The American Law Institute's Reporters' Study on Enterprise Responsibility for Personal Injury: Reforming the Tort System

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Reforming the Tort System†

The first volume of this Report presented a reasonably detailed map of the manner in which the tort system and related institutions have addressed the human and social concerns engendered by personal injuries that are the outgrowth of modern enterprise. In this volume we develop a variety of approaches to reform of the tort system. These approaches are designed to improve the performance of the system in its own right and to define better relations with tort law's institutional neighbors. Unlike the other studies that have emerged from various quarters in the aftermath of the recent tort crisis, in this Report we base our proposals on a set of principles that respond to the legitimate needs of both the victims of enterprise injuries and the targets of tort litigation.

I. The Comparative Institutional Perspective

It may be useful to summarize the major lessons we have drawn from the institutional analysis developed in the various chapters of the companion volume. The first lesson is that lurking beneath the surface of the liability insurance crisis of the mid-eighties were serious difficulties in the operation of the tort system. In the areas of high-stakes tort litigation that are the focus of this Study, total premiums for product and medical liability insurance trebled in just two to three years in the middle of the decade, and coverage for environmental liability became unavailable at any price. Although certain features and flaws of the insurance industry's own methods of pricing bear a major responsibility for the erratic trajectory that liability premiums followed during the last decade, real growth in the total

litigation burden underlies and helps explain the huge cumulative rise in premium costs which took place during that period.

Second, the most significant component of this growth appears to have been an increase in the severity rather than in the frequency of tort litigation—in other words, in the total amount of damages paid rather than in the number of claims filed and pursued. Personal injury damage awards of seven, eight, and even nine figures, comprising not simply reimbursement of financial losses but also compensation for a variety of forms of “pain and suffering” of the victim and family, as well as occasional huge punitive levies, all help to explain what otherwise might appear to have been sudden overreactions by insurers and enterprises to the actual cumulative increase in tort costs over the last ten to twenty years.

Third, there appears to be little or no foundation for the common diagnosis that erosion of the fault principle as the basis of tort liability has attracted surplus numbers of dubious claims into the tort system. It is revealing, for example, to analyze recent liability trends from the comparative perspective afforded by workers’ compensation, a system characterized by a far stronger mode of absolute liability than was ever contemplated for tort. Even though employer liability costs for workers’ compensation have grown steadily and substantially for two decades, the sudden lurches in premiums and drying up of coverage that marked high-stakes tort litigation did not occur. Meanwhile, within the tort system itself a growing body of empirical research demonstrates that the number of tort claims filed is much smaller than the number of tortious injuries actually inflicted. A less visible but equally distressing liability “crisis,” then, arises from the fact that deserving victims with legitimate claims continue to face high barriers to obtaining tort redress.

Recognizing that this sizable compensation gap exists side by side with the onerous liability burden that has preoccupied most popular political discussion of this subject makes the task of designing a fair and sensible tort regime far more difficult and delicate. The complexity is accentuated by examining tort’s performance in pursuit of its several objectives.

On the one hand, tort litigation responds to the popular sentiment that fairness requires that those guilty of wrongdoing be held to account for the harm they have done. At the same time, tort litigation as a mode of private redress does deliver some necessary compensation into the hands of seriously injured victims, and the prospect of litigation and liability appears to reduce somewhat the likelihood that risky behavior will take place and resulting future injuries will occur.

On the other hand, many analysts have serious reservations about
the merits of using the costly litigation process as a response to populist grievances about the defendant’s “outrageous misconduct,” particularly since the focus of liability is an impersonal organization, and the costs of the liability are often borne by the pool of potential victim in the form of liability insurance buried in the price of goods and services purchased from the enterprise. Moreover, using a liability regime to redress and distribute the risks of enterprise-related injury creates in effect a type of loss insurance that is badly skewed in design and terribly expensive to administer. Finally, although attributing the costs of accidents to the actors or enterprises responsible appears to engender at least a modest level of future injury prevention, it remains unclear whether this additional protection comes at too great a price in defensive medicine, reduced product innovation, and generally higher costs of doing business in an increasingly competitive international economy—all this is a world in which no other nation has a liability regime of anywhere near the magnitude of our own.

