The American Law Institute's Reporters' Study on Enterprise Responsibility for Personal Injury: Perspectives on the Tort System and the Liability Crisis

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The American Law Institute’s Reporters' Study on Enterprise Responsibility for Personal Injury

Note from the Editors:

In 1986 a number of prominent legal scholars embarked upon a project commissioned by the American Law Institute to re-examine contemporary tort and personal injury law. Five years later, the results of this project came to fruition in a two volume study entitled Reporters’ Study on Enterprise Responsibility for Personal Injury. After a year's debate within the American Law Institute about the broad range of issues canvassed by the Study, the Institute's Executive Council endorsed the value of the Study for deliberations about tort reform now going on in both legislative and judicial forums. However, the Council decided not to have the Institute's membership take a formal position on these policy questions. Instead the American Law Institute has now embarked on a Restatement (Third) of the existing law of Torts.

For the convenience of our readers, we have reprinted the introductory chapter of each volume of the Study. The Editors of the San Diego Law Review wish to express our gratitude to the American Law Institute for granting permission to reproduce this material.

PERSPECTIVES ON THE TORT SYSTEM AND THE LIABILITY CRISIS†

I. INTRODUCTION

This project was conceived and endorsed by The American Law Institute in 1986. In that year the United States was in the throes of a major crisis in its tort litigation/liability insurance system. The immediate symptoms of the crisis were steep increases in insurance premiums for the providers of a host of products and services. In just three years, general (including product) liability premiums shot up from $6.5 billion to more than $19 billion, and medical malpractice premiums soared from $2 billion to more than $5 billion. Many other domains fared even worse when their insurance policies were

cancelled and they were unable to secure substitute coverage (for environmental damage, for example) at any price. The popular impression was that the source of the unavailability or unaffordability of liability insurance was an explosion in tort claims and damage awards. The prevailing sentiment that something was seriously amiss in the tort regime moved both the federal and state governments, as well as numerous private organizations, to commission studies of the causes of these ailments and proposed solutions for them. In the years that followed reports regularly appeared describing and prescribing for the problem — typically calling for restraints or cutbacks on some aspect or other of tort liability. Many of the proposed measures were subsequently adopted by one state legislature or another.

This Report is being presented to The American Law Institute five years after we began our study. During that period the atmosphere has changed, becoming significantly calmer. For the last two years premiums in many lines of liability insurance have been declining. More systematic analysis of claims trends has demonstrated either that there never was a true general explosion in tort litigation, or at least that any incipient trend has definitely subsided. Indeed, some

1. Popular feelings at the time were vividly displayed by the title of Time Magazine’s cover story for March 24, 1986: “Sorry, America, Your Insurance Has Been Cancelled.”


scholars have depicted a pronounced recent change in judicial attitude against the expansionary trend in tort liability, at least in the products area.

The considerably longer time span of this American Law Institute study has permitted serious scholarly analysis and reflection about the tort system and related institutions for dealing with disabling injuries. The serendipitous result is that we have had the luxury of forming our final judgments with a much better perspective on the overall problem. In our view, both the alarmist concerns expressed by many observers of the tort system at the height of the crisis and the adamant defenses of the system against all criticism and reform were equally wrongheaded. It is clear that the crisis has now eased; the tort system did not spin out of control, and major dislocations were not visited upon the nation's economic and social life. While subsequent study and debate have identified certain aspects of health care or product manufacturing that are hampered by the threat of tort litigation, we have often been reminded of the vital positive functions served by tort law—in particular, the compensation and prevention of serious personal injuries—functions that may be sacrificed when the legal rights of injured victims are reduced.

The events of the mid-eighties now stand out as an especially stark turn in the litigation/insurance cycle that had manifested itself in the motor vehicle area in the late sixties, in medical malpractice in the mid-seventies, and in product liability in the late seventies (and which recently returned in the motor vehicle setting in a number of states). Recognition of the cyclical character of this phenomenon offers some comfort: liability premiums may rise, but they also drop, particularly in real dollar terms. At the same time it should serve as a reminder that the present respite may itself be only temporary, that yet another tort crisis may be waiting in the wings. Still, lurking

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5. See Henderson and Eisenberg, “The Quiet Revolution in Products Liability: An Empirical Study of Legal Change,” 37 UCLA Law Review 479 (1990); But See A. Havenner, Note Quite a Revolution in Products Liability (1990, for a systematic statistical critique of Henderson and Eisenberg's assertion that actual product claims and recoveries have fallen off, irrespective of what has been happening to the law in the appellate courts.

6. For example, P. Huber, Liability: The Legal Revolution and Its Consequences (1988).
beneath the surface of this ebb and flow in premium costs are deeper concerns about the performance of the tort system including the fact that most of the premium dollar is used up in legal administration rather than direct compensation of victims, the unavailability of any insurance coverage for a variety of environmental liability risks, and the apparent inhibiting effect of the tort threat on the practice of medicine or product innovation. It is crucial, then, to take advantage of the present period of relative claim to consider carefully whether there are improvements to the current regime, both inside tort and as alternatives to tort, that would afford us a better prospect in the event we experience the turn of the wheel once more.

II. THE FOCUS OF THE ALI STUDY

Tort law is a vast and complex subject. Even with the luxury of five years and a dozen participating scholars, we had to narrow considerably the focus of this study. Early on we decided to concentrate solely on bodily injuries to the person, on the assumption that these inflict qualitatively different harms on individuals and their families than do the property damage or lost profits affecting commercial enterprises, or the invasions of reputation and privacy suffered by people at the hands of businesses or government. At the same time, serious analysis of the law’s treatment of disabling personal injuries required consideration of the other institutions through which society intervenes for the prevention (through consumer product safety laws, for example) or the compensation (for instance, through social security disability insurance) of such harms. These neighboring institutions are usually complementary to, and occasionally at odds with, tort policy.

Even within the field of personal injuries we have narrowed the focus to disabilities that arise out of product use, medical treatment, the workplace, and toxic exposures in the environment. For the most part these harms stem from the modern technology that is the hallmark of much of our private enterprise system. The major omission from in-depth study in its own right were injuries arising out of the use of motor vehicles, even though these comprise the bulk of present-day tort litigation.

Along with other researchers we saw contemporary tort litigation as operating in three distinct tiers. The first tier, ordinary accident litigation, consisted primarily of motor vehicle cases in which individual defendants were sued for isolated events that caused harm to strangers (by contrast with enterprises sued for systemic behavior

causing repeated injuries to their clientele). In the motor vehicle field—as in occupiers’ liability cases, for example—litigation rates, though substantial, have been stable for the last two decades. Perhaps because of jurors’ recognition that they themselves might easily be the defendants in such suits, damage awards were also relatively moderate in amount, and at least in real terms have not manifested any pronounced upward trend.

In recent years popular reaction against premium increases in auto insurance has generated heated political debate in a number of states (including California and New Jersey).8 No major change in tort doctrine have appeared to contribute significantly to that phenomenon; in any event, the general recommendations we make for reform of the tort system (regarding damages for pain and suffering, for example) would, when applied to motor vehicle litigation, ameliorate many of the same deficiencies that manifest themselves in that context.

When people spoke about a tort crisis five years ago, what they primarily had in mind were not routine motor vehicle collision or slip-and-fall cases, but a second tier of high-stakes litigation arising out of product defects or medical mishaps. These cases involved people who were injured as a result of an encounter with modern technology operated by large and impersonal enterprises. (In the medical context these cases have an additional emotional impact, because an individual physician is being sued for the treatment rendered his or her patient in the hospital.9) Not only has there been a steady and appreciable rise in the number of second-tier tort claims since the late sixties, but for any given level of physical injury juries are systematically prone to awarding successful claimants much higher sums of money from the deep pockets of these organizations or their insurers.10 By the eighties serious qualms were emerging about the comparatively high administrative cost of providing victims with tort compensation in these hard-fought, high stakes cases, and about the seemingly erratic manner in which lay juries second-guessed and

8. That popular reaction is precipitated by receiving the overall bill for one’s auto policy, a significant portion of which stems from collision and theft coverage. For an illuminating exchange about the sources of and possible cures for problems on the personal injury side of motor vehicle litigation and insurance, see “Symposium on Tort Law—No-Fault Insurance,” 26 San Diego Law Review 977 (1989).


found fault with the judgments and actions of physicians, product
designers, and the like.

