents. My models are not water-tight, but I offer them for heuristic purposes; moreover, I have given them labels drawn from political philosophy, broadly, right to left, that are meant to be suggestive, more than definitive.

1. THE LIBERTARIAN MODEL

The first model is the Libertarian alternative. Under this approach, members of society rely primarily upon the market to determine standards of conduct and provide compensation for accidental injuries. Government protects property from theft and intentional destruction, enforces contracts and, I suppose, punishes fraud. Voluntary market transactions, however, determine the degree of risk people will accept in the goods and services they consume. The market also provides insurance of all kinds. The dominant value is liberty; the social picture is a result of millions of decentralized decisions about risk.

2. THE CONSERVATIVE MODEL

The historic tort law/liability insurance option I call the Conservative model, both because it reflects the status quo for many types of accidents and because many of the values it embodies are conservative. In this model, government establishes legal rights and wrongs with respect to risk-taking beyond those created by contract. But those rights are enforced only when they are asserted by individuals. Fault is the fundamental criterion by which both wrongdoing and the right to compensation are identified. Behavior is meant to be controlled through private threats to assert these rights via lawsuits claiming money damages. (Hence, the judiciary, not the executive, is the public agency of social control.) Compensation, when provided, is intended to be full, with two further conservative consequences. First, by providing more compensation to the disabled high earner than to the disabled laborer, the law reinforces pre-existing inequalities in income and wealth that were upset by the injury-triggering event; second, by compensating for intangible loss ("pain and suffering"), the law caters to individual feelings of indignity and outrage.

3. THE LIBERAL MODEL

Focused compensation plans, of which workers' compensation is the most prominent example, characterize what I call the Liberal model. This alternative is more interventionist than traditional tort law in several ways. Like other liberal ideas, little weight is put on individual fault. Instead, larger institutional forces are thought to be responsible for causing the majority of injuries, and institutions are obligated to compensate their victims. Compensation, although comprehensively wide (perhaps excluding intentional self-injurers), is not meant to be full. The aim is to assure that the basic material needs of the ordinary citizen are met. The focused compensation plan, like the traditional tort system, can be seen as a single societal instrument used both to control conduct and provide compensation.

Because the funding mechanisms of these plans internalize the costs of accidents to specifically responsible institutions, they are meant to discourage dangerous activities and promote their safe performance.

4. THE COLLECTIVE MODEL

What I call the Collective model is more interventionist than the Liberal model in two critical ways. First, accident victims are not singled out based upon the specific type of accident they suffer, e.g., auto, medical, or product. In fact, accident victims are not treated separately or differently from the disabled generally; accident victims, like those suffering from disease, birth defects, and so on need medical care and income protection. Indeed, accident victims may be treated as part of a much broader class

of citizens, including the unemployed and the retired, for whom collective protection against loss is assured. Social insurance is the mechanism used to compensate the protected class and, as with focused compensation plans, its goal is to meet the basic material needs of its beneficiaries. Social insurance funding may be unrelated to behavior-channeling goals, relying instead on effective revenue-generating devices such as payroll and income taxes. This gives rise to the second contrast with focused compensation schemes. Under the Collective model, behavior control must be accomplished independent of compensation, through government regulation.

5. THE SOCIALIST MODEL

Finally, there is what I call the Socialist alternative. Its compensation side is not sharply differentiated from the Collective option. However, this alternative precludes the range of wealth and income inequalities permitted or encouraged by the other alternatives. It protects accident victims and others by nationalizing health care and providing a minimum guaranteed income for all. Under the Socialist model, behavior control is accomplished by a collective commitment to risk-sharing that is far greater than under other models. There is less freedom for individual risk-taking and risk-creating, and hence less diversity in the risk levels to which people are exposed. This greater equality with respect to the exposure to risk comes about not only through reductions in the levels of risk created in the society but also through collective ownership of, and worker control over, large enterprises that create risk.

Our actual experience in the United States, of course, neither runs the gamut of these five models, nor always fits neatly into just one of the boxes. But the models represent ideologically distinctive approaches to the control of risk and the personal injury consequences of risk. As we move through the models, managing risk and providing compensation shift from individual matters to matters of increasingly wider social responsibility. Thus, the focus of compensation shifts away from the individual and the particular to the group and the general, and the process for determining which risks are socially acceptable shifts from the decentralized to the increasingly centralized.

Obviously, as tort law shifts towards mass victim claims proceedings, ignores defendant fault, reduces its insistence on clear defendant-plaintiff causal connections, and pays out damage amounts that are much less finely tuned to individual circumstances, it ceases to be traditional tort law. It thereby loses many of its conservative characteristics and begins to take on those of the focused compensation plan of the Liberal model, albeit a compensation plan organized and operated under the supervision of the judiciary.

Combined models, which reject ideological purity in favor of pragmatic considerations, offer additional possibilities. Viewing the models as complementary rather than mutually exclusive, society could employ both cascading compensation arrangements (tort plus compensation plans and/or social insurance) and cascading control mechanisms (tort plus focused plan funding plus government regulation). Society, too, at least in certain respects, can decide to apply one model to some accidents and another model to others.

Before 1900, the United States largely combined reliance on the Conservative and Libertarian models. Today, no modern industrialized society relies exclusively, or even predominantly, on the Libertarian model. At present our nation's policy towards those suffering personal injuries and the prevention of accidents is decidedly mixed, combining elements of the Conservative, Liberal, and Collective models. This is contrasted, for example, with New Zealand where the Collective model predominates.

BLUM & KALVEN, PUBLIC LAW PERSPECTIVES ON A PRIVATE LAW PROBLEM: AUTO COMPENSATION PLANS

(Boston: Little, Brown, 1965) at 81-85

[I]t may be appropriate to try a brief summary statement of how the case for an auto compensation plan looks to us now.

We of course find attractive the two main objectives of plans: to compensate all victims and to provide medical and emergency expense payments promptly. Nor can there be any argument but that the common law fails to achieve either of these. It does not achieve the first because it intends as a matter of policy to leave some victims uncompensated; and it cannot as a matter of practice achieve the second inasmuch as it limits liability to fault and hence subjects that issue to controversy.

In analysing plans it quickly becomes apparent that the old common law issue of liability translates into a question of costs. Changing the form of the question does not cause the underlying issue to evaporate. Any plan requires coverage of additional victims in order to achieve its twin objectives. Additional coverage of victims means additional cost. The central policy problem, in weighing the merits of plans, is: How is this additional cost to be defrayed? ...

The first alternative is to seek financing through economies in handling claims expected to follow from simplifying the criteria for making payments to victims. As a solution this has the great appeal of appearing to be painless to all concerned, except possibly to the lawyers whose fees would be substantially reduced. This approach, however, is not apt to take us as far as is hoped. At best the magnitude of the savings from internal economies alone is likely to fall far short of requirements, and at worst it is likely to be offset by an increase in claims consciousness.

The second alternative is to generate the financing by reallocating awards among victims. The arresting aspect of this approach is that while motorists remain unaffected by the switch to a plan, the victims who would be eligible for recovery at common law are materially affected. As long as the focus is on providing additional coverage, such a reallocation looks like a stratagem for taking something away from more deserving victims in order to give to less deserving victims. When, however, the focus is on improving the time of payment for medical and emergency expenses, there emerges a quid pro quo to the old victims who, as a class, are compelled to accept smaller awards in order to get quicker payments.

It might be possible to finance a plan by drawing on each of these last two sources. The result would be a plan which, in theory, would not alter the position of motorists, would not drive too hard a bargain with old victims, and would not make unrealistic demands on effectuating economies in handling claims. On this avowedly eclectic approach the full formula for producing a plan would run as follows: (1) Take no more from motorists than in the absence of a plan. (2) Maximize the economies in handling claims. (3) Tentatively set the award level so as to reflect these economies through lowering the gross awards without reducing the take-home sums. (4) Adjust the tentative award level downward so that the old victims give up enough in take-home sums to cover any gap in satisfying the claims of new victims.

For a brief moment this compromise seems to realize the philosopher's dream of a political solution which achieves the common good—a solution in which there is an adjustment of self interests in a manner that is mutually satisfactory to each participant. On further inspection, however, the dream tends to fade. There is the doubt that, as a political matter, the promise to the motorists can be kept; there is the doubt that the savings through economies in handling claims will be substantial enough to avoid a harsh bargain with the old victims; there is the high likelihood

that some old victims, either because of the certainty of their claim at common law or because of their comfortable economic position, will in any event find the bargain detrimental; there is the difficulty of communicating the rationale for the compromise to a wide enough public to enlist sufficient political support; and there is the difficulty of translating the compromise formula into a concrete plan.

But the main challenge comes from quite another quarter. The rival is the final alternative for financing the additional cost. It will be recalled that the last approach is not to shift losses directly but to put the burden on all victims as a class—a class which is co-extensive with the entire population. The image is of compulsory accident insurance for everyone; but in reality so wide a scheme of accident insurance would require use of the taxing mechanism to collect premiums, producing what can be viewed as an extension of social security.

The greatest strength of this approach is that it frames the problem candidly and coherently. From the very beginning the proponents of plans have insisted that the auto accident be viewed as an instance of human misfortune calling for a welfare remedy. When the situation is looked at in this manner, it immediately becomes apparent that the problem is bigger than that which the proponents started out to solve. The welfare universe is not limited to victims of auto accidents but includes victims of all other kinds of human misfortune. We can think of no ground for singling out the misfortune of auto accident victims for special welfare treatment.

The social security perspective also has the merit of bringing to the surface the profound question of why the state should do anything about human misfortunes. We infer that those who urge the state to intervene have mixed motives. To some extent they favor sumptuary legislation in behalf of prudence. They are willing to restrict the power of the individual to choose because they distrust every man's capacity to make prudent judgments about privately carrying accident insurance. But more important, they are concerned over the financial ability of people to absorb misfortune. They see that by no means is everyone prosperous enough to buy adequate insurance against misfortune. The attraction of financing protection through the tax mechanism is that the necessary funds can be collected on some progressive tax basis, so that the richer will pay the costs for the poorer. Intervention by the state thus is sought in order to mitigate the evils of poverty. We are tempted to hazard the grand generalization that at the root of most of our major social issues lies the concern with what is thought to be poverty. The automobile compensation plan is no exception.

While social security provides a candid and coherent approach to the problem of the accident victim, it leaves unanswered the common law's main question of justice. In addressing itself to the problem of the needy auto accident victim, the social security approach tells us that his claim to help from society should be on a par with the claims of others who suffer from misfortune. But it cannot tell us why losses caused by negligent motorists should not be shifted to these drivers. The common law's solution was to make negligent motorists poorer in order to compensate victims in full for their losses. The question is whether this is any less just because the needs of victims are provided for by society.

We would urge that, in theory, the case for shifting the loss to a faulty driver rather than leaving it with the victim or as a charge on society is not thereby impaired. Theory would thus call for drawing a distinction between responding immediately to the victim's needs and deciding at leisure under the fault principle who ultimately should bear the cost. Once the dust had settled on all payments, no one would have been compelled to pay taxes or premiums on insurance to cover losses caused him by the fault of another.

We may, however, be in an area where there is a wide gulf between the theoretical and the practical. The effort to be this pure in allocating costs according to fault presents formidable difficulties quite apart from any controversy about the appropriateness of fault as a criterion of liability. To implement the suggested principle fully, the welfare fund would have to be allowed to recover over against the negligent actors. This complication raises two awful prospects: We can anticipate that motorists would then carry liability insurance against the threat of subrogation by the welfare fund, and the crucial equity would lie in adjustments between the insurance carriers and the welfare fund. And logic would seem to require that the welfare fund also be obligated to sue contributorily negligent victims. The spectre of these two results might well induce us to accept the social security approach without a negligence rider.