Conscious of these concerns, the participants on this Project spent much time in its early stages exploring the potential of alternative institutions for addressing the personal injury problem—competitive markets, public and private loss insurance, and administrative health and safety regulation. As so often happens, the evident imperfections of tort litigation that are revealed when the system is viewed against an absolute ideal became somewhat less striking when tort was compared to the actual performance of the alternative regimes. As we indicated in the chapters devoted to these institutions in the first volume, each system makes a vital contribution to personal injury policy. However, each in turn has its own characteristic failings, well known to specialists in the respective areas. These limitations help explain why, for example, the United States has no comprehensive insurance against the earnings lost by those who are permanently but partially disabled, and why government regulation has been able to target only a tiny handful of hazards to our health and safety.

This canvass of the broader institutional constellation of which tort law is one component eventually brought us to two conclusions. First, it is essential to avoid a “tort-centric” approach to personal injury policy. The lawyers, judges, and legislators responsible for the evolution of the tort system must be far more conscious than they have ever been of the need to dovetail their doctrinal and procedural innovations in tort with what is happening in outside regimes that
often dwarf tort litigation in magnitude and effect. Indeed, sometimes the appropriate solution to ticklish litigation questions is to remove the problem from the tort regime altogether and deal with it elsewhere.

Second, notwithstanding how appropriate this more modest view of tort law’s capacity may be, the fact remains that tort plays a valuable role in the broader personal injury picture. A mode of civil liability that is shaped by judges and juries and privately enforced by victims against those responsible for hazardous activities in an essential mechanism for handling the many problems—some old, some new—that are not adequately dealt with in either the marketplace or the political arena. It is important, then, that our tort system be properly designed to play its part in a pluralistic personal injury universe.

II. PRINCIPLES FOR REFORM

This volume presents our judgements about and proposals for the future evolution of the tort system and its institutional relationships. Each chapter deals in depth with a particular problem area, including the arguments and recommendations we make for legal reform. As a prelude to these detailed analyses we now offer an overview of our approach and a synopsis of all our proposals.

We note at the outset that while the background studies summarized in the prior volume canvassed the entire array of personal injury institutions, our policy prescriptions in this volume are largely devoted to tort law alone. As a group of tort scholars, that is where our comparative advantage lies. The more we learned about the problems as well as the virtues of disability insurance, for example, the more we realized how presumptuous it would be for us to judge whether Social Security Disability Insurance might be expanded to cover partial as well as total disability. At the same time, we focused on a number of key areas in which the tort system intersects with these other institutions. As a result, we make a variety of recommendations—for example, advocating a regulatory compliance defense—to establish more sensible boundary lines between the two sectors and consequently to allow tort decision makers to take better advantage of what the other regimes have to offer.

Even within the tort system we have not attempted to cover every improvement that could be made. In order to produce a report that was of manageable length and yet that did justice to the issues addressed, we had to be selective. We focused on proposals that should be debated seriously in both courts and legislatures during the next decade; as a consequence we omitted ideas that are intellectually appealing to at least some of us, but that are likely, at least for the
foreseeable future, to be debated only the law reviews. We have also concentrated our attention on proposals that promise to exert substantial leverage on the overall functioning of the tort litigation/liability insurance regime, thus excluding a number of interesting but rather peripheral issues (such as informed consent in medical malpractice) that are the stuff of routine appellate court opinions and legislative enactments.

The recommendations we arrived at were not worked through to the level of detail found in a Restatement or in a statute. The bulk of each chapter is devoted to presentation of the problem the pros and cons of alternative solutions, and the arguments for the direction that we favor. We attempted to flesh out our proposals sufficiently to provide assurance they are workable and to address the major questions each might raise. But our aim has been to put forward a number of key ideas for adoption within the tort system—for example, a scale for pain and suffering damages—not to specify a precise blueprint that should be adhered to in every jurisdiction where it might be adopted.

Our most important objective has been to ensure that our diagnoses and prescriptions are principled and nonpartisan. In particular we wanted to avoid the tendency of tort “reformers” in the last decade to assume that the “problem” (indeed, the “crisis”) in the tort system consists simply in businesses facing too many legal claims and burdensome insurance premiums. The research we reviewed and distilled for this Report has driven home to us how many people suffer serious personal injuries and how often these victims do not have ready access to a legal system that can provide effective redress. It is true that the targets of litigation have legitimate objections to much of the treatment they receive under the contemporary tort system, and we offer a number of proposals for appropriate relief in the definition of liability and the scope of damages. But where the principles we found persuasive call for expansion instead of contraction of tort liability, we emphatically endorse enlarging protection offered to injury victims who are the intended beneficiaries of the tort system.