Even graver concerns arose about the capacity of our centuries-old
tort regime to grapple with a new third tier of litigation. This cate-
gory involves the “mass” tort of toxic exposure of a large number of
people to a product or environmental hazard that may cause cancers
or other serious illnesses decades later. Although such mass tort epi-
isodes have been relatively few in number and their legal treatment is
still in a state of flux, the third tier involves the highest stakes of all.
A single product from a single firm, such as the Dalkon Shield, can
produce tens of thousands of disabling injuries and tort claims, and,
like the asbestos cases, can threaten to swamp the legal system with
several hundred thousand lawsuits around the country. At the same
time, because of the long latency period between initial exposure and
eventual manifestation of diseases such as cancer without a single
standard cause, knotty questions were presented to the tort system
about precisely which product or firm was responsible for a particu-
lar victim’s present condition or fatality. And liability insurers,
themselves not much better able than their policyholders to predict
the scope and limits of mass tort liability, displayed greater and
greater reluctance to provide any future coverage against it.

Our focus, then, has been on the two upper tiers of high-stakes
and very-high-stakes litigation, and on what, if anything, should be
done about them. We also decided to set aside one further dimension
of present-day tort litigation, the involvement of the government. Of
course many aspects of government’s ordinary activities and liability
parallel those of private actors—malpractice in public hospitals, for
example—and are therefore encompassed in our recommendations
on these topics. But the specific legal responsibilities and immunities
that should be assigned to government as such raise a distinctive set
of concerns about appropriate judicial scrutiny of discretionary risk-
taking judgments made within the political process. To keep our
analysis and debate manageable, we have decided largely to bypass
that terrain.

11. See Brennan, “Causal Chains and Statistical Links: The Role of Scientific Un-
12. See Abraham, “Environmental Liability and the Limits of Insurance,” 88 Co-
13. For broader explorations of these problems, see P. Schuck, Suing Government:
Citizen Remedies for Official Wrongs (1983); and Zilhnan, “Congress, Courts and Gov-
ernment Tort Liability: Reflections on the Discretionary Function Exception to the Fed-
III. SOURCES OF THE TORT CRISIS

A. The Insurance Regime

Even within the boundaries described above, the appropriate tort and other legal policy responses to product, medical, workplace, and environmental injuries have provided more than enough grist for our mill over the last five years. In order to make sound recommendations for action that would cure any supposed deficiencies within these areas of the tort system, we first had to arrive at a correct diagnosis of the underlying problems.

For many observers, an equally plausible candidate for reform is the liability insurance system. The popular outcry for reform first arose when people and firms began receiving from their insurers notices of steep premium hikes or even of cancellation of their insurance coverage. The situation was especial intolerable in contexts in which liability insurance was practically or legally required in order to engage in the activity in question. Many trial lawyers and consumer groups felt that insurance was not only the symptom but also the source of the tort "crisis." On its face there seemed to be little logic to a pricing pattern in which sudden sharp increased in premiums were followed two or three years later by plateaus or even declines in insurance rates. A more cynical view was that the price increases were fostered by collusive arrangements within the insurance industry—an industry that is insulated by the McCarran-Ferguson Act from the full force and effect of antitrust law. That, indeed, was the judgment of a group of states that filed an antitrust suit against a number of major casualty insurers and the Insurance Service Office, charging that anticompetitive insurance practices had exacerbated the shortage or the price of coverage at the height of the liability crisis.

Though we have not undertaken as far-ranging a review of the

insurance side of the equation as have more specialized studies, we have satisfied ourselves about certain crucial points regarding the insurance dimension of the liability crisis. First, it is clear that the sudden explosion of insurance premiums and the contraction of available coverage in the mid-eighties was not caused by any immediate events within the legal system, any more than were similar insurance phenomena in the mid-seventies. A variety of technical explanations—including changes in investment earnings or reductions in the supply of capital in the industry—have been offered for the peculiar pattern of the insurance cycle, in which sudden upsurges in price are followed by premiums pauses, followed by another upsurge, and so on. Taking into consideration the rather unusual character of the insurance product—liability carriers must price and sell their coverage before the vast bulk of their "costs of product" have yet been incurred, and so these costs can only be projected—perhaps the alternating bouts of pessimism and optimism that seem to overtake the industry should not be surprising.

Later in this Report we analyze these and other explanations for the sort-term problems that affect the liability insurance system. Long-term trends in insurance pricing, however, give little credence to the charge of collusive exploitation. In fact, liability insurance is one of our least, not most, concentrated industries. Perhaps the McCarran-Ferguson Act offers some degree of insulation from full competition to short-term premium setting, but there is no evidence of abnormal and excessive profits being earned by the industry—nor any evidence of significant losses, either. In addition, the collusion hypothesis cannot sensibly account for the refusal by participating firms to sell their product at any price—that is, to refuse insurance coverage in a number of settings—rather than sell at an unwarrantedly high price. Yet such a refusal to sell is precisely what took place in the mid-eighties. Most important, careful investigation of longer-term trends has shown that increases in the cost of liability insurance are validated by trends in underlying tort claims, awards, and legal expenses. At any one time insurance prices lag behind the legal

17. See, for example, the New York State, Florida, and ABA Commission studies cited in note 2 supra.


system, as in the early eighties, and then jump too far ahead, as in the mid-eighties; but over the long haul expansions of legal liability and increases in insurance prices run together. If this longer-term trend in insurance costs is viewed as a policy problem (a premise that may or may not be valid), then a search for a solution must focus on the factors that have been driving tort claims and awards upward.

B. The Legal Regime

Even a casual reader of the law reports and the law review should get the impression that the major driving force in the burgeoning of tort litigation has been the host of common law developments that have expanded victim rights to tort redress. Most of the highly publicized judicial innovations have involved greater substantive liability imposed on defendants for their activities. But just as significant have been numerous changes that have given victims greater access to the tort process to enforce their rights, and have enlarged the scope of damages that are recovered once initial liability is established.

Throughout this Report we will dwell in more detail on these various legal changes. Here we briefly note the highlights.

**Strict Product Liability.** The watershed event in this domain was generally conceded to be the adoption in the mid-sixties (particularly in Section 402A of the Restatement (Second) of Torts) of strict liability for defective products, followed in the next decade by steady enlargement of the concept of "defect" to encompass a variety of failings in product design and warnings about use. This development had a major impact not only on tort claims by those injured as the result of using consumer products in the home, but also by those hurt in motor vehicles, in the workplace, and while receiving medical treatment (on account of prescription drugs, for example).

**Expanding Medical Liability.** Although there is no analog to the Restatement's Section 402A in the field of medical liability, in

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the last two decades there has been a steady accumulation of developments involving such doctrines as the locality rule, informed consent, vicarious or corporate hospital responsibility, and *res ipsa loquitur*, all of which added apparently helpful weapons to the injured patient's legal armory.\(^{22}\)

**Banning waivers of liability.** Both product and medical injuries occur in settings in which the parties are in a direct or indirect contractual relationship. Therefore it is feasible in principle for the manufacturer or doctor to insist on a contract waiver of these new forms of tort liability as a condition to delivering the product or service in question. Not surprisingly, though, the judges who considered it important to enlarge the scope of enterprise responsibility in the first place were not prepared to countenance frustration of their social policy by individual waivers. Consequently, even the most explicit disclaimers of liability were uniformly struck down as contrary to public policy.\(^{23}\)

**Toxic causation.** In the late seventies and early eighties a variety of innovations, legal (such as market share liability) as well as scientific, facilitated identification of long-latency diseases and attribution of the diseases to particular hazardous sources.\(^{24}\) These developments paralleled the use of the traditional doctrine of joint and several liability to force one of several defendants to insure the plaintiff-victim against the judgment-proof condition of the party that was often more directly responsible for the harm.\(^{25}\)

**Limiting victim responsibility.** The long-established common law doctrines of contributory negligence and voluntary assumption of risk historically barred many victim suits against even negligent defendants. But over the past two decades these doctrines have been either overturned or sharply narrowed. As a result, the *prima facie* liability of the culpable defendant is preserved, and responsibility for the overall harm is shared by the victim and defendant in proportion

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\(^{22}\) Medical malpractice law is analyzed and evaluated in P. Weiler, *Medical Malpractice in Trial* (Harvard University Press, 1991) (originally written as an ALI Background Paper).