A middle ground has been suggested. The social security approach could be used to underwrite relief for those in need without allowing any recovery over by the welfare fund. Victims of faulty drivers, however, would be left with their common law actions intact, subject only to deduction for welfare payments which they have received from the fund. Under such an arrangement, losses below a certain level would be borne by the public generally and would be allocated wholly without regard to fault, while losses above that level would be allocated according to the fault principle—some remaining on victims and some shifted to drivers as the principle dictated. This result is in effect the Saskatchewan plan. For those who have a wholesale lack of enthusiasm for the fault principle, retaining it in this context might well appear as a foolish luxury.

So much for the perplexities of either marrying or divorcing social security and fault.

The old common law issue of justice apart, the social security approach to the problem of the auto accident victim has some distinctive disadvantages of its own. If economic considerations have a bearing on accident causing behaviour, this approach would seem to run the greatest risk of lessening deterrence. Neither drivers nor pedestrians would perceive any relationship between their taxes and their conduct in respect to automobiles. The approach also has the disadvantage of supplanting the private insurance industry in a major sector of its activities, and replacing it with taxation and government administration of welfare benefits. Such a development would add to the power of the government and weaken what now is an important private pool of power. Finally, the approach calls for one more—and perhaps an irreversible—reduction in the area of individual autonomy.

BLUM & KALVEN, "CEILINGS, COSTS, AND COMPULSION IN AUTO COMPENSATION LEGISLATION"

(1973) Utah L Rev 341 at 346-55, 376-77

[IS THE FUND LIMITED?]

A principal concern of any plan is how much the accident victim should be awarded for his accident experience. All plans offering substantial unconditional reparations to victims for personal injuries have had to deal one way or another with three specific operational questions: (i) Is there any top limit on the unconditional reparations the plan will pay the victims? (ii) Is there at the bottom, so to speak, any minimal loss for which the plan will not make reparations? (iii) To what extent are the unconditional reparations to be the exclusive source of compensation—or is the common law tort action to some extent to be preserved?

Whatever the variety of answers given to the three questions, there is one overriding observation to make about the responses. No plan has ever attempted to provide full common law damages as unconditional reparations to all victims. Numerous reasons for this have surfaced in the literature about plans: a desire, for reasons of administrative efficiency, to keep damage items as objective as possible; a criticism of some items of common law damages as unsound even for the common law; a distaste for the exploitation felt to be involved in the publicized million dollar awards; and a practical conviction that it would be wholly impolitic to have the new arrangements under the plan be that expensive. Behind such reasons we sense a point of principle. The upshot of a plan is to effect a shift from a redress perspective to an insurance perspective. As a result, one is liberated from being controlled by the common law damage answers, and even from being much guided by them.

For purposes of a plan it is proper to look elsewhere to set the award levels. The puzzle is where to look. There is an unexamined choice of basic assumptions underlying most discussions of award levels. To overstate the polarity: Are the award levels to be set on the assumption that there is a more or less fixed aggregate pool to be distributed as unconditional reparations to the victims, or on the assumption that the size of the pool is not a given, but is to be determined by notions of what the award levels ought to be? It is our impression that in almost all discussions it is implicit that there is a more or less determined limit to the pool, and that this sense of limit is perhaps the controlling factor in determining the award structure.

One does not have to look far for an explanation. A chief point of rhetoric in the advocacy of plans has been that they will offer a better product, dollar for dollar, than the motorist is now buying; in brief, under a plan, a motorist's total insurance premiums will not increase, but will in all likelihood decrease. It follows that the maximum size of the pool to be distributed in unconditional awards has to be set by the size of the "pool" that is generated under the common law tort-insurance system. Whatever the need to acknowledge the political imperatives, an anomaly lurks here. The award potential under a plan is being largely determined by a factor which is irrelevant to the aspirations of a plan. The aggregate amount the common law "collects" for distribution to victims is crucially affected by the fact that the law is not intended to pay all victims, but only those who qualify under common law liability rules. A principal point of every plan in mandating unconditional reparations is to reject those common law criteria of eligibility for compensation. Yet in effect the outcome is to permit these rejected criteria to limit how much a plan will do for victims. This almost automatic acceptance of the size of the common law "pool" as a limitation may be a key clue in explaining why the discussion of awards under plans has been so little concerned with theory. Once it is assumed that the size of the pool is already determined, many genuine issues about award levels are readily short-circuited.

[THE INSOLVENCY ANALOGY]

Plans, particularly high ceiling plans, have been designed as if to meet the problem of insolvency: the losses of victims are like claims that exceed the total assets of the estate or "pool" to be distributed. One solution has been to refuse recognition to certain claims or losses hitherto accepted as valid. Excluding from the unconditional reparations any claims based on pain and suffering is, we suspect, largely a strategy for dealing with the "insolvency" problem—although, as will be seen later, it admits of other rationales.

But the point we wish to build on here is the response of plans *even to items of strict economic loss*. Whatever the case for pain and suffering as loss, the case for recognition of loss of earnings is more sturdy and stubborn. If we assume for the

moment that the rationale for limiting compensation for loss of earnings is the sheer insufficiency of the pool to meet such loss in full, there are three principal ways to "balance the budget." A plan can employ a floor, a ceiling or upper limit, or a percentage scale-down of claims. Purely as a matter of arithmetic, any of these methods will serve to make the fund go around. While traces of floors and scale-down arrangements can be found in proposed plans, the dominant strategy has been to impose an upper limit or ceiling.

This preference for a ceiling yields the anomalous result that the more serious the economic loss, the greater the likelihood that it will not be paid in full by the unconditional reparations of the plan. Assume a $4,000 ceiling on unconditional reparations for economic loss: all losses below $4,000 will be paid in full; a loss of $6,000 will be compensated two-thirds; a loss of $8,000 will be compensated one-half, and so on. If instead the preference were for a floor, the result would be that the larger the claim, the greater the percentage of loss paid. If a pro rata scaling down were the preferred alternative, the result would be that all claims, whatever their size, would bear the same fraction of uncompensated loss. But it should be noted that under neither the floor nor the scale-down approach would any victim recover one hundred percent of his economic loss.

We find it a considerable puzzle that the floor and scale-down alternatives have not proved more popular to plan designers. Use of the floor would serve to eliminate a large fraction of the total number of claims being processed under the common law tort-insurance system; it would yield great internal economies in administration and have a direct bearing on the nuisance claim phenomena; it is, moreover, given its wide use in collision insurance, a device very familiar to the motoring public. Use of the scale-down alternative would have the deep appeal of treating all claimants evenhandedly.

The puzzle cuts deeper. For generations, a grievance urged against the common law has been that it so often dealt harshly with the seriously injured victim of an auto accident. Surely a much voiced aspiration of plans has been to do better by him. An empirical finding which has been widely publicized by advocates of plans appears to show that the common law tends on average to grossly overpay small claims, while grossly underpaying large ones. Whatever the aspirations of plans, the achievement is, at best, to correct the overpayment for small losses, while continuing to underpay large losses—once the "budget is balanced" through ceilings.

It may be helpful to consider why those who design plans nevertheless have found the choice of a ceiling so attractive. Undoubtedly there has been a strong desire to be able to say that the vast majority of auto accident victims recover their losses in full—a claim which, as noted, is precluded by use of either the floor or the scale-down. There is further the desire to be able to say that if there is a bias in the plan, the bias runs in favor of the poor.

Use of a floor may present some distinctive drawbacks of its own. It precludes saying that *all* victims will now receive at least *some* compensation. It may also invite insurance industry opposition because it could cut so deeply into the volume of business.

[DOES PRESERVING ACCESS TO A TORT REMEDY CORRECT THE BIAS AGAINST SERIOUS LOSS INVOLVED IN THE USE OF CEILINGS?]

This discussion of award levels for economic losses is obviously incomplete. We have been writing as though the unconditional reparations under a plan were to be the exclusive source of compensation. In the historic analogues this was the case. Workmen's compensation, the grandfather of all compensation proposals, and the Columbia Plan of 1930, the first auto plan, were both total replacements of the tort

system. Another overriding observation about contemporary auto plans is that virtually never are the unconditional reparations designed as the exclusive source of compensation—virtually all plans keep a tort remedy open to some extent.

The full story about reparations for economic losses then is that it may include unconditional reparations under a plan in combination with some redress under the tort system. Does this combination mitigate the bias against serious harms in the handling of economic losses?

The situations on which to focus are those in which economic losses exceed the limit specified in the plan, whatever that limit may be. The question concerns the fate of these excess economic losses. Assume for present purposes that the plan imposes a relatively high ceiling on awards so that in the vast majority of cases economic losses are compensated in full by the unconditional reparations. Assume also that the part of the common law tort remedy that is preserved will serve for many victims to take care of their economic losses that exceed the unconditional reparations ceiling. A puzzle nevertheless resides in this combination treatment of large economic losses.

The total scheme still appears to discriminate in favor of less seriously injured victims. It seems a fair assumption that large economic losses are associated with more serious auto accidents. Whatever the arguments for compensating victims without regard to fault, these arguments would seem to be stronger in cases where the accident is more serious. The excess economic losses of some victims will not be recoverable because their claims will be ineligible under the liability criterion of the common law. The outcome then of combining the tort remedy and the unconditional reparations of the plan is still that economic losses of the less seriously injured victims will be paid under all circumstances, while the economic losses of some of the more seriously injured victims will be paid only in part.

For the plan with a high ceiling there are further embarrassments in preserving the tort action. Such a plan is designed to replace the tort system altogether in all but the small minority of very serious cases. The arguments made on its behalf have heavily stressed the inadequacies of the existing tort system. These arguments reduce to the complaints that only victims "lucky enough" to be hit by a negligent driver may recover, and that the system carries an undue invitation to fraud. But it stands to reason that high economic loss correlates to the more serious injury. The use of a ceiling on economic loss leaves a higher portion of that loss beyond the coverage of unconditional reparations, the more serious the injury. Thus, the more serious his injury, the more the victim is left to the mercies of the common law tort system, which will be as imperfect as before. It is implausible that the fault criterion for reparation becomes less arbitrary and the invitation to fraud less potent as the injury becomes more serious.

Whether or not the tort remedy is kept open above some level, the use of a ceiling on unconditional reparations involves the plan in discriminating against the more seriously injured victims. This inconsistency might be met in at least two ways: (i) by questioning the justice of paying in full the high economic losses of the more affluent; (ii) by relying on the use of voluntary insurance to cover the excess economic loss.

[IS LIMITED PROTECTION OF "EXCESS" ECONOMIC LOSS JUSTIFIED BY CONCERNS FOR DISTRIBUTIVE JUSTICE?]

The justice question is worthy in its own right and has more than one strand. In contemporary society there seems to be a deep-seated uneasiness about high incomes, and undoubtedly some of this carries over to economic losses that reflect high incomes. People whose incomes are considerably higher than the median are likely, if injured, to suffer economic losses beyond the ceiling of a plan. One need

only reflect for a moment on the $200,000 a year athlete who is temporarily disabled as a result of an auto accident. A year's disablement results in an economic loss ninety-five percent of which may well be above the limit for a plan, but which may also be twenty times the economic loss for the laborer who suffers comparable injury. This example is admittedly extreme, but is used only to dramatize the strains on any award system that may be generated by the unequal distribution of earned income in society.

At common law the tort system never experienced any qualms in redressing full economic loss regardless of disparities in income levels. It would be unheard of for a defendant to argue that his damages should be reduced because the plaintiff's income was unseemly high! Tort law, engaged in corrective justice, was able to leave matters of distributive justice for other branches of the law to deal with—if at all.