This philosophy is visible, for example, in our analysis of the various components of the tort award.¹ Our judgement is that the law

¹. A simply but graphic illustration, not addressed in the main body of this Report, concerns the recent move to substitute periodic payments for lump sum tort awards. The aim of that statutory change is to take the guesswork out of jury estimates of the future life (or disability) of the victim. Almost invariably, though, the enactments focus on the case of the victim who dies earlier than the jury anticipated, with the result that the unexpended portion of the jury award is a windfall bequest to the victim’s heirs. Only
relating to tort damages has generated greater legitimate concerns than have the underlying standards of substantive liability. The current open-ended process of jury damage determination produces awards that are customarily unpredictable, occasionally far too large (and sometimes too small), and that channel disproportionate sums into payment for nonpecuniary injuries such as pain and suffering, as well as into punitive damages. We favor the basic principle that the primary (although not the exclusive) role for tort damages is to compensate injured victims for the actual financial losses they suffer as a result of personal injury. This principle would reorient the limited resources of the tort system toward pecuniary losses, the area in which the victim’s needs are most pressing and insurability by defendant enterprises is most viable. The implications are (1) that payments received from other sources of insurance should be offset against the tort award (see Chapters 6 and 7), and (2) that while pain and suffering and punitive damages should be retained, meaningful legal criteria should guide and constrain juries in the awards they make under each of these headings (see Chapters 8 and 9).

Having accepted the pecuniary loss principle, however, we realized that one critical item of financial loss was not being compensated by the tort system except sub rosa through “excess” damages awarded for pain and suffering or by ignoring collateral source payments. This damage gap stems from the sizable legal cost borne by victims who seek redress for their injuries. A key component of our proposed recasting of tort damages, then, is the extension of the award to include this distinct tangible harm inflicted on the victims of tortious actions by defendants (see Chapter 10).

Even though we are not convinced that substantive standards of tort liability are as crucial to the operation of the litigation/insurance regime as law school courses and casebooks make them out to be, a number of important and troublesome features are nevertheless visible in current tort doctrine. Interestingly, the supposed erosion of the fault principle is not one of these features. Thus, adoption by the Restatement (Second) of strict liability for a manufacturing defect in a product has occasioned nothing like the difficulty and dislocation regularly experienced in litigation over design and warning defects, two jurisdictions, Arizona and Illinois, have recognized that it is just as likely that any one tort victim will live longer than he actuarial tables project, with the result that the jury’s award will leave a shortfall from medical expenses and the like: see Henderson, “Designing a Responsible Periodic Payment System for Tort Awards: Arizona Enacts a Prototype,” 32 Arizona Law Review 21, 36 n.94, 46 (1990). To our mind there are real virtues to this type of restructuring of tort victim’s needs when death comes later than expected as this legislation now accommodates the tort defendant’s interests when death comes earlier (and we note that the Uniform Periodic Payment of Judgments Act, drafted by Professor Roger Henderson for the National Conference of Commissioners on Uniform State Laws, does reflect that principle of reciprocity in Sections 4(e) and 7(g)).
where the liability requirement is negligence, in function if not in form. (The same point holds true of a comparison with medical malpractice, where the doctor's liability rests on an explicit and rather narrowly defined fault standard).

As will be seen in the relevant chapters in this volume, a recurrent theme in our legal diagnoses and prescriptions is the need to refine the standards of tort liability so as to reinforce rather than to obstruct the valuable contribution that other institutions can make to the reduction of personal injuries. In the product setting the complementary institution is an informed and competitive consumer market (see Chapter 2); in the medical area it is a mechanism for peer review of the individual physician's treatment conducted under the auspices of the hospital organization (see Chapter 4); and in a variety of injury settings, it is the regulatory judgments made and standards set by administrative agencies with special responsibilities for health and safety (see Chapter 3).

As was true of our proposals regarding tort damages, some (though not all) of the doctrinal reforms we favor would contract the current scope of common law liability, for what we believe are justifiable reasons. Other proposals in this volume move in a different direction.