\(^{23}\) The bellwether cases were Henningsen v. Bloomfield Motors, Inc., 161 A.2d 69 (N.J. 1960) (products liability); and Tunkl v. Regents of the University of California, 383 P.2d 441 (Cal. 1963) (medical liability).


to their comparative fault and responsibility.\textsuperscript{26}

**Reasonable Discovery Periods.** Statutes of limitations, strictly construed, had been used in the past to bar tort claims for long-past harmful events, the consequences of which were felt or appreciated by the victim much later. Most courts began to deem such time bars as running only after the plaintiff discovered or should have discovered a doctor’s negligence (such as his having left a sponge in the body after an operation), or after the harmful effects of a toxic exposure (cancer in an insulation worker, for example) manifested themselves.\textsuperscript{27}

**Types and Quantum of Damages.** The average damage award rose at a much faster rate after the early sixties than did general wages of prices.\textsuperscript{28} Perhaps the most important source of this trend was the great increase in amounts awarded for pain and suffering, in both traditional situations and in a variety of new categories such as wrongful death or the psychological distress generated by witnessing another’s injuries.\textsuperscript{29} In addition, though they were paid in only a minority of cases, punitive damages became a significant phenomenon in high-stakes product, environmental, and even medical injury litigation.\textsuperscript{30}

The foregoing developments are among the most prominent doctrinal indicia of the progressively expanding tort agenda. Inevitably this extensive judicial action produced popular, political, and scholarly reactions. The widespread belief, valid or not, is that judges and juries have been accepting and encouraging a host of farfetched claims that personal injury attorneys translate into huge damage awards, from which the lawyers then take hefty contingency fees. Meanwhile, the enterprises that are the targets of this litigation have


\textsuperscript{27} See, e.g., McGovern, “The Variety, Policy and Constitutionality of Product Liability Statutes of Repose,” \textit{30 American University Law Review} 579 (1981), on both the initial judicial interpretations and then the legislative revisions.


been groaning under the burden of spiralling insurance and legal costs. In the mid-seventies the nation’s doctors went to the legislatures for relief; they returned in the mid-eighties, this time in league with a host of other actors who considered themselves the victims of unduly generous tort law. Doctors enjoyed considerable success at the state level, but a decade-long effort by the business community to secure product liability reform at the federal level has so far proved fruitless.

Without detailing here the content of statutory tort “reform,” it is interesting to observe that none of this legislation overturned any of the major judicial innovations in substantive liability standards that we just canvassed (including strict product liability and informed consent for doctors), although legislatures have whittled away at the margins of these doctrines (through adoption of a “state of the art” product liability defense, for example, and use of the “reasonable physician” rather than the “reasonable patient” standard for doctor disclosure sufficient to secure informed consent). Instead, legislators have concentrated the bulk of their efforts on restricting the plaintiff’s initial access to the tort process (through devices such as statutes of repose that place outer limits on the discovery period, and limits on attorney fees that make riskier claims less viable) or on the eventual scope of damages payable for successful claims (through collateral source offsets or caps on pain and suffering awards). Needless to say, statutory limits on the ultimate payoff from a case also exert a significant influence on the likelihood that a claim will initially be filed and pursued.

C. Tort Law in a Broader Perspective

It is natural for legislators, judges, lawyers, and legal scholars to suppose that the new doctrinal concepts they debate, adopt, and revise have played the major role in expanding tort litigation and increasing insurance premiums. Yet there is considerable reason for skepticism on that score. In the field of medical malpractice, a number of empirical studies have assessed the impact of legal rules—both judge-made common law and statutory reforms—on tort claims, awards, and premiums. The consistent finding of this work

33. Because malpractice legislation has been the most extensive, varied, and long-
is that the specific content of medical liability standards has only a marginal influence on aggregate tort trends, much less than the influence exerted by direct restraints on initial plaintiff access to the system, or especially by limits on the size of awards in successful claims.

A number of commentators have expressed a contrary view about the significance of doctrine in the product liability field. In this field there was a major doctrinal revolution—the move from fault to strict liability—which supposedly led to an explosion in tort claims and thence to an unraveling of the liability insurance pool, culminating in the widespread unavailability, let alone affordability, of insurance coverage in the mid-eighties.³⁴

Viewed in a broader perspective, however, the attempt to link these doctrinal, litigation, and insurance events seems dubious. First, close examination of product liability law itself reveals that this brand of liability is based far more on "fault" than it initially appears to be. The largest and most troublesome growth area has involved claims of "defective" design and warnings, for which the legal standard still smacks of traditional fault—the absence of reasonable precautions that properly balance such product ingredients as risk, cost, and benefits in the context of the current state of the art. Similarly, although medical malpractice law remains explicitly wedded to fault (determined by reference to standards set by doctors, not juries), health care providers have experienced equally steep increases in claims and premiums, though without an unraveling of their insurance pools. Most importantly, comparing either of these aspects of tort law to workers' compensation, a no-fault liability regime in the purest sense of the term, reveals a comparable increase in workers' compensation aggregate costs over the last several decades. However, while serious concerns about rising claims and

³⁴ This is a recurrent theme, for example, in the Report of the Committee for Economic Development, Who Should Be Liable?, supra note 2. The most prominent scholarly exposition of this thesis is Priest, "The Current Insurance Crisis and Modern Tort Law," 96 Yale Law Journal 1521 (1987).

clots—involving such new concepts as cumulative trauma or occupational stress—exist in the workers' compensation realm, there has not been the sense of recurrent crisis that regularly overtakes tort law.35 The big difference in workers' compensation is that however broad and inviting may be its standards of entitlement and liability, there are real constraints on the amount of compensation that will be awarded in any one case. This factor has permitted much smoother and more controlled expansion in aggregate expenditures within the workers' compensation system.

The foregoing are some of the reason we devote as much attention in this Report to the legal principles governing tort damages as the rules that define initial liability. But we must still address the objection of the critic who argues that whatever the explanation, the expansion of the role of tort litigation (as well as tort doctrine) over the last quarter-century has been perverse, especially in view of the fact that the real world appears to be growing safer rather than more hazardous.

The fallacy in that point is its assumption that because the world is getting safer, a growing propensity to sue must mean that people are increasingly filing spurious tort claims. Yet on the contrary a recent nationwide survey by the RAND Institute for Civil Justice36 found that far more people were injured than ever considered suing, and that most people who entertained the idea of litigation eventually never pursued it, particularly in the high stakes fields of product, workplace, medical, or environmental injuries. (The inclination to sue is considerably higher for motor vehicle accidents.) Nor is this reluctance to bring a lawsuit due to the fact that the victim has no one but himself to blame for injury. The recent Harvard study of medical injuries in New York37 found that only a small fraction of patients who suffered disabling injuries resulting from the negligence of a doctor or other health care provider ever filed a tort claim, and that less than half of these claims succeeded in producing a settlement or award. It is clear, then, that the recent growth in tort litigation has served only to narrow the always wide gap between actual


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negligent injuries and successful suits for those injuries, not to over-
shoot that gap.