Calling into question the justice of the earned income distribution in society raises a point so powerful that it becomes difficult to know what to do with it. In this context, setting the ceiling on awards under a plan is inescapably perceived as a normative judgment. In a fashion reminiscent of earlier literature on tax justice, the ceiling suggests a distinction between two levels of income. The first level is that which is "normal"—that is, expected to be used in usual consumption patterns; the second level is that which is "surplus." In taxation this distinction was employed to justify taxing the surplus at higher rates; in designing compensation plans the distinction can be used analogously to justify not providing unconditional reparations for economic losses above the ceiling.

Notions of surplus income, whatever their plausibility, cannot be decisive for the handling of all high economic losses in the special case of auto accidents. The stumbling block is the serious disability injury. People with middle bracket incomes surely can suffer injuries producing very high aggregate economic losses. To revert to our athlete example again, a journeyman worker with only one-twentieth of the athlete's income may, if disabled for life, suffer an equally large aggregate economic loss. Indeed, the predominant experience with high awards under the present tort system has not been with injuries to the high income earner, but with serious injuries to the man whose income is not high enough to be regarded as surplus. Designers of high ceiling plans presumably would like to take care of this dominant case of severe economic loss, even when for distributive justice reasons they may not wish to cover losses reflecting merely high earned income.

There would seem to be a practical method for separating the treatment of the two situations. All that need be done is to state the award ceiling not in a single aggregate amount, but rather as a limit on loss of earnings incurred in a given time interval; no limit would otherwise be imposed on the total loss that may be covered by reparations. What is striking here is that a detail of plan design—the ceiling format—turns out to implicate a serious and interesting policy question concerning distributive justice.

[IS LIMITED PROTECTION OF "EXCESS" ECONOMIC LOSS JUSTIFIED BECAUSE VOLUNTARY INSURANCE IS MADE AVAILABLE?]

The other route to justifying limitations on awards for economic loss, under plans with high ceilings, is to rely on the opportunity for the motoring public to voluntarily buy insurance to cover any above-ceiling economic loss. Put this way the analysis may again contain an implicit notion of surplus earned income. The thought seems to be that the high earner, if he is concerned about protecting his economic power in full from accident loss, can afford to take out insurance to cover himself. And if

he does not, there is no reason why society should have any great interest in second guessing his judgment.

This approach runs into serious difficulties too, once account is taken of the sources of high economic loss. The dominant case, as pointed out, will be that of the middle income victim. As to him the suggestion that he can make himself whole by voluntary insurance calls into question the social achievement of the plan.

It calls into question something further—the basic commitment that the plan be compulsory on the motoring public. Consider first the situation of the man with a large earned income. A plan with a high ceiling explicitly accepts and relies on his judgment as to what to do about the possibility of excess economic loss—which may well be the major part of his loss. If we give him the choice of being a voluntary insurer (or a self insurer) of so major a part of his loss, should he not be accorded the same choice with respect to the whole of his loss?

Is the compulsion different if we focus attention on the accident victim whose income is near the median? A high ceiling plan (that is well designed) will be compelling him to insure against substantially all of his economic loss from accident. Granting that most people in the median income range would find such insurance a sensible buy, is this a sufficient basis for compelling those who do not see it that way to buy the insurance? Some, once stimulated to think about first party accident insurance, may prefer to buy some more general form of protection, rather than one confined so provincially to auto accidents alone. Others may not wish to insure at all because they have different risk preferences, as is so often apparent in the case of life insurance. For these people, and others, there is a puzzle about the policy behind the compulsion.

However the matter of compulsion may stand as to those with median incomes, is there any way of at least permitting those with high incomes, as to whom the case for compulsion is weakest, to have a choice? The theoretical merit of drawing such a distinction among income levels need not detain us. There is no way to put it into practice. It is not feasible to isolate those who will be permitted to opt out. We here confront, in the unexpected context of an auto plan, the well-known and formidable difficulties of introducing into the law "a means test"—difficulties that have become so familiar under social security and welfare measures.

[AT WHAT LEVEL SHOULD THE CEILING FOR UNCONDITIONAL REPARATIONS BE SET?]

The discussion of award levels for economic loss is still incomplete. We have been directing attention to plans that aspire to unconditional reparations up to substantial amounts. At the outset in our profile of plans we noted that one category of plans had a different aspiration, not calling for substantial reparation. This difference introduces a new note into the discussion. One of the most intense points in debate over plans concerns this difference. The question is: At what level of economic loss is the unconditional reparation under the plan to stop and the conditional reparation under the common law to begin? On the surface the debate appears to be over a mechanical detail of little theoretic import—should the award limit under the plan be $500, $1,000, $5,000 or $10,000? But beneath the surface there is posed a fundamental policy choice. ...

There is no need to settle on a definition of a serious loss in order to acknowledge two key relationships. First, the larger the economic loss, the less frequent its incidence. The gravest economic losses occur in only a very small minority of instances. Second, turning to dollar aggregates, a substantial reaction of all economic loss suffered by all victims falls upon the relatively few who are seriously injured. If a

choice must be made, there is a tough issue of locating the principal social problem. Is it more important to take care of the vast majority of auto accident victims—under which premise any scheme which disposes of say 85 to 95 percent of such claims is the solution? Or is it more important to concentrate resources on the minority of seriously harmed victims?

Against this backdrop, polar responses have emerged in the popular debate. On one view unconditional reparations under the plan are seen as the heart of the matter; and whether or not the tort system is kept open at any level is pretty much a minor strategy or a footnote. Predictably, high ceilings are advocated. On the opposing view the tort system, with its traditional merits, continues to be seen as the heart of the matter; unconditional reparations under the plan function simply as a way of disposing expeditiously of losses from less serious injuries. Again predictably, low ceilings are advocated. The tort system remains as the channel for what is seen as the central job—the handling of seriously injured auto accident victims.

Under either high or low ceilings there is an embarrassment. With the high ceiling alternative it proves awkward, as we have seen, to explain why the tort system is left alive at all, and there arises an apparently ineradicable discrimination against victims having the most serious injuries. With the low ceiling alternative it proves awkward to explain the need for introducing a plan at all.

Evaluation of low ceiling plans is dampened because they have been put forward largely by the trial bar. The function of the low ceiling has been viewed with deep suspicion since it preserves the symbol of a plan, while leaving as much of the tort system, and therefore the business of the trial bar, as undisturbed as possible.

It is not, however, altogether implausible that a low ceiling plan would be proposed on its merits. Several lines of argument could be advanced for such a plan. Certain characteristics of small claims make it advisable to exclude them from the tort fault system. It is widely thought that they are unduly expensive to process. The expectation is that internal economies from paying small claims unconditionally under a plan will result in substantial savings. Indeed, it is hoped that these savings will make it possible to pay all small claims for economic loss, whether or not compensable at common law, without any increase in overall insurance costs to motorists. On this approach, it might be noted, pressure to employ a ceiling does not, as it did with the high ceiling plan, come from what we have called the fixed fund or the "insolvency" dilemma.

Another concern, especially prominent in the literature, has been with the overpayment of small claims because of their nuisance value. This, it is often said, injects a major injustice into the distribution of damages under common law settlement practices. It is argued that the simplicity of unconditional reparations under a plan will vastly reduce the nuisance value of small claims and their exploitative potential.

If support for the low ceiling plan is predicated either upon the diseconomy or nuisance of processing small claims, why not eliminate small claims from the tort system altogether? Doing so would certainly remove these evils and with the maximum savings to society. If the tactic is to set the ceiling so as to just catch the small claim, leaving everything else to the common law, the purported goals might be better achieved by dropping the plan altogether and, as the alternative, merely setting a floor for redress under the tort system.

The logic plays differently if the assumption as to the purpose of the low ceiling is changed. Such a ceiling may be explained on the ground that a plan will have done enough if unconditional reparations are made in full for the range of auto accident claims that will be experienced by the vast majority of the public. A major part of the rationale here presumably derives from distaste over asking financially poor victims to handle these losses themselves. But if so, this sharply differs from most proposals

for assisting the poor. It would avoid having the poor manage the injury losses individually by insisting that the motoring poor (like other motorists) pay in advance for insurance to cover such losses. The puzzle that arises keys once again to the fact that the plan is compulsory. Consequently there is the old problem of forcing people by law to do what is good for them. In this version, the lower the ceiling, the more the "official advice" is concentrated on the poor.

Additional questions about the fit of the sumptuary principle readily come to mind. Is there really sufficient justification for being sumptuary on behalf of the motoring poor? Might they not rationally prefer to bear the loss themselves; or, if they elect to insure, might they not choose to cover the unlikely but serious loss rather than the more likely but less serious loss? Can there, moreover, be any justification for applying the sumptuary principle to the small losses of the more affluent? Or are they included only because we cannot design any political way to leave them out while insisting upon helping the poor?

It thus appears that compulsion raises difficulties for both high and low ceiling plans. In either case is it possible to devise ways of screening out those who may not be the objective of the coercion? With a high ceiling, it appears that to reach the objective—to force the middle classes to be prudent enough to insure substantially all their losses—it becomes necessary to compel the upper income people to insure. With a low ceiling, everyone is compelled to insure in order to reach the objective of forcing the poor to be prudent enough to insure their typical losses.

[DOES THE COMMON LAW CONCEPTUALIZATION CONTINUE TO "RULE FROM THE GRAVE"?]

The underlying theme of this Article has been that auto compensation legislation has been proliferated and elaborated to the point where it is now creating its own jurisprudence. Throughout we have recognized that the auto plan is a new institutional concept. Something new has been brought in to replace something old. At the heart of every plan is the replacement of conditional redress keyed to corrective justice, by unconditional reparations keyed to insurance. One might have thought that a change so conceived would have been able to break sharply with the common law and its legacy of traditions, expectations, and concepts. The most interesting impression with which we are left is that the common law, even in the case of the most ambitious plans, still makes its presence felt. Once again Maitland's aphorism is corroborated: auto plans, too, might be said to be ruled from the grave.

On at least three issues the bond is close. The most obvious instance, made explicitly in the public rhetoric, is tying the cost of the new arrangement to the cost of the old. Almost universally the baseline for assessing the cost of a plan to the motorist is provided by the cost to him of the common law tort-insurance system. Use of the common law as a baseline is exemplified again in justifying, with respect to non-contributors, the limitations on reparations. This time the reference is not to what the common law costs, but to what the common law affords as redress. The justification may be seen in terms of "a bargain" in which old common law rights are traded for new unconditional reparation rights—a justification which would be without foundation in the absence of any common law rights. Further, we would hazard the guess that it is this same sense of trade-off of the old for the new which explains why the compulsion of the first party insurance component of plans has received so little attention. In general one would not have anticipated that society was so ready to take for granted the propriety of compelling first party insurance. The sumptuary principle, we suggest, was tranquilly accepted in the auto plan instance because the first party insurance was not viewed as simply first party

insurance. It was viewed rather as the replacement of an older system which itself is "compulsory"—that is, the common law liability system, whether or not accompanied by compulsory third party liability insurance.