For example, we reject the recently popular legislative trend to cut back sharply on the scope of joint and several liability, a practice that may leave innocent plaintiffs without recourse when one of several defendants turns out to be unreachable or judgment-proof (see Chapter 5). And in the environmental area, we were struck by the fact (sketched in Chapter 11 of the companion volume) that relative to the incidence of fatal or disabling diseases that apparently are produced by toxic environmental exposures, only a tiny handful of tort claims have surfaced in litigation. Among the reasons for this shortfall is the great difficulty (at least outside the asbestos context) of establishing causation under the current "preponderance of the evidence" standard. That led us to propose (in Chapter 12 below) careful use of a "proportionality" approach to causation findings and damage awards, designed to lower the present legal barriers to successful pursuit of claims for real environmental harms that need the degree of prevention and compensation our tort system is supposed to provide.

In the environmental area, as elsewhere, it is just as important to improve the operation of the litigation process as it is to refine the doctrinal standards that are applied in that process. One problem is
insuring ready access to legal relief by victims with legitimate tort claims: our attorney fee-shifting and proportionate causation proposals are partial responses to this need. A second concern is the accuracy and predictability of court verdicts. We do support the institution of the jury as a vehicle for lay participation in the dispensing of civil justice. It is vital, though, that juries be provided with authoritative guidance in the assessment of tort damages, which up to now has been an entirely open-ended process heavily influenced by the manner in which the immediate situation is presented to the jury be counsel. Not only would meaningful legal guidelines—relating to pain and suffering, for example—enhance the fairness of results from one trial to the next, but they would also provide potential litigants with the basis they need to settle their cases without the expense and delay of a full trial. We also believe that it is time for the tort system to recognize the inadequacies of an adversarial trial in grappling with difficult contested scientific issues. As a result, we have mapped out ways in which judges can make use of court-appointed experts or even specialized science panels to secure better founded ruling on this issues (see Chapter 11).

Perhaps most pressing of all is the need to avoid wasting the scarce time of the courts and the scarce resources of the parties in constant relitigation of common questions that arise in mass tort episodes, for example from defective product designs or environmental exposures. To produce greater economy in use of the tort litigation system, we recommend reversal of the current presumption against class actions in tort. This change would also offer improved legal access and leverage to the scattered victims who have to deal with a large enterprise that benefits from a naturally unified approach to multiple claims (see Chapter 13). In addition, we sketch the paths that might be taken inside or outside tort litigation to handle future mass disasters of the magnitude of asbestos, Agent Orange, and The Dalkon Shield, borrowing and improving on the techniques utilized by judges and special masters who have recently wrestled with these cases, often as the result of a bankruptcy Filing (see Chapters 13 and 14).

Finally, we return to the theme with which we began: because tort law is only one member of the extended family of personal injury institutions, there is a pressing need for better definition of the boundaries between tort and its neighbors.

We referred earlier to our emphasis on legal reinforcement of the product market by enhancing the informational quality of product warnings (see Chapter 2). In the damages area, we are satisfied that tort liability insurance should be a second payer, standing behind the cheaper and better tailored system of loss insurance. Reversing the traditional collateral source rule and eliminating the subrogation
rights of loss insurance (see Chapter 6) would also make an important contribution to the present contentious overlap between workers' compensation and product liability for occupational injuries (see Chapter 7). A similar concern about institutional overlap on prevention side underlies our endorsement of a carefully specified regulatory compliance defense for situations in which defendant enterprises have relied on and complied with precautionary standards developed by specialized administrative agencies (See Chapter 3).

More positively, although we defend and seek to improve the performance of tort law as a general source of redress for injury victims, it is equally vital that we make greater use of other institutions designed specifically for either compensation or prevention. Perhaps the closest relative to tort is the no-fault administrative compensation model exemplified by workers' compensation, also a third-party liability regime. We conclude that the no-fault model is worth serious consideration for handling injuries caused by medical treatment, though probably on an initial elective basis (see Chapter 15). Although there appears to be similar promise in this approach for certain categories of product injury, particularly from pharmaceutical, we are more pessimistic about the prospects for no-fault (elective or mandatory) for consumer product injuries generally (for reason elaborated in Chapter 16).

Later chapters canvass the possibilities for an implications of changes in liability insurance (Chapter 17) an social insurance (Chapter 18). Although a number of intriguing options are worth considering and debating in those spheres (as well as in administrative health and safety regulation, which we analyzed in Chapter 8 of the prior volume), there should be no illusion that these options promise quick and easy relief for the problems that now beset the tort system. That is why the program laid out in this volume for systematic reform of tort law itself must be given serious attention in the legal and political arenas.