What are the reasons for this steady increase in tort (workers’
compensation) claims over the past several decades? Change in the
governing legal standards, particularly the standards for tort dam-
ages rather than for substantive liability, have certainly had some
impact. Major social influences are the fact that seeing a lawyer and
filing a tort claim are now much more acceptable, and that people
feel more entitled to a higher level of protection against bodily injury
both before and after an accident occurs. In addition, the personal
injury bar, aided by the scientific community, has developed a
greater capacity to identify the connection between a victim's injury
and an enterprise's risk activity, as well as to establish this connec-
tion to the satisfaction of a jury. To the extent that these practical
social factors have provided the greatest impetus to rising tort litiga-
tion and insurance premiums, in future years we are likely to
experience more, not less, of the same trends.

IV. THE AIMS AND LIMITS OF TORT LAW

The mere fact that the number of real injuries is greater than the
number of legal claims is not sufficient to justify the continuing ex-
pansion of tort law. We must also be satisfied that the litigation aris-
ing from these injuries contributes something of real value to the
personal injury problem. One reason that such a question mark
hangs over the current tort regime is that no clear consensus exists
about the objectives the system is supposed to serve. A number of
plausible rationales are regularly advanced, but upon close analysis
each reveals flaws of principle or of fact. Moreover, the effort by tort
law to secure several of these objectives at once is a source of contin-
ual tension in the system's operation.

A. Corrective Justice

The simplest and most venerable justification for tort liability is
that it secures the value of corrective justice. In this account, a

38. Elaborated in Rabin, "Tort Law in Transition: Tracing Patterns of Sociolegal
39. For illuminating treatments of the contemporary tort debate from this perspec-
tive, see Weinrib, "Understanding Tort Law," 23 Valparaiso University Law Review 485
(1989); Smith, "The Critics and the 'Crisis': A Reassessment of current Conceptions of
Tort law," 72 Cornell Law Review 765 (1987); Schroeder, "Corrective Justice and Liab-
ility for Increasing Risks," 37 UCLA Law Review 439 (1990); and Wright, "Allocating

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lawsuit is pictured as a contest between two individuals, a reflection of their bipolar relationship in the real world in which the defendant caused the plaintiff to suffer an injury. Assume that the defendant’s actions evidenced an unreasonable preference for this own interests and insufficient regard for the risk that actions created to the plaintiff’s rights. If the risk then materializes, under this theory it is only fair to require that the defendant make the plaintiff whole for the injuries suffered, so that the defendant will shoulder the burden of the losses produced by his own misconduct.40

From the corrective justice perspective, the fact that victims are provided with compensation for past losses and defendants supplied with incentives for future care is a fortuitous byproduct, not the central rationale, for tort liability. The crucial defining feature of this liability regime—extending compensation only to victims harmed by someone else’s fault, and determining the size of the damage award by the victim’s losses, not the degree of defendant culpability—are the legal implications of the community’s effort to restore the pre-existing relationship between the two parties, a relationship that was unjustly disturbed by one party’s misconduct and the resulting injury to the other.

Although this corrective justice rationale continues to maintain its hold on the popular mind and to have important scholarly exponents, its premises have become progressively less resonant with the real world of tort litigation. One particular problem is that the actor who was at fault does not actually pay for the victim’s injuries. Instead, the damages are ordinarily paid by the enterprise employing the actor or by the insurance company that provides liability coverage to the actor or firm. More importantly, in situations such as product, medical, or workplace injuries, in which victims and injurers are in some kind of contractual relationship, much of the financial burden of tort liability is ultimately borne by potential victims themselves in the prices they pay for the products or services that create the risks, or in wages foregone by employees who take more hazardous jobs that have this type of liability insurance attached to them. A verdict in court may formally reflect the tenets of corrective justice in the way it allocates legal responsibility between the two immediate parties to the lawsuit. However, the court award is simply a symbolic starting point for the allocation of financial responsibility that eventually works itself out in the world beyond the courtroom.

Liability Among Multiple Responsible Causes,” note 25 supra.

40. In cases in which the victim’s fault contributed to his own injuries, this creates a bar to, or more recently and more properly, a proportional sharing of, legal responsibility for the injury.
B. Social Grievance Redress

The fact that large corporate enterprises are the real defendants in most high-stakes tort litigation has exacerbated rather than allayed the sense of social grievance that such cases produce. The community fervently wishes to see these grievances redressed in some fashion or other. Perhaps the most revealing manifestation of this popular sentiment is the increasing incidence of sizable punitive damage awards over the last two decades. Juries and judges see large organization abusing their power through systematic endangerment of large segments of the population, not simply in sporadic injuries to a few individuals. At the same time, skepticism proliferates about the willingness of the executive branches of government to control abuses of corporate power, in part because of a perceived symbiotic relationship between the private and public bureaucracies.

The populist goal of tort litigation, then, is to empower the private citizen to act as an effective one-person lobby against such abuses. The victim (or group of victims) hires a lawyer to investigate and uncover the malfeasance in question and to hale the offender into court, where the "outrageous misconduct" can be publicly displayed. The victim then invites a jury of his peers to send a message to the malefactor as well as to the other potential defendants in the form of a multimillion-dollar damage award.

Unquestionably there is something satisfying about a process that allows ordinary people to put "authority in the dock" and hold it to account for such human tragedies as asbestos exposure, DES, or the fallout from nuclear testing. Whether the authority held liable is actually the responsible party in these high-profile suits is, however, open to question. Generally it turns out that the individuals in the public and private organizations who made the original risky decisions have long departed from the scene by the time the risks they took materialize decades later in the form of disability, death, and litigation. Those who end up paying the bill for lawsuits over the

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43. This is the title of the well-known book by Paul Brodeur on the role played by tort litigation in uncovering the asbestos disaster.
earlier misconduct are the present shareholders, employees, and customers of the private firm (or taxpayers of the government). The financial burden is distributed among these groups in a manner determined by the intersection of the capital, labor, and product markets within which the firm functions. Just as was true of the corrective justice rationale for tort liability, proponents of the populist justification for tort litigation as a means of redressing social grievances must eventually fact the facts of the hefty burden imposed by litigation and the often great distance between those whose actions trigger the suit and those who must eventually pay the bill. When they do, the need for a more pragmatic justification of our tort litigation/liability insurance system becomes evident. Is there any good reason to believe that the costs of litigation will prove to be a socially worthwhile investment in this technique for ameliorating the personal injury problem?

C. Compensation/Risk Distribution

One accomplishment of tort law that can be directly observed is the transfer of money from the defendant to the injured victim. We can be generally confident that defendant enterprises or insurers will distribute the burden of this compensation award across broader segments of the community in the prices paid for risky products or activities. Public finance and social welfare policy make the plausible assumption that modest additional costs borne by a large number of people are less burdensome than catastrophic losses falling on individual victims and families. Under this view the mandatory spreading of the risk of seriously disabling injuries through the imposition of tort liability reduces the aggregate social cost of injuries.

The theory of risk spreading through enterprise tort liability took root in the scholarly community in the fifties. It is commonly believed to have been the major influence in the expansion of tort liability from the mid-sixties onward. At the same time, social insurance against health care costs and earnings losses was increasingly pictured as essential in the popular and political debates of that era. Yet as it turned out there were serious obstacles to either private or public adoption of a comprehensive social insurance program in the United States. Understandably, then, judges who believed that risk distribution was desirable but who could see the gaps and limitations in the country's existing social safety net were inclined to use the occasion of litigation over serious injuries to expand the reach of

third-party tort liability to fill the insurance gaps.\footnote{For a systematic presentation of the judges’ success (or social security’s failure), see O’Connell and Guinivan, “An Irrational Combination: The Relative Expansion of Liability Insurance and Contraction of Loss insurance,” \textit{49 Ohio State Law Journal} 757 (1989).}

With the luxury of our historical perspective on the enterprise liability movement, we can identify the considerable flaws of tort law as a source of disability insurance, especially a tort system whose formal rules of liability and entitlement are still largely based on the historic corrective justice rationale.\footnote{Systematic critiques of tort compensation from differing points of view include S. Sugarman, \textit{Doing Away with Personal Injury Law} (1989), Chapter 2; Epstein, “Products Liability as an Insurance Market,” \textit{14 Journal of Legal Studies} 645 (1985); and Priest, “Modern Tort Law and Its Reform,” \textit{22 Valparaiso University Law Review} 1 (1987).}

1. **Fault-Limited.** Entitlement to compensation is based on the fortuitous fact that some other actor is at fault in causing the injury, not on the fact that the injury creates immediate needs on the part of the victim. In addition, any contribution of the victim’s fault to the injury traditionally served as a bar to any tort recovery; now it generally provides a rationale for reducing the amount of the recovery, again without regard to the real current needs of the victim and family.