ABEL, "A CRITIQUE OF AMERICAN TORT LAW"

(1981) 8 Brit J Law & Soc'y 199 at 208-11

A SOCIALIST APPROACH TO INJURY AND ILLNESS

Just as capitalism expropriates from workers, consumers, and citizens the power to control their own health and safety, offering only an inadequate level of compensation in exchange, so the primary concern of socialism must be to ensure that those at risk regain control over the threat of injury and illness; compensation must be subordinated to safety, if it remains important. This reversal of priorities simply reflects our spontaneous response to danger: surely we think first about the safety of those we love and not whether they will be compensated if they are injured. We do not accept—or perversely welcome—injury because it is accompanied by damages. Furthermore, compensating victims by imposing liability on the causal actor cannot achieve an acceptable level of safety. Even if we remedied all the defects in the capitalist compensation system, raising damages to adequate levels and increasing rates of recognition, claim, and recovery to one hundred percent—and clearly this would require a fundamental social transformation—we would have devised a social democratic rather than a socialist solution to the problem of injuries, one that contains two irremediable and fatal flaws. First we would have spread the cost of accidents across society through a social welfare scheme, whereas what we must do is spread the risk of accidents more equally. True, accidents would then cost the same, regardless of the victim's identity, and there would be no economic incentive to inflict them on a particular class, race, or gender. But those with greater resources would still be able to buy more immunity from risk and would undoubtedly do so, just as they do now under capitalism. For every social democracy preserves differences of wealth and income that allow the privileged to obtain superior education, health care, cultural and physical amenities—and safety. The social democratic program might better promote the capitalist criterion of allocating efficiency, but it would not realize the distributional goal of equality. Second, the social democratic solution remains paternalistic (like capitalist law, whatever its pretensions to protect individual freedom). The valuation of illness and injury (and the converse, health and safety) is still performed by the state—whether by a legislature, regulatory agency, judge, or jury—and not by the person or group who suffers (or enjoys) it. Respect for personal autonomy demands that the person at risk decide what it is worth to undergo that danger—even bourgeois economics concedes this (which suggests that the bourgeois ideal of optimal efficiency can only be realized under socialism and may not be all that different from the principle: to each according to his needs).

The two requirements of a just approach to illness and injury—equalizing risk and restoring control to those who undergo danger—cannot be satisfied without radical change: in the division of labour (a reduction in specialization and perhaps rotation between hand work and head work, such as occurred during the Chinese cultural revolution and in many intentional communities); and in control over the means of production (which must be transferred from capitalists to workers). The first steps might be forms of cooperative enterprise and worker involvement in improving health and safety in the workplace—not nationalization of industry, which simply substitutes the state for capital. Since both reforms would threaten capitalist

control vigorous resistance can be expected, and is already visible in the Reagan administration's decision to withdraw funding from the national cooperative bank and in its attacks on OSHA. The strength of capitalist opposition may also explain the timidity of unions. But for precisely these reasons, occupational health and safety is an excellent issue for rank and file activists and for organizing unorganized workers. It is harder to see how to equalize exposure to the risks posed by consumer goods and services and by residence (although economic equality and its political and social consequences would advance this goal) and how to empower those exposed to such risks to control their own safety (increased self-reliance may be necessary since consumers are a diffuse category, unlike those who share the same workplace or residential area).

The socialist approach to the problem of safety will still require a response to illness and injury, since these will occur even under socialism(!), although their frequency and distribution will be radically altered. Furthermore, because full attainment of the socialist programme will have to await the overthrow of capitalism it is essential to identify other short-run goals that progressives can pursue as long as there is no reason to believe that these detract from safety or come to be seen as substitutes for prevention. Historically, and perhaps inevitably, there has been a tension between efforts to extend recovery to new victims or new forms of misfortune and efforts to increase the amount of compensation paid to each. Thus both workers' compensation and no-fault insurance for automobile accidents protect more victims but are less generous than tort damages. I believe this is the right choice on grounds of both equity and political tactics. The paramount criterion for a just compensation system should be equality: it should respond to all victims if it responds to any, and the response to each should be equal. The first requirement mandates equality among victims whether or not their misfortunes were caused by fault (their own or that of others), or by human actor at all: those who suffer from tort, unavoidable accident, illness, and congenital disability should be treated alike. After all, that is how we respond to the misfortunes of those we love. The second requirement argues that inequalities of wealth and income should not be reproduced in the level of compensation, for this would maintain those inequalities materially and reaffirm them symbolically. Thus there should be no compensation for damage to either property or individual earning power: those who enjoy privileges of wealth or income should pay to protect them against loss. But if the present system of compensating pecuniary loss treats equals unequally (all people are created equal), compensation for intangibles treats unequals equally (human experience is unique). I advocate an end to such compensation, both for this reason and because I believe that damages for intangible injury dehumanize, substituting money for compassion, arousing jealousy rather than expressing sympathy, and contributing to a culture that views experience and love as commodities. We need, instead, to recreate a society that responds to misfortune with personal care rather than relegating the victim to the scrap heap of welfare and custodial institutions: nursing homes, hospitals, "special" schools, and ghettos for the aged and the mentally ill—the sanitized and less visible skid rows of our society.

Implementing these latter recommendations might also enhance our ability to provide a remedy for all—the first (and primary) meaning of equality. By reducing the amount of compensation paid to any one victim (i.e., by excluding property damage, loss of income above some minimum level, and intangible injury) we would free resources that could be distributed to additional victims. Even more important, the extraordinarily high transaction rates of the present system virtually would be eliminated because there would no longer by any need to adjudicate causation, fault, defenses, or even damages. For the same reason lengthy delays would disappear and

victims would no longer be dependent on, or exploited by, lawyers. The politics of injury would be replaced by the administration of care.

To this end I propose that the state provide comprehensive medical care and a guaranteed minimum income. The first would be broadly defined to include all forms of therapy, rehabilitation, physical aids, special education, etc. The second would ensure a minimum standard of living for all members of the society regardless of why their income was otherwise inadequate. Both state responsibilities are mandated by the fundamental requirements of human dignity; they are a response to all forms of misfortune, not just to traumatic injuries. But this proposal, too, will have its opponents who benefit from the status quo: personal injury lawyers (whose greed and hypocrisy have become notorious), the private insurance industry (endowed with enormous assets and substantial political clout), and those who presently enjoy privileges of wealth and income. These are less formidable adversaries than the capitalist class that will resist the reallocation of risk and worker control over safety (indeed, capital might well favour some of these changes); but they are not insignificant enemies, as the dismal history of recent reform efforts shows. It is essential to recognize the limitations of this plan. It would not greatly alter the existing distribution of wealth and income since the privileged would protect themselves by insuring their property and income expectations. It would not itself encourage greater compassion for the victims of misfortune, although they would less likely become the subjects of misplaced envy. It would not express societal outrage at the victim's wrong, for which purpose a criminal penalty is necessary. And it would do nothing to enhance safety (if there is also little persuasive evidence that externalizing accident costs presently internalized through the tort system would reduce safety). Nevertheless, the proposed response to misfortune would be more humane and just and might allow us to concentrate on safety the energies that are presently dissipated in simultaneously pursuing the often inconsistent goals of compensation and the punishment of moral fault.

ATIYAH, "PERSONAL INJURIES IN THE TWENTY-FIRST CENTURY: THINKING THE UNTHINKABLE"

in Birks, ed, *Wrongs and Remedies in the Twenty-First Century* (Oxford: Clarendon, 1996) at 1-3, 33-38, 42-44

It is one of the functions of the academic lawyer from time to time to think the unthinkable, and to challenge some of the most fundamental assumptions of our legal system. Few assumptions are more basic than the idea that if someone wrongfully does you an injury you should be entitled to sue him, and to think of abolishing this right without providing any real replacement is to go about as far as one can in thinking the unthinkable. Yet I want in all seriousness to float the suggestion that the action for damages for personal injuries should largely be abolished, and its replacement left to the free market. I shall also offer some reasons for thinking that the next century may well see some moves in this direction.

One of the principal reasons why this whole idea appears so unthinkable is that it confronts two powerful, though to some extent rival, ideologies, at the root of much of the legal system, and of the law of personal injuries in particular. One of these ideologies is, if one may for a moment be a little simplistic, that of the political right. This ideology concentrates on the position of the defendant in a personal injury action, and is rooted in the idea of personal responsibility. ... Everyone must be answerable at law for his own actions, and to think of abolishing liability for personal

injuries is to fly in the face of everything which modern conservatism appears to stand for. The other ideology which thinking the unthinkable also confronts appears to be a form of consumerism. According to this view the victims of accidents causing personal injury are entitled to some form of benefit like a welfare benefit, though it needs to be much more generous than the welfare benefits of the modern social security system. These injuries are often caused, on this view, by large corporations or public bodies who need to be kept in check and made to pay for their misdeeds to the individual suffering the accident. This ideology concentrates not only on the wrong committed by the defendants, but also stresses the position of the injured victim rather more than the rival conservative ideology, but since they concur in supporting the system of tort liability, anybody who proposes to take them both on obviously faces a formidable task. Yet there is an important distinction between them which is crucial to the theme of this paper, and that is that while the conservative ideology of personal responsibility is rooted in corrective justice, the consumerism which underlies the rival ideology is in reality rooted in ideas of distributive justice.

The view I want to offer here will no doubt be seen by some as resting on its own ideology, which will easily be identified as close to that of the extreme right of modern conservatism; but that would be an over-simplification. In some respects I am, on the contrary, moved by a desire to redistribute certain accident costs towards the higher paid classes. In any event, whatever the ideology behind the proposal made in this article, it rests at least upon the realities of the law as it currently operates, and not upon a vision of those realities distorted by the differing ideologies. I can summarise the argument which follows very briefly. The current system of tort liability for personal injuries is not a system of personal responsibility because those who are genuinely responsible for such injuries are hardly ever called to account for the injuries or required to pay the damages. It is actually a system of insurance but a very peculiar kind of insurance system in which those who benefit do not pay the premiums. It thus operates much more like a welfare system in which those who are injured seek benefits under insurance policies which they have not themselves bought or paid for. To this extent I find the consumerist ideology more real than that of personal responsibility, and to my mind this means that the law of personal injuries cannot be defended by moral arguments about corrective justice. In practice it just does not operate as a system of corrective justice but of distributive justice. To justify its fairness or equity, therefore, it must be looked at from the point of view of distributive justice, and from that perspective, it is evident that the whole system is grossly unfair. Efficiency arguments must also be considered from this perspective, and although it is possible that there may be a slight loss of efficiency in some respects if tort liability is abolished, there will be a great gain in other respects because of the restructuring of the insurance markets which would inevitably follow from abolition of liability.

Before proceeding to detailed development of my case, there are a few preliminary points I want to make. First, I am not dealing here with cases of intentional assault and deliberately caused injuries. These raise special issues and I simply put them on one side. My concern is with the run of the mill personal injury accident which arises from negligence or pure accident. ...

Twenty-five or thirty years ago there was a world-wide movement to replace tort liability for personal injuries. The criticisms of the tort system which I have summarised above began to be taken seriously by many academic lawyers and insurance companies, and even some judges and politicians. As is widely known, the reform movement took two basic forms. The narrow option was to deal solely with road accidents and establish a no-fault system of compensation for traffic related injuries. The broader movement, which was at first largely confined to New Zealand and

Australia, was much more ambitious. The famous Woodhouse Report in New Zealand first promulgated the revolutionary idea that personal injury liability in tort should simply be abolished and replaced by a national accident compensation system. The case for it was set out so persuasively and simply in Mr. Justice Woodhouse's Report that many academics, at least, were totally convinced by it, if not indeed, bowled over by the force of the arguments. ...

As everybody knows, there has been a massive, world-wide reaction against bureaucratic welfare schemes in the past decade, much of it fuelled by the unwillingness of voters to return to the high tax policies of the third quarter of the twentieth century. And so far as the UK is concerned there is the additional problem raised by the demographic factors which I have already alluded to [that is, the prospect that the proportion of the population of working age will fall to its lowest level in history]. In the next century the pressures will be stronger than ever to cut welfare benefits more, and to encourage people to insure themselves against more of the risks presently covered by social security. It is virtually certain, for example, that the days of the present retirement pension, payable to all, regardless of need, and regularly uprated against inflation, are doomed. In that context the idea of the personal injury system being replaced by a massive state compensation system is, frankly, absurd. ...