III. SYNOPSIS OF PROPOSALS

Having provide this overview of the approach followed in this Report, we now present a complete synopsis of all the proposals we will make in this volume. We caution the reader that each set of recommendations has a lengthy chapter devoted to it. Each chapter's broad canvass of the policy problems and competing legal options may well be more valuable than the particular judgments we arrive at about each issue. As lawyers regularly learn, however nothing so
concentrates the mind and sharpens an analysis as the realization that one must commit oneself to a specific conclusion. The following pages provide a summary, then, of the entire set of policy commitments arrived at by the Project team after five years of work.

LIABILITY STANDARDS

A. Product Defects and Warnings

1. For “manufacturing” defects, the historic focus of Section 402A of the Restatement (Second) of Torts, we endorse retaining strict liability for defects that can ordinarily be measured against the manufacturer's own standard of design.

2. As to defects in the product design itself, the courts should explicitly recognize that they are employing a de facto negligence standard in this area of product liability law, under which a reasonable balance must be struck between the risks and benefits of alternative designs in light of the state of the art at the relevant time. There should be no separate “consumer expectations” test for design defects, nor any reference in this inquiry to the superior capacity of manufacturers to serve as insurers for product injuries. We endorse the caution recently exhibited by courts against presuming to judge that the risks of certain products are so severe (even if unavoidable) that they should not be marketed, even to informed consumers. From this arises our proposal that a product design should be held defective only if there was a feasible alternative design which would have avoided the injury in question without materially altering the consumer's expected use and enjoyment of the product, and then only if the costs of incorporating this new precaution in the design do not outweigh the human and financial harms from the injuries thereby preventable.

3. For reasons offered in the discussion of markets in Chapter 7 of the prior volume, we believe that competitive markets can make a signal contribution to product safety, particularly when consumers are well informed about the hazards presented by various product choices. The law of product warnings should be recast and administered to serve this vital function of informing consumers. Risk level warnings should be given for products, ideally through a standardized vocabulary that federal government agencies are encouraged to develop, drawing on the model of the Food and Drug Administration. Instructions should also be given for proper use and are by consumers in situations in which these procedures are not apparent. At

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2. See Chapter 2 of this title, together with Chapter 7 on Markets, Chapter 8 on Regulation, and Chapter 9 on Product Injuries, all in the prior volume.
the same time courts must take cognizance of recent research regarding the difficulty of communicating safety-related data in the context of mass consumer transactions. Because of the danger of dysfunctional label clutter when firms react to adverse judgments by adding far too many warnings for ordinary consumers to assimilate, courts should be more cautious about holding firms liable for failing to instruct consumers how to avoid very low-probability accidents. Finally, if a firm has violated its duty to provide the product warning required by these improved legal standards, the court should presume that the consumer-plaintiff would have read and heeded the warning that was not given.

B. Regulatory Compliance

Not simply in the product liability area but in tort litigation generally, a special problem has arisen in coordinating court judgments concerning safety with judgments reached in the process of administrative regulation. We are satisfied that some form of regulatory compliance defense should be recognized in tort litigation. There is a persuasive case for making such compliance a complete bar to tort liability, once certain carefully defined conditions respecting the regulation have been satisfied. At a minimum, such regulatory compliance should preclude the award of any punitive damages (where compensation of the victim is not at issue) and should entitle the defendant to an explicit instruction to the jury that compliance with a regulatory standard creates either a rebuttable presumption or strong and substantial evidence that the defendant’s actions or its products were not at fault.

Whatever the precise legal effect of this tort defense, the following ingredients should be satisfied to make it available:

1. The regulation must have been produced by a specialized administrative agency with the statutory responsibility to monitor risk-creating activities in the area in question and to establish and regularly revise specific standards governing enterprise behavior. (The relevance of statutory standards to tort litigation should continue to be addressed through judicial interpretation of whether and what the legislature intended to be the preemptive or preclusive effect of the particular statute in question.)

2. The agency must have addressed the specific risk in question i

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3. See Chapter 3 of this title, and also Chapter 8 on Regulation in the companion volume.
the case at hand and have made an explicit judgment about what type of legal controls are appropriate.