2. **Overgenerous.** Once the plaintiff manages to establish the defendant’s fault, the plaintiff collects full compensation for all his losses, whether or not there is a real need for such insurance. In other words, if the victim’s losses are financial, he recovers irrespective of whether first-party insurance has or would cover the same losses. If the victim’s losses are psychological, he recovers irrespective of whether there is any social value in transferring insurance monies to cover an inherently nonmonetary loss.

3. **Regressive.** Even with respect to uninsured financial losses, because tort law focuses on the fact and size of the victim’s injury viewed \textit{ex post}, the amount of compensation provided is based on the size of the victim’s prior earnings, however high or low they may be, in marked contrast to the frankly redistributive character of explicit social insurance programs such as SSDI. But unlike private disability or life insurance, for which higher earners pay larger premiums in return for greater income protection, mandatory tort “insurance” is financed through regressive flat-rate assessments incorporated in the prices of products or services that are charged to everyone, rich and poor alike.
4. EXPENSIVE. Third-party tort insurance is extremely expensive to administer. Individualized decisions must be made about each defendant’s fault and each plaintiff’s losses, using all the procedural paraphernalia of the civil justice system. As a result, most of the claims expenditure dollar pays for administration rather than ending up in the hands of the victim. This administrative share is significantly greater in high-stakes product, medical, or environmental litigation than in routine motor vehicle litigation, and is several times the percentage expended in first-party medical and disability insurance, public or private.

D. Incentives for Prevention

For these reasons, the use of tort law as a device for expanding insurance protection against disabling injuries is increasingly viewed as a questionable enterprise. For at least the last decade the focus of most tort scholars has turned from the compensation of past injuries—a job most consider is best left to loss insurance mechanisms explicitly designed for that purpose—to the creation of liability incentives for the prevention of future injuries.48

From this perspective the function of tort litigation is to force actors who cause injuries (at least avoidable injuries) to pay for the cost of the injuries in order to generate a financial motive for future actors to adopt appropriate safety precautions. Tort law has certain special virtues in this effort. It relies on the incentive of private victims’ seeking substantial damage awards to identify and prove the liability of others who were responsible for their injuries. It also measures the size of the sanction imposed for a defendant’s misconduct by reference to the actual harm done to its victims. Potential accident costs thus become salient in the deliberations of potential defendants about whether a particular safeguard really is optimal—whether the extra safety protection is worth the costs it will add to the product or service in question. In a fault-based liability system, risks judged not worth preventing are left to be borne by the victim. In a strict liability system, the expense of even unavoidable injuries is also shifted to the enterprise. Here the expectation is that incorporating the real social costs into the price of inevitably risky activities will reduce the amount of the activity demanded in the short run and create a financial incentive for firms to devise new precautions that will be feasible and worthwhile in the long run.

48. See generally S. Shavell, An Economic Analysis of Accident Law (1987); and W. Landes and R. Posner, The Economic Structure of Tort Law 91987). As the work of these scholars exemplifies, the economic approach to tort also pays considerable attention to the capacity of this institution to deliver efficient insurance for as well as optimal prevention of personal injuries.
That, in any event, is the generally prevailing scholarly theory about the appropriate role of tort law. Many are still skeptical about how material tort liability is to accident prevention efforts, particularly in the context of motor vehicle or medical malpractice injuries. In these settings, argue the skeptics, widespread liability insurance provides a buffer between the tort award and the individually culpable driver or doctor. Even if defendants are subject to certain uninsured consequences when they are sued and found liable, the actions judged to be at fault are typically cases of momentary, often inadvertent, slips and mistakes that are hardly likely to be influenced by the prospect of litigation years later. Yet however plausible this counterargument may be, there is evidence of at least some deterrent value in motor vehicle and medical malpractice litigation.\textsuperscript{49} In any event these objections do not apply to much of the high-stakes litigation conducted against corporate enterprises for product, workplace, or environmental injuries. In those settings either the firm is self-insured or its insurance is merit-rated, and the target of litigation will often be deliberate, consciously planned judgments about whether to build a safeguard into a product or activity, precisely the type of enterprise decision that can and will take account of legal-financial incentives.\textsuperscript{50}

Even in that context, of course, there is a huge gap between the promise and performance of tort law. On the one hand, in the medical and environmental settings, where it is difficult to identify the cause and the source of an injury, there are far fewer claims and awards than injuries, and thus deterrence is far less than optimal. On the other hand, in areas where the cause of injury may be clear (such as a motor vehicle or a prescription drug), there is no guarantee that the jury will make the appropriate judgment about whether the manufacturer could and should have avoided the injury, rather than hold the victim or a third party (such as a driver or a doctor) responsible. Many assert that juries are inclined to find some way to compensate the severely injured plaintiff they see before them in the courtroom, and that they are prone to overplay the risks relative to

\textsuperscript{49} D. Dewees and M. Trebilcock, \textit{The Efficacy of the Tort System: A Review of the Empirical Evidence} (ALI Background Paper, 1991), Chapter 2, contains a careful review of what we know about the potential of and experience with tort liability as a mechanism for reducing motor vehicle injuries. The \textit{Harvard Study}, supra note 37, presents findings of a modest preventive effect of malpractice litigation on negligent medical injuries. See Chapter 13 below for a summary of this research.

the benefits of the product involved in the injury. If so, a tort system that can produce multimillion-dollar awards in such cases will in fact generate far too much deterrence against the enterprises and industries that American society vitally needs (if only to protect us from what may be even more serious background risks that are not readily visible in any single legal contest).  

V. A PLURALISTIC PERSONAL INJURY UNIVERSE

Anyone conducting a fair-minded review of trends and analyses over the last several decades would have to concede the flaws in tort law's performance. A special challenge faced by tort is that as the original policy instrument for handling personal injuries, it is expected to perform the broad variety of roles we have noted. A particular source of its difficulties is the fact that these tort functions are often in a state of internal tension.

For example, suppose we calculate a make-whole damage award designed to impose on the defendant the full social costs of its negligence in order to create optimal incentives for future precautions. We thereby mandate levels of insurance for victims that may provide considerably more generous compensation than is appropriate for injuries that have already occurred. Similarly, to the extent that we ask juries to review painstakingly the culpability of each individual defendant (or plaintiff) in order to mete out corrective justice between them, we create an administratively expensive mode of injury compensation and prevention, the costs of which serve as a barrier to a great many claimants whose injuries merit attention.

One obvious response to these dilemmas is to stop using only one policy instrument—tort law—to serve multiple goals that are often conflicting, such that the more we succeed with respect to one goal, the more we must sacrifice with respect to another. Instead we might employ a variety of devices, each tailored to the particular role that is parceled out to it. A number of alternatives to tort law have in fact been used with progressively greater frequency to respond to perceived deficiencies in tort. Given our experience with each of these contenders, however, it is not clear that any of them


performs appreciably better than the tort system.

A. No-Fault Liability

One prominent alternative to tort is the no-fault model of liability, which first put down roots in workers' compensation for employment injuries.\(^{54}\) No-fault is also the major instrument for handling service-related injuries to veterans of the armed forces. More recently it has been employed on a limited basis to compensate for motor vehicle and medical injuries.