It is against this background that I make my suggestion that the personal injury tort system should be abolished, but not replaced by a universal state compensation system. Instead, we should be willing to leave its replacement largely to the operation of the free market. Now I must immediately qualify this proposal by adding that I do not believe that this idea, sensibly implemented, would be nearly so radical and perhaps even outrageous as it may seem at first sight. ...

First, it is reasonable to assume that many, and perhaps most, people want some insurance protection against the risk of being injured in accidents, and would be willing to pay for it, if it was not paid for by others. But judging by the market for comprehensive motor insurance, for household insurance and for life insurance most people would want coverage for accidental injury on a no-fault basis. People do not expect their life insurance policies to apply only if they die as a result of someone else's fault, and I would not think they would expect accident coverage to be so limited either. So to that extent, most people would want substantially wider coverage than tort law gives them today.

On the other hand, there seems to me to be many respects in which a free first party insurance market for personal injuries would probably be considerably less extensive in its benefits than tort law is today, though perhaps more generous than social security. For example, I would expect to see frequent use of "excesses," that is the insured would be expected to meet his own losses for minor injuries where the loss is perhaps less than £50 or £100. Second, I would expect to see very little coverage for pain and suffering. There appears to be virtually no demand for this in first party insurance, though there are companies who, in some policies like holiday insurance, offer relatively small disability payments or other lump sums for specified injuries (loss of a limb, for instance, or blindness) and no doubt a wide variety of these may be on offer in a free market. I would expect very few people to take them up unless the cost of coverage is so small that it is offered as part of an overall package. Third, I would expect that insurance against medical and hospital costs would virtually disappear. Those who expect to use the NHS for their medical or hospital care would continue to expect to do so if they are injured in an accident. Those who have BUPA or similar private insurance would continue to rely on their private insurer. Not many people, surely, would be content to rely on the NHS for ordinary medical needs, but would be willing to pay for BUPA coverage for accidental injuries. But I would also expect some insurers to offer major and generous benefits for really catastrophic injuries, probably well beyond the kind of thing the public services could provide.

Turning now to income protection, I would expect a free first party market to operate in a very different way from the tort system. First, there are many people who do not need income-protection insurance at all. The retired, for instance, whose pensions will continue whether they are able to work or not, do not need and will clearly not buy income-protection insurance in a free market. Furthermore short-term income protection (for example, for periods of up to six months) is not needed by many other members of the community, such as children, and those who are unemployed and expect to continue unemployed for a substantial time. Nor is it needed by many professional and middle-class earners whose employers would continue to pay them for periods of up to six months or even longer. Long-term income protection may be needed by these groups, but since we know that over 95% of those injured in accidents are able to resume work within six months, it is likely that the market would soon learn to differentiate between the needs of those who want long-term protection and those who need short-term protection. It also seems to me probable that in a free market first party insurance system, earners would be especially likely to insure against the loss of that slice of their income which is needed to cover some of their more important commitments; indeed, this kind of insurance has actually been operating for some years, because anybody who borrows substantial sums of money for consumer expenditure, such as the purchase of a car, is nowadays always offered the opportunity (and sometimes is obliged) to insure against illness or redundancy or other causes of income loss which may jeopardise repayment of the loan. Apart from the extent of the coverage, I would expect the market to introduce some limits on the amount of income to be protected, and naturally I would expect the cost of the policy would vary substantially according to the size of the income protected. Even the really wealthy may choose to insure the first slice of their income rather than the whole of it, if they have to pay premiums proportionate to the amount of income to be protected. In addition, as a purely practical way of cutting administrative costs I would suspect that many insurers may be tempted to make income replacement payments without asking for proof of actual income loss, often a complex and tiresome business. So long as the premium is proportionate to the income insured, the only risk of this procedure lies in the element of moral hazard which insurers may prefer to tackle in other ways. All this would mean that the first party insurer would generally be paying out much less, in these respects, than third party insurers. So that even if coverage is granted for all accidents, the total cost will almost certainly be lower than the costs of third party liability insurance.

The next problem is plainly the really difficult one. Will society be satisfied to leave this kind of insurance to a voluntary market? Will the uptake be sufficient if everything is done on a voluntary basis? Even if the change were heralded with massive advertising campaigns, and (say) distribution of leaflets to householders and employees and motorists, is it not likely that large numbers will not buy the insurance, claiming that they cannot afford it, or that they do not understand it? I have no doubt that this would be the case if everything was left entirely voluntary and the state adopted no role at all. Hard cases would undoubtedly occur and would get massive publicity especially from those who opposed the introduction of the new system. I am not entirely persuaded that this would actually justify departing from the voluntary free market principle. It must never be forgotten that anybody who relies on the tort system today to protect him against the consequences of accidental injury is still leaving by far the greater part of the risk uninsured anyhow. Since so few people buy any first party personal injury insurance today, and since so few people are anyhow likely to obtain damages if they are injured in an accident, most people would not be significantly worse off if tort law were abolished even if they declined to buy insurance for themselves in the open market. Indeed, many people would be

better off because they would be spared some part of the motor insurance premiums which they pay today. All the same, I appreciate that this attitude would probably be unsustainable in practice, and that some degree of interference with a first party market would almost certainly be a necessity. ...

The main advantages of a scheme of this kind seems to me to be these. First, it will save a great deal of money which, from the social point of view, is today largely wasted. The huge administrative costs of the tort system will largely disappear, and although this will no doubt be unpalatable to lawyers, history suggests that lawyers can usually find work to be done. Reduction or elimination of these legal costs will, of course, be especially welcome to the Lord Chancellor and the Treasury, because it will save a great deal of taxpayers' money which currently goes on legal aid. Second, it will vastly improve the coverage against various risks which most people have today. Instead of being offered a small, often a minuscule chance, of recovering enormous damages for some injuries, most people will have a much better chance of obtaining some compensation for those injuries. The compensation will be nothing like as generous as that on offer in the tort system, but it should meet essential needs much more effectively than most basic social security benefits. Third, it begins the job of getting rid of the artificial distinctions embodied in present law and practice between accidental injuries and disabilities from other causes. While I am not offering anything like the wildly ambitious Woodhouse proposals in the Australian report, the shift to personal or first party insurance will, I think, gradually begin the process of getting people to think about insuring themselves against disabilities which arise from non-accidental causes. Fourth, the shift to a free market in insurance will introduce a great deal of consumer choice in an area where it is significantly absent today. Fifth, it will distribute more equitably the burden of many accidents, especially road accidents, where at present the insurance system favours the more highly paid, and penalises the low-paid, the unemployed and the retired. Sixth, it will get rid of the adversarial process in cases like medical malpractice where its disadvantages heavily outweigh any benefits it brings.

I now have to answer some of the more obvious objections which my proposals are likely to encounter. First, it may be objected that I am not offering any general or universal coverage against accidental injuries. What I propose is a system which will operate in patches, and will be full of holes. All kinds of people may fail to obtain compensation for injuries under a free market insurance system of the kind I have outlined.

I cannot deny this, but for the defenders of the tort system to object to a proposed new system on the ground that it is full of holes is certainly a case of the pot calling the kettle black, or to use a more appropriate metaphor, of the sieve accusing the colander of being full of holes. There is no doubt that a system such as I have outlined would cover far more victims than tort law does in practice, and many of those who are not covered would have had the opportunity to buy coverage but would have failed to avail themselves of that opportunity. Further, given the almost certain pressures on the welfare state in the next century for the demographic reasons I have already referred to, it seems to me highly probable that future governments will strain every nerve to encourage the spread of the sort of system I have outlined, once it has been introduced and become familiar.

The next inevitable objection to my proposals is likely to be that I will be depriving many people of their potential right to sue for damages in cases where they may remain without cover under my proposals. What about the "little old lady" who is harmed by a defective drug manufactured, perhaps negligently, by some giant drug company? Am I really prepared to see her deprived of her right to sue without ensuring some adequate replacement? I have to say that the answer is Yes, for reasons

which I have already largely given. But let me spell those reasons out more fully in the context of a specific example, like this one. The little old lady's present right to sue the drug company for damages, assessed as they are in the generous way that tort law uses, appears to me to be very difficult to justify on any moral principle. The actual chemists or employees of the drug company who were responsible for putting the drug on the market in its defective state will not be paying the damages, nor indeed will they have paid the insurance premium for this risk. So arguments based on corrective justice are out of place, unless we can truly think of a drug company as a moral entity, which I find impossible. To my mind, arguments based on ideas of this kind are probably ultimately derived from simple redistributive ideas. But these, too, on analysis, prove to be based on very insubstantial grounds.

The third likely objection to my proposals is closely allied to the second. It will, no doubt, be complained that the benefits I am proposing for much first party insurance will be extremely basic. Nothing for pain and suffering, nothing for medicals (except perhaps for catastrophe insurance) and income replacement which will often be less than the income lost. Yet would such a system of benefits, if the coverage is really widespread, be so very inadequate? Of course, after an accidental injury has been insured, the victim, and (to be fair) many others who sympathise with him, will want and feel that he is entitled to much more substantial compensation. But if a person is asked to make rational choices about these matters in advance I cannot believe that most would not willingly accept more limited but certain benefits, than huge but highly uncertain benefits. Speaking for myself I would be delighted if I and my family could have coverage against risks of this kind at no additional cost compared with the low coverage and high benefits offered by the tort system. And, given the whole thrust of my proposals towards expansion and development of first party insurance in many new forms, if people really want higher benefits they will be able to get them, but only if they pay the price.

IV. THE DETERRENCE PERSPECTIVE

TREBILCOCK, "THE FUTURE OF TORT LAW: MAPPING THE CONTOURS OF THE DEBATE"

(1990) 15 Can Bus LJ 471 at 483-87

Those who advocate the complete or partial replacement of tort law in respect of personal injuries—principally the compensation theorists—argue first that the deterrent function of tort law can safely be assigned to other legal or regulatory instruments. This argument needs to be treated with some caution. Whatever the empirical frailties in the evidence on the deterrent effects of tort law, tort theorists who propose these alternatives have rarely bothered to acquaint themselves with the empirical evidence on the efficacy of alternative control mechanisms. In fact, the evidence on the efficacy of various public control measures in the case of both automobile and industrial accidents is often highly inconclusive and findings on safety effects have often been extremely disappointing.

However, proceeding from their first argument, the proponents of the replacement of tort law then argue that with deterrence and compensatory objectives separated, the compensation objective is best served by new legal arrangements that focus exclusively on the compensation function. Proposals are more or less ambitious

ranging from complete or total displacement of the tort system in some contexts (e.g., industrial accidents, auto accidents, catastrophic mass injuries), to all accidents, a universal disability programme, or a universal minimum income guarantee.

Compensation proposals in each of these contexts present their own complexities, but one central and common complexity warrants special comment: this is the role that safety incentives should play in such compensation schemes. I believe that the argument that this issue can be set aside is fundamentally misconceived, in part because alternative control regimes are highly imperfect, and in part because compensation schemes that ignore incentive effects are likely to prove extremely expensive. In other words, the notion that deterrence and compensation objectives can be separated and addressed independently of one another is untenable.

This issue is well illustrated by the New Zealand Accident Compensation scheme which many proponents of the replacement of tort law hold up as a model, subject only to the criticism that the scheme covers only accidents and not most illnesses and other disabilities. The New Zealand scheme provides for a high level of earnings-related benefits and is financed from flat rate contributions by employers and motorists, and from general tax revenues. In short, no attempt is made to risk-rate injurers in setting contribution levels or to structure benefit levels to provide incentives to victims to minimize the likelihood or magnitude of claims.