3. The enterprise in question must have complied with all the relevant standards prescribed by the Agency.

4. The enterprise must also have disclosed to the regulatory agency any information in its possession (or of which it had good reason to be aware) concerning both the hazards posed by the risk in question and the available means of controlling the risk.

C. Medical Malpractice

Although our review disclosed many technical issues relating to medical liability standards that are now being debated, few of these issues pose sufficient problems in the malpractice system to warrant in-depth treatment in a report of this type. The major concern in this branch of tort litigation relates to the level and form of damages that should be awarded, not to the definition of legal “fault” on the part of doctors. We do recommend, however, a broader change in the orientation of medical liability. The primary bearer of liability (and provider of insurance) for negligently caused injuries to hospitalized patients should be the hospital or other health care organization under whose auspices the treatment takes place, rather than the individual physician with admitting privileges in the hospital.

D. Joint and Several Liability

A controversial doctrine that cuts across most personal injury settings and that has attracted considerable recent attention from legislatures is joint and several liability. We endorse this basic common law principle as developed and recently expanded by the courts, but with one qualification for situations in which ex ante contracting regarding such liability is not feasible among potential defendants. Outside this contractual context, all defendants should continue to be jointly and severally liable to the injured plaintiff. However, in situations in which one defendant has become insolvent or otherwise judgment-proof, that party's share of responsibility should be allocated among all parties involved, including the plaintiff, in proportion to their respective negligence or on whatever other basis of equitable responsibility is used by courts for apportioning the loss among the parties.

4. See Chapter 4 of this title, and also Chapter 10 on Medical Injuries in the earlier volume.

5. See Chapter 5 of this title.
TORT DAMAGES

We observed earlier that greater responsibility for the recent dislocation experienced in tort litigation and insurance markets is attributable to the principles governing damage awards than to those specifying initial liability. Consequently, we recommend more extensive changes in this branch of tort law. The proposals detailed below are all designed to reflect the principle that the primary, though not exclusive focus of tort compensation should be to redress the actual financial losses suffered by the injured victim.

A. Collateral Sources

We recommend reversal of the traditional collateral source rule, so that the tort award would be reduced by any past and estimated future payments for the loss from first-party systems of insurance (with the exception of life insurance and other forms of insurance that bear a close resemblance to it). In tandem with this reduction in the size of the award payable to the tort plaintiff, there must be a bar to any subrogation or reimbursement rights exercised by loss insurers against the tort award.

B. Workers' Compensation and Product Liability

This setting present essentially the same problem of collateral sources and subrogation rights, but with the special twist that two liability systems—no-fault workers' compensation and tort-fault product liability—apply to the same subset of occupational injuries. The most widely accepted subset of occupational injuries. The most widely accepted current rule gives the product manufacturer no credit for workers' compensation benefits paid to the employee, and instead gives the employer full subrogation rights to recover the workers' compensation payments. In addition, even negligent employers are usually immune from any contribution to the product liability award. We propose, instead, that there be full offset of workers' compensation benefits against the tort award, no employer

6. See Chapter 6 of this title, as well as the prior volume's Chapter 4 on Health Insurance, Chapter 5 on Private Disability and Life Insurance, and Chapter 6 on Social Insurance Alternatives.

7. See Chapter 7 of this title, and also Chapter 3 on No-Fault Workers' Compensation, and Chapter 12 on Workplace Injuries, both in the earlier volume.
subrogation rights to recover these payments, and no employer obliga-
tion to indemnify or contribute to the manufacturer's product lia-
bility. We also believe that serious thought should be given to
eliminating all product liability suits by employees covered by work-
ners' compensation, but only if the value of workers' compensation
benefits is materially improved—in particular by indexing all long-
term disability or survivorship benefits to the rate of inflation. If in
considering that last option there appears to be a need for some
residual prevention role for product litigation arising from occupa-
tional injuries, that role could be performed by allowing employers
to sue the product manufacturer for recovery of workers' compensa-
tion benefits paid for injuries attributable to a defective product used
in the workplace.