The no-fault concept embedded in such administrative compensation systems is far more searching than anything tort lawyers have ever envisioned with strict liability for "defective" (that is, faulty) products. For example, if an employee is injured as a result of a hazard that was not even known, let alone preventable at the time of the injury, no "state of the art" defense will be available to the employer to avoid a workers' compensation claim. Workers' compensation (and veterans' benefits) dispense entirely with the moralistic overtones of traditional tort/fault liability. Their objectives are entirely functional in character: securing a better blend of compensation for past injuries, and preventing future injuries at a more economic administrative cost. The benefit structures focus on the economic losses suffered by the average worker rather than on the higher earnings of some or the pain and suffering of all injured workers—the pain and suffering category being considered a dubious candidate for mandatory insurance. Although the system does not purpose to investigate and judge whether any particular injury should have been avoided, it does assign the financial responsibility for all occupational injuries to the employer. The employer is considered to have the best opportunity (or at least the greatest purely financial incentive) to reduce the risk of such injuries, either by insisting on appropriate personal precautions from its employees or by investing in safeguards that automatically guard against human error when it does occur.\(^{55}\)

However appealing no-fault might appear as an ideal, there is no

\(^{54}\) P. Wiler, *Legal Policy for Workplace Injuries* (ALI Background Paper, 1986), canvasses the accomplishments and failings of the no-fault workers' compensation system. See also Chapter 3 below.

\(^{55}\) M. Moore and W.K. Viscusi, *Compensation Mechanisms for Job Risks: Wages, Workers' Compensation, and Product Liability* (1990), find that workers' compensation has had a pronounced preventive effect, reducing workplace fatalities alone by more than 25 percent of the level they would otherwise have reached.
denying the major flaws in the realization of the concept in workers’ compensation in the United States. One major failing has been the political determination of benefit levels. For the many workers who suffer short-term temporary disabilities, the level of (after-tax) income replacement is often extremely generous; consequently, it induces measurable increases in the number of reported injuries and the duration of time spent receiving compensation payments. However, severe statutory constraints limit the adequacy of support for the much smaller number of victims of serious permanently disabling or fatal injuries. Added to this problem is the great difficulty of identifying and attributing the causes of certain disabilities to the workplace, especially long latency conditions or diseases such as chronic back trouble or cancer. Because an individual firm or insurer has an incentive to fight liability in the more expensive cases, and because this difficult causal issue exists to fight about, lawyers and legal procedures are sued far more often than the early exponents of workers’ compensation ever anticipated. At the end of seven a successful struggle, the disabled worker or his surviving dependents can look forward to only the modest payoff of a fixed pension that is typically not adjusted for years of subsequent inflation.

The best test of the perceived inadequacy of workers’ compensation in America is that so many injured employees have, in effect, voted against the system by filing third-party tort actions against the manufacturers of products used in the workplace. Such employee suits include many of the most costly claims in the surge of product litigation over the last two decades. In Chapters 15 and 16 we explore the possible uses of administrative no-fault as an alternative liability model in such areas as medical injuries, but we do so fully aware of the imperfections of that legal instrument, just as we were mindful of the flaws in the tort system it might replace.

B. Private Contracts

The fact that many injured workers find the tort/fault regime more attractive than no-fault workers’ compensation does not establish that either mode of liability is beneficial to society as a whole. Recent years have seen a revival of interest in a no-liability option—private contracting within competitive markets. This option is not

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56. See Weiler, “Workers' Compensation and Product Liability: The Interaction of a Tort and Non-Tort Regime,” 50 Ohio State Law Journal 825 (1989). Of course, that worker “vote” was often aided by the fact that workers’ compensation had extended its more limited benefits to allay the immediate burden of the disability, and from the base of support it was much easier to pursue vigorously the ultimately more valuable tort claim.

57. Unquestionably, Richard Epstein has been the major exponent of the virtues of freedom of contracting about the risks of personal injury in his writings about product,
viable for injuries inflicted by an actor on strangers (in Tier I motor
vehicle or certain Tier III environmental exposure cases, for exam-
ple); however, no-liability is feasible in a number of important injury
settings—not only workplace injuries, but also medical and product
injuries in which actors and victims are in some kind of bargaining
relationship, even if only through an intermediary. Indeed, in the
nineteenth century contract law was the primary determinant of re-
sponsibility for such injuries, until it was displaced from the work-
place in the early twentieth century in favor of mandatory workers’
compensation and was judicially routed from the product and med-
ical areas in the last three decades.

As we near the twenty-first century, it is not at all obvious that
tort policy is universally preferable. One major advantage of contract
is that it cuts back sharply on the administrative cost of trying to
define and enforce mandatory liability rules from the outside. The
immediate sacrifice, of course, is the loss of the positive value of
compensation and prevention secured by those legal rules. Yet nearly
two decades of law and economics analysis have (again) demon-
strated why the last proposition is at best a half-truth. In competitive
markets, potential victims (such as consumers, workers, or patients)
must be offered compensating price or wage differentials to induce
them to encounter greater risks. This additional expense to the enter-
prise, forcing it to internalize ex ante the cost of these accidents,
generates a financial incentive to reduce the level of risk where doing
so is a reasonable option, and puts additional funds in the pockets of
potential victims to purchase insurance protection against disabling
injuries that still occur.

Not only is it plausible to suppose that there will often be suffi-
cient comparison shopping by a critical mass of potential victims to
make such markets for risks reasonably competitive, but we now
have a significant body of empirical evidence which demonstrates
that these markets function with considerable power. Indeed, com-
penating wage differentials for the risk of workplace injury alone

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58. See Schwartz and Wilde, "Imperfect Information in Markets for Contract
Terms: The Examples of Guarantee and Security Interests," 69 Virginia Law

59. See, for example, Priest, "A Theory of the Consumer Warranty," 90 Yale Law
are on the order of $100 billion a year, roughly the same as the cost of workers’ compensation and tort liability together. And a major virtue of market-determined contracts is that they leave decisions about the expenditure of these funds up to the private parties themselves: the enterprise decides whether certain precautions are optimal, given their costs, and victims decide whether certain levels of insurance are worthwhile, given alternative uses of the funds.

The authors of this Report believe that market does impose significant constraints on risky activities, and we will propose a number of techniques for enhancing and reinforcing market incentives. But we are satisfied that the following limits and imperfections in the functioning markets are great enough that we would decline any invitation to reassume the nineteenth-century posture of untrammeled freedom of contract regarding the risk of personal injury.

1. INFORMATION. Contrary to the opinion of some lawmakers, Americans are reasonably well informed about the risk of something going wrong and their getting hurt when they buy and use a car, for example, or get to work at a construction site, or go into a hospital for an operation. Moreover, to the extent that people incorrectly estimate the precise level of risk, they are as likely to overestimate as to underestimate the odds. On the other hand, individuals are much less likely to have accurate information about the relative risks posed by different individual producers of cars, suppliers of construction work, or hospital operating teams; yet it is this comparative information that is crucial for directing the appropriate market signals at competing enterprises.

2. INTERMEDIARIES. Even when the government takes steps to force greater dissemination of relative risk data than the free market would provide on its own—in the workplace or regarding health care, for example—people must still rely on appraisal of this information by intermediaries: on the employer’s decision about which machine tools to purchase or the doctor’s judgment about which drugs to prescribe. Although these intermediaries have good reasons to try to make the appropriate decisions on behalf of their constituents, they also have competing interests of their own, and the need to rely on the intersection of these overlapping markets adds to the likelihood of malfunctioning incentives.

3. EXIT COSTS. Individuals often gain their best appreciation for risks only after they have had sufficient contact and experience with them—as an employee on a job, as a patient with a doctor, as a consumer who purchases and uses a car. But having once made a

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commitment, these people face significantly greater costs if they act on the more accurate information by choosing to leave unduly hazardous jobs, doctors, or cars. These additional exit costs reduce the market incentives trained on providers to establish appropriate risk levels from the outset.