The implications of these design choices are easily demonstrated. In the case of non-risk-rated contributions, the Quebec auto no-fault scheme indicates the likely safety effects in an auto accident context. By abandoning age, sex, previous accident and traffic violation experience as pricing variables and charging a standard annual premium to all drivers, high-risk drivers, including young male drivers who were priced off the highways by substantial insurance premiums under the traditional tort private third-party insurance regime that previously prevailed, were now able to afford to drive. Instead of facing annual premiums of perhaps $2,000 to buy mandatory third-party insurance coverage, these drivers could now obtain coverage for less than $300. The two recent Quebec studies find that the sharp increase in fatalities after adoption of the scheme was largely attributable to a failure to internalize expected accident costs to drivers through a differentiated premium structure.

In the workers compensation context, employers' contributions in most jurisdictions are determined mostly by industry classification and are not individualized to particular firms. A recent Ontario study found that if individualized risk rating had been in effect, this would have resulted in one company in the automobile manufacturing industry in 1982 receiving a rebate of $1.6 million, while another firm in the same industry would have paid an additional $2.6 million surcharge. Shifts in levels of contribution among firms in other industries of comparable magnitude would also have occurred. The author of the study concludes that shifts in contributions of this scale would be likely to have a significant impact on safety incentives.

However, the difficulties of operationalizing risk-rating regimes in many contexts should not be underestimated. With small employers, past accident experience is unlikely to be a reliable predictor of future accident costs. With new workplace substances, whose health effects may not be known for many years, risk-rating contributions may be a next-to-impossible task. Indeed, many of the problems that currently bedevil the tort system in most toxic tort cases—causation and fault—are likely to reappear in another guise in risk-rated, contributory compensation systems.

With respect to benefit levels, high earnings-related benefits raise the problem of what economists call "moral hazard." The concept of moral hazard refers to two classes of situations: *ex ante* moral hazard refers to incentives that insureds face, by virtue of being insured, to engage in conduct that increases the probability of the insured contingency happening; *ex post* moral hazard refers to incentives that insureds face, once in receipt of insurance benefits, to exaggerate their losses or to perpetuate the

state of affairs that qualifies them for continuing insurance benefits. Both forms of moral hazard are present in differing degrees of severity across the landscape of insured states of affairs that comprehensive social insurance schemes would cover, and make it impossible responsibly to sustain in unqualified form the horizontal equity argument that is a central predicate of such schemes. While it may be true, as is often asserted, that no one wishes voluntarily to sustain personal injuries, even if most pecuniary losses are covered, this is not to say that the problem does not exist, at least with respect to an increased propensity to file contrived claims. For example, under the New Zealand scheme, employers are required to provide direct 100% coverage of earnings for a worker's first week off work as a result of an accident or work-related illness. A New Zealand government study reported a 92% increase in lost-time injuries (mostly short-term) by workers in the meat freezing industry following the adoption of the scheme.

If an accident compensation scheme were to be extended to all illnesses and other disabilities, these problems would become even more acute. If illness were to be broadly defined ... to include mental and emotional illness, questions of whether an insured is "ill" in the first place, or if so, remains "ill," so as to disable him or her from working are likely to prove highly problematic. Unless benefit levels are scaled down so as to reflect a significant element of co-insurance, substantial costs are likely to be entailed in some mix of socially unjustified payments and administrative resources devoted to verification and monitoring in order to contain these payments. But to scale down benefits in the case of at least some illnesses relative to accidents implies an acknowledgement that horizontal equity arguments cannot alone determine benefit schedules, but that incentive effects with respect to recipients of benefits are also a relevant consideration. If a comprehensive social insurance scheme were also to embrace other causes of financial deficiency, e.g., unemployment, spousal desertion, and retirement, moral hazard problems of differing severity would dictate even further deviations from a common benefits schedule.

In short, in structuring both contributions to a compensation scheme and benefit entitlements under it, incentive effects cannot be ignored. Moreover, there may well be room for a residual role for the tort system, reflecting corrective justice and deterrence rationales for tort liability in their most powerful form, such as extreme cases of intentionally, recklessly or grossly negligently inflicted injuries resulting in serious and permanent physical impairment. Preserving some residual role for the tort system also ensured some continuing role for tort law as ombudsman in uncovering regulatory failures that require redressing, as in the case of asbestos. The dream of a "pure" compensation system is unattainable if it is accepted that reducing accidents is at least as worthwhile as compensating for their occurrence.

CALABRESI, "THE DECISION FOR ACCIDENTS: AN APPROACH TO NONFAULT ALLOCATION OF COSTS"

(1965) 78 Harv L Rev 713 at 713-16, 725, 733-35, 739-45 (footnotes omitted)

I. INTRODUCTION

I take it as given that the principal functions of "accident law" are to compensate victims and reduce accident costs. Such incidental benefits as providing respectable livelihoods for a large number of lawyers and insurance agents are at best beneficent side effects. The notion that accident law's role is punishment of wrongdoers cannot be taken seriously. Whatever function we may wish to ascribe to punishment in criminal law, it simply will not carry over to civil accident suits. If the time-honored, though somewhat shopworn, distinctions between legal and moral fault and between

damages and degree of culpability which prevail in tort law do not sufficiently demonstrate this proposition, then surely the prevalence of insurance priced on the basis of categories that have little to do with any individual insured's "goodness" or "badness" must. ...

Many recent writers have tended to focus on compensation as the main purpose of accident law. Were this emphasis proper, there would be no justification for limiting compensation to accidents and not spreading it across the board to illness, old age, and all the troubles of this planet. Of course, we do spread compensation beyond accidents to some extent, but it is the fact that we only do it "to some extent" that is crucial. Why is compensation for illness—even in highly welfaristic countries—much less complete than compensation for accidents? And why is the accident field kept a separate entity, where methods that achieve a fair degree of compensation spreading are used, but which would be woefully inefficient if compensation spreading were the only aim? Surely, if the type of cost reduction with which we are concerned is solely or principally that accomplished by diminishing secondary costs—social and economic dislocations—then a generalized system of social insurance covering all types of severe injuries would be the only efficient system.

The answer is that accidents are not the same as diseases. There are ways to reduce the primary cost of accidents—their number and severity—that can, indeed must, be an important aim of whatever system of law that governs the field. One way is to discourage those activities that result in accidents and to substitute safer ones for them. Another is to encourage care in the course of an activity. "Activity" and "care" are not, of course, mutually exclusive categories. If "activity" is defined narrowly or if "care" is broadly viewed, the concepts tend to merge. The activity of driving is not thought to be careless although a predictable number of accidents result from it. Driving through a busy intersection without brakes is careless and not an activity. Between these relatively clear cases the distinction becomes more difficult, as, for example, navigating without radar. In addition, an activity may properly be defined as the doing of something by an actuarial class, which may tend to do it carelessly. Treating the problems of accident law in terms of activities rather than in terms of careless conduct is the first step toward a rational system of resource allocation.

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IV. WHAT IS A COST OF WHAT ACTIVITY

The difficulty of deciding which costs are relevant is painfully apparent. When compounded with the problem of deciding what costs are allocable to which activity, the game of deterring competing accident-causing activities by making their prices reflect their full cost and letting the market decide may well seem not worth the candle. Why is it sometimes thought that a heart attack is caused by an automobile accident and sometimes by the victim's occupation? Is a pedestrian–auto accident to be attributed to driving or walking? Despite their familiar ring, these questions are not meant to herald a metaphysical search for ultimate causes. Rather they must be approached in terms of a "social cost accounting" system, in which activities are made to bear their costs in pursuit of sounder resource allocation.

The methodology involved in finding the accident costs of an activity is deceptively simple. The cost of any activity, *A*, includes the sum of the cost of accidents in which *A* alone is involved and some part of the cost of all other accidents in which *A* is involved with other activities. Solving the problem is more complex. A solution requires that criteria be evolved for apportioning the cost of an accident among those activities that caused it. There is no formula for allocating the cost of an accident among the activities involved, as there is no such formula for allocating overhead

costs among activities that share the same facilities. One is reduced to making guesses in light of the goals of the system, as do cost accountants and regulatory agencies. When the system extends to the whole of society, the goals become harder to define and the guess more open to error. A cost accountant for an oil-drilling company need not study the effect on the rest of the economy of buying extra equipment needed to recover gas as well as oil. A student of accident law cannot *a priori* neglect the effects of discouraging driving on, for example, walking, busing, and cycling. ...

[Calabresi first deals with bargaining situations, where it does not matter which of the two activities initially bears the cost, because the proper allocation of burdens will be worked out through the bargaining process. He then turns to the idea of subcategorization.]

It is better to apportion the accident costs among subcategories of drivers on the basis of the accident proneness of the category rather than to charge the accident costs equally to all drivers. If driving's share of auto–pedestrian accidents is paid by a set tax on driver's licenses, some desired deterrence on driving would be achieved. This allocation of costs, however, fails to distinguish between driving old cars and new cars, and the best way of reducing accidents (the cheapest way in terms of the choice for accidents) might be to reduce driving somewhat but to shift most driving to newer cars.

I shall not discuss now how far we can go in subdividing activities in allocating accident costs. Suffice it to say that there comes a point where the cost of further subclassification is greater than the worth of the choice offered, and that in practice it is possible to find that point. Indeed, in the context of subclassification for fault proneness, insurance companies make exactly such a decision every day when they charge higher rates for unmarried male drivers under twenty-five but do not break this down into unmarried male drivers of twenty-two and seven months as against unmarried male drivers of twenty-two and eight months.

The point is simply this: were there no costs involved in subclassifying activities, it would always be best to put the accident cost of an activity on its smallest subcategory. To the extent that the subcategory has the same accident proneness as another subcategory, no choice between these subcategories would be affected nor would one be desired. To the extent that subcategories were differently accident prone, some movement to the safer ones would result because the greater real cost of the more dangerous one would be reflected in its price. In either case, the activity of which both were subcategories would automatically also reflect its own accident proneness relative to other safer activities. Instead, if the costs were allocated solely to the larger category or activity, any possible "general deterrence" at the "subactivity" level would be lost.

Thus, although it is unclear whether an accident cost is attributable to driving or walking, in terms of general accident deterrence it is better to allocate it to one or the other or both than to pay it out of general taxes. And to the extent that the cost is put on these activities, further subclassification by drivers, type of cars, and the like, causing people to shift from the more accident-prone subclassification to the safer one, will bring about minimization of accident costs.

In this sense, then, the problem of "what is a cost of what" is further diminished. For even in a nonbargaining situation where accident costs are not readily divisible between the activities involved, it is clear that placing the costs on them is better than externalizing the costs. ...

[Calabresi then turns to situations where there is no hope of influencing one of the activities involved in an accident.]

Thus, if it is clear that pedestrianism is ineluctably here and nothing much can be done about it or its habits, and our concern is whether it is better to have driving or busing or how much of each and what kind of each, then it is proper to consider as part of the costs of cars and buses the added accidents they each bring to a pedestrian's world.

[Calabresi then outlines his idea of "involvement."]

Despite the lack of any inclusive theoretical basis for apportioning the cost of an accident among the activities involved, substantial guides to the allocation of costs in a nonfault system of accident law have been shown to exist in many situations. Yet a great many cases remain in which there are no rational criteria for dividing the accident costs among the activities involved. A straightforward, if rough, solution for these cases is possible. The cost of each accident might be divided pro rata among the activities involved and then cumulated for each activity.

For example, if a car and a pedestrian are involved, the cost will be split between driving and walking. If a car, a pedestrian, and a cyclist are involved, then the cost will be divided three ways. If a cost can be allocated between two of the three according to any of the previously derived criteria, then this will be done for two-thirds of the cost and the third activity will bear the remainder. At the end of any given period of time, those activities that are involved in more accidents or in more expensive accidents will bear the greater proportion of all costs. According to theory, safer but formerly more expensive substitutes will replace more dangerous activities as these are made to bear their costs. Even if categories are initially defined in terms of factors that are not related to accident proneness, this defect will eventually work itself out of the system.