4. Social Altruism. For these and other reasons, markets for risk function imperfectly (though, we reiterate, often more effectively than is commonly supposed). But a final reason for public policy intervention is the strongly held sentiment that the community should not automatically accept whatever happens to be the outcome of even an optimally functioning market for life and limb. Suppose that fully informed consumers, selecting from a variety of options, choose to drive a more dangerous car or to work on a more hazardous job site, and then spend whatever premium they get in prices or wages on a variety of other more attractive goods or services than health or disability insurance—all on the optimistic assumption that they will escape the odds of being hurt. For a host of social and political reasons that have been debated throughout this century, the American polity is simply not prepared to allow individuals to take whatever type and magnitude of risks they may choose with respect to their own lives, with the inevitable impact that doing so can have on family members and the rest of us who will feel obligated to look after the victims if something goes wrong. That sentiment regularly moves policy makers, be they judges or legislators, to insist upon some minimum level of injury prevention and compensation, irrespective of whether that level would be chosen by everyone in the marketplace.

C. Loss Insurance

Still unanswered is the question of what is the best instrument to use in controlling market contracting. Some argue that we must


62. For a brief appraisal of that sentiment, see Chapters 7 and 8 below.

63. Indeed, it is possible to use suitably restrained modes of contracting to try to remedy some of the flaws in existing tort litigation. For imaginative proposals along these lines, see O’Connell, “Neo-No-Fault: A Fair Exchange Proposal for Tort Reform,” in New Directions in Liability Law 186 (W. Olson ed. 1988) (contracting after the injury);
cut back sharply on legal liability (either the tort or the no-fault version), with its inevitably imperfect blend of compensation and prevention, and use instead two distinct instruments—command-and-control regulation for injury prevention and first-party loss insurance for compensation.64

There can be no doubt that if we focus solely on the compensation objective, then loss insurance is preferable to liability insurance. That is why the major expansion of the former type of coverage (both public and private) over the last half-century has proven so attractive.

With loss insurance, payments to the injured victim do not turn on the fortuitous factor of who happened to cause or be at fault in the occurrence of an injury. Instead, benefits are paid by reason of the victim's injury and the needs it creates, normally a much less contentious and costly issue to resolve.

Loss insurance, moreover, does not compensate all injuries implied because they occurred in the way the liability rule specifies. Instead, explicit social judgments are made about whether the loss in question is the type for which it makes sense to have insurance (medical costs versus pain and suffering, for instance, or long-term versus short-term lost earnings).

The amount of reimbursement of the loss is set in a way that is more equitable in terms of how contributions are made to the program. For example, there should be relatively fault-rate replacement of earnings if there is a relatively flat-rate mode of taxing those earnings for the fund. In addition, the reimbursement is structured in a way that is efficient in reducing the frequency and size of the losses insured against, through deductibles or co-insurance that reduce victim moral hazard before and after the injury has occurred.65

Even granting the comparative advantages of loss insurance as a mode of compensation, for two basic reasons we should be reluctant to place all our reliance on that instrument. The first is the existence of huge gaps in the social safety net in this country.66 The gap that

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64. This is the argument of S. Sugarman, Doing Away with Personal Injury Law (1989).
66. For a recent overview of our social insurance system, see T. Marmor, J. Mashaw, and P. Harvey, America’s Misunderstood Welfare State: Persistent Myths, Enduring Realities (1990). The financial consequences of the serious gaps in this system for injury victims are documented by the RAND study, supra note 36. As we show in Chapters 4, 5, and 6 of this volume, the problem of underinsurance consists not in the presence of deductibles or co-insurance for small short-term medical costs or earning losses, but rather in the fact so many Americans have no effective protection for the more
gets the biggest share of popular attention is in health insurance: 30 percent of all medical bills and 15 percent of the more sizable bills of those who are seriously injured are left uninsured. But an even starker gap confronts people who lose earnings due to injury. Most people have some form of sick leave to protect against short-term loss of earnings. But the private insurance market has been able to satisfy for only a small fraction of workers the more vital need for earnings replacement following serious long-term disabilities, when savings are exhausted and the victim and family need funds to live on. Admittedly, the Social Security Disability Insurance program has established a reasonably adequate floor of support for those who are permanently and totally disabled; for the last two decades the program has been under great pressure to expand to fill the gap we have noted. But research about the economic consequences of disabling injuries consistently finds earnings protection to be the biggest shortfall in our loss insurance system. So a major practical virtue of tort (or workers' compensation) liability is that it mandates a sizable infusion of insurance funds to meet this serious human need. Granted, such tort insurance entails high administrative costs, and tort law has long maintained a questionable relationship between itself and other "collateral" sources of loss insurance (for which we shall propose a better accommodation in Chapter 6 in the companion volume of this Report). But it makes little sense for critics of the tort system to call for retrenchment of tort compensation on the ground that loss insurance could do a better job of compensating injuries, when we know full well that for the foreseeable future such alternative sources of protection will not be available for so many injured victims.

D. Safety and Health Regulation

Even if the politically improbable were to occur and this Country were to establish comprehensive medical insurance and permanent partial disability insurance, retrenchment on tort law would confront

67. The Evidence and likely explanations are presented in K. Abraham, Disability Insurance and Tort Reform (ALI Background Paper, 1987); see also Chapter 5 below.

another problem. By its very nature loss insurance ignores how injuries happen to come about and who is responsible for them. Under a comprehensive insurance program, the prospect of the responsible party's having to pay for injuries that could and should have been avoided would no longer be available as an incentive to prevent such injuries from occurring and thus from requiring redress from the more generous loss insurance.69

That concern would be considerably allayed, however, if this prevention function could be entrusted to regulatory programs. In fact, the last two decades have seen a huge expansion in administrative command-and-control regulation for occupational safety and health, consumer product safety, motor vehicle and highway safety, environmental protection, and medical licensing and discipline.70 The argument in favor of retrenchment in general tort liability is that in its place we will get more effective and sensible prevention from specialized regulators, agencies explicitly designed for this function.

In theory regulation seems to have marked comparative advantages over tort as a mode of injury prevention. Contrast, for example, the procedures for arriving at their respective standards of safety. Regulatory standards are established by experienced administrators, at the end of a rulemaking process in which a broad range of affected constituencies can express their views and criticize options that have been tentatively proposed. By contrast, tort standards are adopted after hearing the position of only the parties to an adjudicative proceeding, by lay jurors who leave the courtroom after their verdict, not likely to think about the issues again. One would never dream of using such a process to design a car, a building, or a nuclear facility; why, then, use juries to evaluate the safety of these complex items after they are completed?

In addition, in a regulatory regime administrators are required to establish rules of behavior that can be communicated to the parties before they act, giving regulated enterprises meaningful guidance both for what they can do as well as what they cannot do. By contract, juries adopt only an implicit standard of appropriate behavior as they apply the amorphous negligence concept to individual situations, long after the fact. Firms are forced to guess how this legal

69. For a valuable critique from this incentives perspective of the New Zealand accident compensation program, perhaps the most widely heralded substitute for tort compensation, see Miller, “The Future of New Zealand's Accident Compensation Scheme,” 11 University of Hawaii Law Review 1 (1989).

70. See W. K. Viscusi, Regulation, Tort Liability, and the Promotion of Health and Safety (ALI Background Paper, 1990), on the emergence of safety and health regulation and a distillation of what we know about its impact (much of this empirical research having been done by Professor Viscusi himself); see also Chapters 8 and 13 of this volume.
process might turn out if they happen to be sued. Because the penalty for guessing wrong may be a multimillion-dollar damage award, there is a real danger of overdeterrence when firms shy away from risky but socially beneficial activities or products (in the pharmaceutical area, for example).\textsuperscript{71}

Finally, regulation seems to offer a considerably more rational and effective mode of enforcement. Rather than rely on the happenstance that a private party will be injured seriously enough to find it worthwhile to sue, agency inspectors regularly monitor firm behavior for compliance and file charges for violations even before any harm is done. Such a proactive enforcement stance is especially helpful in situations such as environmental exposures, in which the overall social harm may be large in the aggregate, but too small or too long delayed in any one case to make effective use of the tort sanction.

Notwithstanding these apparent advantages of the regulatory process, the actual impact of command-and-control regulation has been mixed at best. In a variety of empirical studies from the last two decades of administrative regulation (in particular, of federal occupational safety and health legislation), the consensus seems to be that although compliance with regulatory standards has exacted substantial costs from business, the payoff in injury prevention has been disappointingly modest—considerably less than the prevention provided by liability systems such as workers’ compensation for occupational injuries or tort liability from motor vehicle accidents.\textsuperscript{72}

What characteristics of regulation might account for these rather marginal gains? A standard refrain from consumer groups is that the law in operation is far too weak. Too few inspectors are available

\textsuperscript{71} For an argument that this did happen, see Institute of Medicine, \textit{Vaccine Supply and Innovation} (1985), a study which helped influence Congress to pass the National Childhood Vaccine Injuries Act of 1986, intended to channel vaccine injuries out of the tort system and into an industry-financed, no-fault compensation system. A more recent argument to the same effect but about contraceptives: Obstacles and Opportunities (1990), in particular Chapter 8 on “Products Liability and Contraceptive Development.”

\textsuperscript{72} This becomes apparent from comparing the results of Viscusi’s studies of the effect of OSHA (see his “The Impact of Occupational Safety and Health Regulation, 1973-1983,” 17 RAND Journal of Economics 567 (1983)) and CPSC (see W. K. Viscusi, \textit{Regulating Consumer Product Safety} (1984)), with his much more powerful results from no-fault workers’ compensation (see W. K. Viscusi and M. Moore, \textit{Compensation Mechanisms for Job Risks}, note 55 supra), and Devlin’s findings about the preventive effect of tort law on motor vehicle fatalities (see R. A. Devlin, \textit{Liability Versus No-Fault Automobile Insurance: An Analysis of the Experience in Quebec} (Ph.D. Diss., University of Toronto, 1988)). On the other hand, much stronger and more cost-efficient injury prevention results have been accomplished by motor vehicle safety regulation: see R. Crandall \textit{et al.}, \textit{Regulating the Automobile} (1986), particularly Chapter 4 on “The Effects of Regulation on Automobile Safety.”
to monitor firms and file charges, by contrast with the tens of thousands of private citizens who may be injured and can file tort suits. Even when charges are laid and violations are found, the fines are minimal, again by contrast with the typical damage award. Calculating the expected sanction for noncompliance with occupational health and safety legislation, for example (the average fine discounted by the chance of detection and prosecution), seems to give little legal reason for any business to comply with the law.

Yet while this critique is surely valid in some cases, it may not be the most important explanation for the limits of regulation. Interestingly, it turns out that huge business compliance costs are in fact produced by these supposedly toothless laws. Apparently most firms feel obliged to comply with regulatory standards for a variety of reasons other than the risk and size of fines. The larger problem consists of the limitations in the standards themselves. First, we should not overestimate the actual influence of administrative expertise on the judgment whether to adopt or how to define the content of the standards. In the real world of administrative politics, such standards inevitably bear the imprint of continual tugging and hauling between the affected interest groups, regulated firms, and representatives of potential victims. Vivid recent experience should leave us with no illusions about the dispassionate quality of decisions whether to escalate or relax regulatory attention. Whatever may be the shortcomings of jurors’ understanding of complex technical issues, one major comparative advantage of the starkly decentralized tort litigation system is that it involves no single body that is susceptible to being “captured.”

Even the most well-meaning agency will find that its formal legal rule scan cover only a small fraction of the hazards to which people are exposed in their day-to-day lives. The Food and Drug Administration may be able to pre-screen and approve every prescription drug before it goes on the market (even though it does so with real costs of delay), but such scrutiny is far from feasible for all consumer products. Similarly, although occupational or motor vehicle


74. Many of the reasons are illustrated in the case studies of OSHA reported by J. Mendeloff, Regulating Safety: An Economic and Political Health Policy (1979); and J. Rees, Reforming the Workplace: A Study of Self-Regulation in Occupational Safety (1988).

regulation can specify appropriate standards that all firms must adopt for common and recognized hazards, most workplace or motor vehicle accidents occur as a result of idiosyncratic factors in specific situations on the job or on the highway (or, in the case of medical accidents, in a hospital operating room).

Safety and health regulation, then, like loss insurance, has proved a valuable policy instrument for addressing important components of the overall personal injury problem. As we will note later in this Report, the tort system should offer better recognition of and room for the contribution that our elaborate regulatory programs make to injury prevention. But the inevitable limits on the scope and efficacy of such ex ante regulation means that it can never entirely replace ex post liability as a technique for influencing enterprises to take the steps reasonably necessary to reduce the risks their activities pose to others.

VI. THEMES OF THE ALI REPORT

After spending more than four years analyzing and debating the performance of tort law, we are fully aware of the limits and failings of the institution. The compensation that tort provides is expensive and often misguided. The deterrence that tort affords is muted and sometimes misdirected. These sense of justice evoked by tort may well be illusory in a world in which the real bearers of liability are usually large corporate enterprises. The erratic quality of tort litigation aggravates both the availability and the affordability of liability insurance, which we have come to rely on as a buffer against the onerous burden imposed by litigation.

At the same time, as our research and analysis has proceeded we have become aware of how many individuals are being injured on the job, in the hospital, or while using manufactured products, and how few of these victims actually take advantage of the rights supposedly available to them under the tort system. Our detailed exploration of alternative institutions for compensating and preventing disabling injuries exposes characteristic failings that are too often missed by tort lawyers, judges, and scholars preoccupied with the flaws in their own regime. Notwithstanding its pronounced imperfections, then, tort law will and should remain an important umbrella institution for the victims of personal injuries.76

76. See, to the same effect, ABA's Special Committee on the Tort Liability System, Towards a Jurisprudence of Injury, supra note 2, Chapter 12.
It is one thing to endorse preservation of the core institution of privately enforced civil liability of enterprises for unduly hazardous activities. It is quite another to defend doggedly every feature of that institution from challenge and reform. Doing so is most definitely not our intention. In the companion volume of this Report we shall develop the case for a number of profound revisions in the present tort regime. But we believe that the longer-range evolution of personal injury policy must be informed by a broader, more pluralistic perspective than can be provided by an isolated focus on the tort system's shortcomings. We do not endorse the more radical scholarly proposals made during the 1st decade for dispensing wholesale with tort liability. However, we are conscious of the need to define more sensible boundary lines between tort prevention and administrative regulation on the one hand, and between tort compensation and public and private loss insurance on the other. We also propose relaxation of the constraints now imposed by judicially mandated tort standards against such devices as contractual development within competitive markets of alternative no-fault programs for compensation and liability of specific types of personal injury.

As important as the particulars of any of the proposals we make, however, is the manner in which debate about these and other reform ideas can best proceed. Debate over any innovation must recognize how difficult it is to create a fair and sensible policy for disabling injuries, to design a regime that satisfies the several competing objectives we need to pursue here. Inevitably, then, limitations and imperfections will appear in any system as it operates in this intractable real world. Tort law will remain a fixture in American personal injury policy because there is no alternative institution that can perform fully and ideally all of tort's functions. At the same time, important constraints and efficiencies in privately enforced civil liability have required the evolution and expansion of public law alternatives for compensation and prevention. The proponents of even a reformed tort system must recognize and accept, then, that their regime should play only a limited role in that larger picture. The problems in tort litigation that were brought to light by the "crisis" of the mid-eighties are still lurking beneath the surface. We must seize this opportunity to reflect carefully on the strengths and weaknesses of the present regime, and to give a fair hearing to changes that will capitalize on the strengths and ameliorate the weaknesses. That, at least, is the spirit in which we produced this Report.