Thus, if everyone drove blue cars and cars were involved in all accidents, then driving would bear a large part of all accident costs. Walking, cycling, and the like would bear the rest. If somehow "blueness" were thought significant, a shift from blue to red cars would occur; but since it would not help to reduce accident costs, the mistake would not persist. If a shift from big cars to small cars would reduce costs, then such a shift would be forthcoming to the extent that the cost differential between small cars and large cars was magnified by the previous year's cost allocation.

This method allows for special treatment in cases where the more exact criteria for allocating costs exist, while dealing with all other situations in terms of the preponderance of involvements. Its basis is the assumption that although criteria for allocating costs cannot always be found, criteria for determining involvement can. Again, it is necessary to warn that activities are not treated as "involved" in order to round out metaphysical notions of causation, but rather to make comparisons between potential substitutes more meaningful. It does not further this purpose to treat each *sine qua non* cause as involved in an accident. For while in most accidents there will be among the *sine qua non* causes some activities that may profitably be compared with substitute activities, there will also be other such *sine qua non* causes not worth comparing. This may be because: (1) there are virtually no substitutes with less accident-causing potential; (2) the activity and its substitutes will appear so infrequently in such accidents that any cost allocation to them could have no significant effect on choice; or (3) placing the cost on them initially would result in having the cost removed and externalized from all the causes.

Determining which causes are to be excluded as coincidental will not always be a simple proposition. For example, suppose a car and a pedestrian collide, and the driver notes that he was distracted by a low-flying plane. In the normal course of

things, planes will not be a sufficiently significant cause of car–pedestrian accidents to be worth bothering about. If, however, a fair number of accidents were to occur near airports, and enough of them involved distraction by a plane, then it might be worthwhile considering planes as involved. In that case, the accumulation of these costs and other costs caused in part by airport noise might induce installation of noise-diminishing devices or relocation of airports. The point is that often it will not be enough to look at the immediate case, but instead it will be necessary to discover whether an apparent coincidental cause is similarly involved in other types of accidents.

In other words, "involvement" is a term of art designed to include all those factors that are part of an accident and that may be replaced by substitutes with a substantially different accident potential. It includes those factors that are "typical" of an accident while ruling out those that are "incidental." Although the example shows that typicalness and incidentality are not altogether easy notions, they are probably workable.

V. CONCLUSION

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I have suggested that usually in our society, decisions on how much we want to deter accidents are made in a way that combines market choice and collective political judgments. My feeling is that this choice can be made more effectively through a system of accident liability based on accident "involvement" instead of fault, combined with a system of criminal and semicriminal penalties for specific behavior, and overseen by collective political judgments on the desirability or undesirability of certain activities regardless of the market.

When we are dealing with deterrence of activities that have some social usefulness but that cause accidents, the first step toward deciding how much of these activities is wanted can still, in a substantially free enterprise society, be best determined by the market. There are simply too many such decisions to be made collectively in any intelligent fashion. However, in a wide and perhaps growing area, we are dissatisfied with letting a purely market determination of social usefulness rule. This is because of the inherent inexactness of both the market mechanism and of any estimate of accident costs and to whom they belong. It is also because in a growing area we are becoming convinced, whether rightly or wrongly, that individuals do *not* know what is best for themselves. For both these reasons, some degree of subsidization or deterrence of activities based on collective decisions overruling the market is inevitable and probably desirable. Such decisions—like that to subsidize drivers over seventy, or to bar drunken driving—are, however, best made openly and in the face of the market decision, so that it is clear to us when we make such decisions that what we are really saying is, "In this case considerations *other* than individual choice among alternatives are paramount and supersede individual choice."

I do not, with all this emphasis on "general deterrence" of accident-causing activities, foreclose the specific deterrence that, it is often asserted, fault liability brings about. I simply believe that the best way to bar groups of acts that we feel politically are sufficiently bad that they should be barred regardless of their market usefulness is not through a "fault" system connected with insurance devices that remove most of the desired specific deterrence. Instead, the way to effect such a political judgment is through criminal or semicriminal penalties.

In elaborating such a "general deterrence" approach I have spent a great deal of time on the very difficult problems of what the costs of accidents are and to whom

they belong. I have done this from the point of view of general deterrence and not at all from the point of view of compensation. This is simply for clarity and not because I would slight compensation as a goal of accident law. I will readily admit, however, that if compensation were the only goal, then by far the most effective and efficient method of accomplishing it would be through a system of general social insurance, which would externalize the costs of accidents from any market decisions.

Social insurance, however, is not likely to be the solution if we are interested in the "savings" brought about by general deterrence, as well as the savings brought about by compensation. In fact, if it can be shown that a system is available that combines a substantial amount of general deterrence with an adequate degree of compensation, that system may be far better than either social insurance or an optimal general deterrence scheme.

The result is that we may very well be influenced in the division of accident costs, between autos and pedestrians say, by compensation motives. If we are in doubt about the proper division of costs, or which are the important comparisons from a general deterrence standpoint, it may well be proper to make the division in a way that accomplishes compensation (risk spreading) best. For in such a case little general deterrence savings would be lost through such a move, and substantial compensation savings gained.

Indeed, it would be the height of foolishness to establish a system—even a perfect system—for market general deterrence if this system were so unpalatable on compensation grounds that it would soon be replaced by social insurance in order to accomplish compensation. And this, of course, is another problem with fault liability. For even if it accomplished general deterrence as well and as cheaply as an "involvement" system (which I believe it does not), it is—apparently—so undesirable from a compensation point of view that it is constantly under attack.

This attack leads too often to the simple alternative of social insurance. Such a result would eliminate even the attenuated general deterrence that the fault system accomplishes, and therefore would substantially decrease the range of informed individual market choices with respect to activities and accidents in our society. In other words, if we stick too obstinately to a system that gives us some but not very effective general deterrence but very poor compensation, we may find that we end up with a system that gives us no general deterrence, or market choice on accidents, in exchange for a perfection in compensation we may neither want nor need. This would be so despite the fact that a little work can develop a modified enterprise-liability approach that would give us better general deterrence than fault and as much compensation as we want.

Ultimately, of course, the problem of what we will do in this area reflects a much broader problem. For here, as so often, we are faced with the fact that a time-honored system (fault) fails to satisfy a modern demand (compensation). We can react to this by dividing into hostile "conservative" and "radical" camps with the result that either nothing gets done or we abolish everything about our previous system, and set up one that meets the demand regardless of its other consequences (social insurance). Alternatively, we can work to see if there are other ways to retain what we believe is fundamental in the old, and yet adequately meet the demands it failed to satisfy. I believe that somewhere in a nonfault enterprise-liability approach, combined with tort or criminal fines for some specific acts, such a satisfactory middle ground exists. I also believe that the finding of such middle ground is the mark of a legal-political system that works.

BLUM & KALVEN, PUBLIC LAW PERSPECTIVES ON A PRIVATE LAW PROBLEM: AUTO COMPENSATION PLANS

(Boston: Little, Brown, 1965) at 57-65, 68-70

The third—and surely the most important—meaning of the superior risk bearer formula is that enterprises should pay their own way. Beginning with the celebrated analyses of vicarious liability a generation ago, a whole series of legal problems have been re-analyzed from this perspective. Under this approach those interested in law in effect turn to the economist for advice in the expectation that the economist's analyses regarding the allocation of costs will aid the law in reaching determinations on the allocation of liability. As far as we can tell, many in the legal world have thought that the concept of an enterprise paying its own way offers a sufficient bridge into the world of economics. They hear the economist talking about proper and improper allocation of costs and understand him as saying that an improper allocation of costs leads to an uneconomic and impolitic result. The lawyer's expectation is that by translating the liability issue into a question of costs, he can draw on the expertise of the economist to reach a proper allocation of these costs.

But if the economist is patient and candid, the lawyer will find his great expectations shaken. The economist will point out that the allocation of costs is not a matter of giving a description of the facts of the economic order, as the lawman seems to have thought. Rather the allocation of costs is always avowedly instrumental. Only if we specify the goals can the economist tell us what is the proper allocation of costs.

But the possibility of getting help from the economist does not end so abruptly. The lawyer may well find congenial two goals which are commonly found in the writings of economists: (1) It is desirable to arrange matters so that as many decisions as possible about the use of resources are made responsible to realistic voting by the consumers of goods and services; (2) in satisfying the votes of consumers, given the existing distribution of wealth and income, it is desirable to maximize output through achieving the most efficient combinations of resources. Using these goals, the economist is now able to say something significant about allocating costs. It is desirable to have consumers confront as realistically as possible the costs of activities in choosing among alternatives. And it is preferable to place costs strategically on those whose decisions can affect the magnitude of the costs. The first injunction will tend to make the allocation of resources in the society conform to the free choice of the members expressed through the market. The second injunction will tend to hold down waste and maximize efficiency in producing the goods and services for which the consumers have voted.

Assuming that we accept these twin goals as stating an attractive public policy, what advice can the economist now give us about resolving liability issues? ...

Let us suppose that a certain radioactive material on the face of a wristwatch dial causes skin damage to some persons who wear the watch. The important characteristics of this situation are that users of the watch acquired the product in voluntary market transactions with the manufacturer and that only users of the watch are exposed to the harm. Thus the universe of consumer voters and the universe of potential victims coincide.

In this situation the economist can add a major insight to what the lawyer might normally perceive about the relationships involved. If the law imposes liability for the harm from the watch dials on the manufacturer, that cost ultimately will be reflected in the price of the watches and hence the cost will be borne by the consumers of the product. Legal writing in recent years has picked up this point and often

takes the position that, whenever possible, liability costs should be placed on an industry in order to achieve such wide distribution of loss. This, however, is only half the story as the economist tells it. If the law does not impose liability on the manufacturer of the watches but leaves it on the consumers, the result would again be that consumers as a class bear the loss. The risk of harm from using the watch, it may be assumed, will be known to users and they will regard it as part of the cost of the product. Therefore whether liability is placed on the industry or the loss is left with consumers, the economy will be equally responsive to consumer voting and consumers as a class will cast the same vote. The law's choice of liability rules thus would seem to have no impact on the allocation of resources in the society. To the economist, the choice of legal rule for this situation might seem *prima facie* to be a matter of indifference.

On further analysis this is not quite the case. But the difference in consequences is not what the lawyer might have expected. Placing liability on the industry is tantamount to compelling the consumers to buy insurance against the loss through paying a higher price. The outcome would be that each user would purchase not only the product but also insurance against harm from the product, in much the same way that today he frequently is forced to purchase "free" trading stamps. This obviously is a sure method for bringing about total insurance coverage against the harm for all purchasers of the product. For a variety of reasons it can be argued that the coverage would not be the same if the law were to leave the loss with consumers. As a practical matter, accident insurance may not be available for so narrowly defined a risk; the consumers may perceive the risk of harm differently than does the industry; and many consumers may deliberately elect not to insure themselves. But such differences in insurance coverage need not lead us to the conclusion that it is better policy for the law to place the cost on the industry. For one thing, this automatic form of compulsory insurance in effect provides every consumer with the same coverage at the same price. It therefore cannot adjust adequately to the differing insurance needs of individual consumers of the product, with the result that some will overpay and others will underpay for protection. And, more important, like any form of compulsory insurance, it deprives the consumer of his own choice as to whether he wishes to carry insurance.

While considerably more could be said about the competing considerations in this situation, what is arresting for us is that the whole issue turns on the merits of compulsory accident insurance. The statement of the policy issue now has an unfamiliar ring. In the end the argument for strict liability turns out to be that it provides the most strategic method for compelling accident insurance.

Having stayed with the economist this far, and perhaps having been reassured by learning that so little depends on the choice of liability rules, we come back to the problem of auto accidents. Does the same analysis hold? If it is thought to be a good idea to place the cost of radium dial injuries on the industry to spread losses, is it not an equally good idea to place the cost of auto accidents on car manufacturers or motorists?

The economist will tell us that here the choice of liability rule may entail consequences of a different order. In his scheme of things, the injuries caused by autos and the radium dial injuries involve intrinsically different situations. Unlike our watch illustration, the risk of harm from autos is not confined to those who buy and drive cars, but includes also those who are strangers to the marketing and use of autos. Insofar as this is true, the cost of auto accidents will not inescapably be borne by motorists through the voluntary act of purchasing or driving a car. The upshot is that under the economist's value system it will make a difference where the law places the loss. If placed on motorists, the loss becomes a cost of driving. If left on

victims, the loss is what the economist might call an "externality" to the auto industry—a cost of society but not one to producers or users of cars. The size of the auto industry, and hence the allocation of resources, can be expected to be materially different under the two alternative legal rules.

At this point it would appear that the economist does find the legal question significant, and that here, unlike the radium watch dial case, the law can make a mistake in economics. But once again the promise of a decisive contribution from economics to legal policy slips from our grasp. In order to know when the law distorts consumer voting in the allocation of resources, we must first know which group of consumers should properly confront the cost of auto accidents. If auto accidents are properly a cost of using autos but the law elects to leave auto accident losses on the victims, there will be a resulting distortion in the allocation of resources. If auto accidents are not properly a cost of using autos but a cost of some other activity—perhaps of living in general—and if the law elects to shift auto accident losses to the users of autos, there will be a comparable distortion in the allocation of resources. In this perplexing situation can the economist advise us where the costs of auto accidents properly belong? The answer seems to be no. Nothing in his analysis can inform us whether it is less arbitrary to place the auto accident losses on the drivers or to leave them with the victims. Economics, in short, cannot tell us under which legal rule we run the larger risk of distortion.

The root difficulty here is simple and can easily be illustrated by juxtaposing pedestrians and motorists. Whatever can be said about accidents being a consequence of the activity of driving can be said with equal force about accidents being a consequence of the activity of pedestrianism. It is true that we can make a statistical statement that for every so many autos on the road there will be so many auto accidents. But the embarrassment is that one can just as correctly make a statistical statement that for a certain amount of pedestrian activity there will be so many auto accidents. Auto accidents appear to be impregnably a cost of multiple activities.

We seem then, and all too quickly, to have reached an impasse where we cannot use the economist's criteria to resolve our liability issue. ...

We have been testing alternative legal rules primarily in terms of responsiveness to consumer voting. It is time to deal more directly with the other major goal of economists which at the outset we accepted—maximizing efficiency in satisfying wants by reducing unnecessary costs or waste. For this purpose the important consideration is bringing about the largest net reduction in costs for the entire economy while it responds to consumer demand. In the auto accident situation the question becomes whether the choice of liability rule will make a difference in total costs. This depends not only on whether, as a result of a given rule, there will be a reduction in accidents, but also on how expensive the means used to accomplish this reduction will be. In these terms the argument for putting the loss from accidents on motorists is that it will hold to a minimum the total net costs of accidents to society.

This thesis, although stated in economic idiom, reintroduces us to an old legal friend—deterrence. Generally speaking the law has not taken very seriously the possibility of deterring with tort sanctions. While imposing liability on drivers might cause some people to decide not to drive at all, the law has not been sanguine about the impact of liability on the specific driving behavior of those who do drive. Even apart from the complications introduced by liability insurance, legal commentary has long emphasized that the driver's own personal safety is almost certain to be involved in any accident and that financial liability on the driver is not likely to add materially to this natural sanction. It is quite possible that legal commentary has come to this conclusion too quickly and that there are many situations in the auto world in which imposition of liability adds a significant stimulus to prudence on the

part of motorists. But there is no need for us to pursue further the troubled issue of deterrence; it is more profitable to turn to other aspects of the economist's quest for a liability rule that will hold down waste.

A major difficulty here is that the thesis requires predictions about behavior of two populations and not just one. It is not enough to predict that if liability is placed on drivers they will act somewhat differently and that there will be a net reduction in costs. This prediction must be weighed against a companion prediction about the reduction in costs if losses are not shifted to drivers but are left on victims. Conceivably investigation might some day establish that there would be a significant difference in the cost reducing potential of those two alternatives for handling accident losses. But surely today no one claims to know this much about the behavior sequences which would be involved. If we are to resort to armchair guessing, the considerations on the one side seem closely balanced by those on the other.

In seeking to use the waste reducing criterion, we have been posing the liability issue in the broad terms of whether all auto accident losses should be placed on drivers or whether all losses should be left on victims. The precise issue is much narrower. Many losses today are shifted by the common law to drivers; what we are seeking to find in economics is whether there is justification for shifting the remaining losses onto drivers. Until now we have considered deterrence without distinguishing between the possible impact of liability rules on faulty conduct and on conduct without fault. Whatever little we may know about deterrence, it seems plausible that liability rules will have a more marked impact on accidents due to fault than on those not caused by fault. If this is accepted, the common law appears to have reached a solution which the economist might find very bright indeed. Offhand, the common law, with its negligence and contributory negligence rules, seems to be maximizing the waste reducing potential of liability rules. It presents inducements to both drivers and potential victims to be careful.

As a final observation on the quest for a liability rule which will most economically reduce waste, it may be asked whether this is, in the end, a prudent way of looking at liability problems. In its efforts to reduce harmful behavior the law, of course, is not limited to tort sanctions. In the auto field we can and do use criminal penalties and licensing controls on drivers. Their availability affects the analysis. If, for example, the case for strict liability on drivers on waste grounds rests in part on the prediction that it will tend to keep poor drivers off the roads, the argument becomes much less persuasive when the availability of these other sanctions is taken into account. Compared with the alternative sanctions, tort liability conceivably might turn out to be the most expensive, as well as the least precise, way of holding down waste due to accidents.

This extended excursion into economic analysis has accepted the twin criteria of having consumers confront proper cost alternatives in casting their votes, and maximizing output of goods and services in response to those votes. It is worth emphasizing that the difficulties we have been experiencing in finding economic clues for legal policy have all arisen in applying these criteria to the problem of allocating liability for harms. We now turn to ask whether these two economic criteria standing alone can ever provide a sufficient definition of public policy for the law.

The economist would be the first to warn us that his criteria may not be sufficient for the law. In addition to the goals he has considered, there is a basic question of equity that the law cannot escape the obligation to answer. In simplest form it is, who should be made poorer as a result of an accident loss? On this issue the economist once again will find helpful the distinction between inescapable user costs involved in the radium watch dial situation and auto accident injuries which can be externalities to purchasing or using a car. In the former case the economist can

reassure us that, as between consumers of watches as a class and the watch industry, the choice of legal rules as to liability does not pose an equity problem since the cost cannot be taken off the users. In the latter case the economist will confirm what the law has long recognized—that its choice of liability rule will make either victims as a class or motorists as a class poorer. This issue of justice is one on which our hypothetical economic adviser takes no position. Yet there might well be a conflict between pursuing the economist's two goals and satisfying a sense of justice in distributing economic goods. Even if it could be shown that putting the cost of all accidents on drivers would minimize the net cost of accidents, the justice of making motorists as a class poorer would still be open to serious challenge.

In retrospect, the harvest from being patient with economic analysis proves to be somewhat ironic. In the situation in which his analysis is most refreshing, the economist tells us that the liability issue is not worth arguing about except possibly as a strategy for compulsory accident insurance; and in the other situation, where he stresses that the legal rule does affect the allocation of resources, his analysis at best yields indecisive clues as to the proper answer. To exaggerate only a little, when the economist is helpful he says that the legal problem is not worth arguing about; when he finds the legal problem consequential, he cannot be helpful in fashioning a solution. And in any event, the two criteria borrowed from him do not profess to touch issues of equity that are the ultimate concern of the law.

It will be recalled that one economic goal we accepted was having consumers face up to proper full costs in choosing among alternatives. The argument has been advanced that insurance succeeds not only in spreading costs but perhaps even more significantly it also succeeds in educating users about costs. On this educational feature it might be possible to suggest another rationale for placing the cost of the additional coverage under a plan on motorists. In discussing the goal of realistic consumer choice, we pointed out that regrettably it was impossible to tell whether the cost of an accident not due to the fault of the driver was a cost of using autos, or of being a pedestrian, or of just living in society. Assuming a wide use of liability insurance the new proposal would be to place some fraction, say one-half, of such cost on motorists in order to confront them with it as a cost of operating a car. The assumption is that it is plausible that some part of the cost of all auto accidents belongs to motoring as an activity, and that we cannot be far wrong if we settle for one-half. It is then argued that consumers are presented with more realistic cost alternatives where half of these losses is made a cost of motoring than where none is, especially since a car is involved in all auto accidents while pedestrians or other factors need not be present in every instance.

Such arguments are ingenious but not persuasive. The whole point to this aspect of economic analysis is that resources should be allocated in response to consumer voting and that the allocation should not be distorted by confronting consumers with improper cost alternatives. Assigning some arbitrary fraction of accident losses to motoring does not necessarily reduce such distortion. It might sound prudent to split the loss in two, but there is no way of knowing whether charging motorists 50% of the loss brings about more or less of a distortion than would charging them nothing for losses—or charging them everything.

It will also be recalled that a second economic goal which we accepted in our prior analysis was that of maximizing output through minimizing waste. In the matter of auto accidents, pursuit of this objective would dictate placing the cost of accident losses on that class of persons who would take steps to reduce accidents by the least costly means. We recognized that this was simply a different way of approaching the not unfamiliar problem of deterrence. We concluded that tort sanctions probably had little impact on the quality of driving conduct; but we observed

that if deterrence of accidents were taken as a serious goal for liability policy it appeared that the common law combination of negligence and contributory negligence was most likely to maximize whatever deterrent potential there might be. We have now reached a convenient place to consider what bearing use of liability insurance has on these possibilities for reducing waste.

The obvious point is that insurance may dampen whatever stimulus to deterrence there may be in liability rules. To the extent that the pooling of risks for insurance purposes homogenizes insureds, as it does by and large under current practices, it can only blunt the impact of liability on driving conduct. But, at most, all that such considerations do is to weaken a very faint argument on behalf of the fault liability principle. They in no way strengthen the affirmative case for a compensation plan.

Such discussion serves to remind us once more that there is much room for experimentation and greater daring in setting insurance rates for the sake of creating more deterrent impact. From time to time insurance companies have experimented with classifications based on safe driving histories so as to give rate discounts to drivers who have good records from an insurance point of view. A well established English practice has been to offer a discount to a motorist where there has been no claim against his liability policy over stated periods, with the discount increasing for each successive claim-free period. Certain companies in the United States have experimented with a demerit point system based on the presence or absence of moving traffic violations. Recently there have been suggestions that deterrence might be increased by use of a mandatory deductible provision which would take loss off the victim but leave part of it on the negligent driver. In general, however, the whole experience in the United States with such rating devices has not been very encouraging. Premium differences have, for the most part, been relatively small and unglamorous, and further elaboration along these lines, it is feared, may tend to complicate or embarrass the insurers in the ready marketing of their product. The rate differences, moreover, have usually been in the form of reductions in premiums for safe driving and have been advertised and understood as rewards and not as penalties. We suspect that these differentials serve not so much to affect driving conduct as to establish fairer rates for those who are the careful drivers anyway. But whether or not more effective arrangements can be devised, the topic has little bearing on the main theme of our analysis. The potentiality for differentiating premiums in terms of safe driving in no respect depends on changing from the common law system to a compensation plan.

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