C. Pain and Suffering

1. We recommend retention of pain and suffering as a basis of tort
damages awarded directly to injured plaintiffs.
2. However, such compensation should be payable only to the vic-
tims of significant injuries, with substantial monetary awards paid to
the permanently disabled who can use the additional funds for ad-
justment to their disability and better enjoyment of life in a disabled
condition.
3. We oppose the type of absolute dollar caps on pain and suffer-
ing damages that have recently been adopted by statute in numerous
states. Instead, we propose that juries be provided meaningful guid-
ance for the assessment of such damages through a scale of inflation-
adjusted damage amounts attached to a series of disability profiles
that range in severity from the most moderate to the gravest injuries.

D. Punitive Damages

We propose a thorough rationalization of this area of tort dam-
ages, at least in the sphere of enterprise injuries. These recommenda-
tions relate to the substantive standards of liability, the principles to
be used in calculating the amount of any punitive award, and the
procedure through which punitive damages may be awarded.
1. An enterprise should be liable for punitive damages only when
there is clear and convincing evidence of reckless disregard for the
safety of others in the decisions made by management officials or
other senior personnel.
2. At a minimum the process for calculating the amount of the

8. See Chapter 8 of this title.
9. See Chapter 9 of this title.
punitive award should be altered to specify clearly the relevant criteria, to exclude from consideration the defendant's overall wealth (While permitting reference to the profits expected or earned from the tortious activity at issue), and to require closer judicial scrutiny of the size of the jury verdict. In addition, judges should have the power to bifurcate the trial of these cases so that the evidence and instruction specifically related to the punitive damage claim would be put to the same jury in a second proceeding following a positive verdict on the compensatory claim. Indeed, we believe that serious consideration should be given to having the trial judge fix the actual amount of such an award, once the jury has found that a punitive award is warranted in response to the defendant's action.

3. Alternatively, a ratio should be established between the amount of compensatory damages awarded to the plaintiff and the amount of punitive damages permitted in the suit, with an alternative monetary ceiling that would authorize a higher award in cases in which especially egregious wrongdoing happens to inflict only modest harm on a particular plaintiff.

4. For large-scale mass tort claims, a mandatory national class action procedure should be developed to determine and distribute the appropriate sum of punitive damages that might be awarded for all tort claims arising out of the defendant's course of conduct.

E. Attorney Fees

The foregoing proposals for recasting the principles governing tort damages, especially our recommendations for offsetting collateral sources and scaling pain and suffering, are advanced only in tandem with this important proposal to expand the scope of recoverable damages to encompass the reasonable attorney fees incurred by the successful plaintiff. We propose this in recognition of the fact that such legal expenditures are a distinct financial loss suffered by the victims of tortious injuries. The specifics of our proposal are as follows.

1. The reasonable attorney fees and other litigation expenses of the prevailing plaintiff should be an independent category of compensatory damages payable by the defendant when the latter is adjudged liable for tortious behavior.

2. A procedure should be instituted under which the defendant could make a formal "offer of settlement," with the consequence

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10. See Chapter 10 of this title.
that if, after rejecting such an offer, the plaintiff did not fare better in the eventual recovery, he or she would forfeit the entitlement to attorney fees (under (1) above) incurred after the time of rejection.

3. The court should use a contingency-based percentage-of-recovery approach as the standard method for determining the amount of the plaintiff's fee award, with the prevailing market percentages appropriately adjusted to take account of the constraints proposed earlier on the size of the underlying damage award.

4. Prejudgment interest at market rates should be included in damage awards, calculated (if and to the extent it is administratively feasible) from the time of the loss rather than of the filing of the suit, with that entitlement not affected by operation of the offer of settlement procedure.

ENVIRONMENTAL LIABILITY AND SCIENCE DISPUTES

The courts have recently been wrestling with a host of related problems in litigation arising out of a family of cases that includes mass product injuries, toxic environmental exposures, and various other scientific-legal dilemmas surrounding causation. The following recommendations address these concerns.

A. Science Experts and Panels

To secure assistance in making accurate and credible findings about complex scientific issues, judges should make more extensive use of their power to appoint a court expert. Because we believe that these science problems are likely to become increasingly difficult and pressing in the future, we also recommend the creation of a Federal Toxic Substances Board. This Board would not only serve as a source of impartial science experts, but it would also take the initiative in convening "science panels" that would develop criteria for more accurate, even-handed adjudication of these cases. In Chapter 11 we present a matrix of these kinds of issues as guidance for judicial use of either science experts or science panels.

B. Environmental Liability

We are persuaded that major legal and practical hurdles now obstruct the initiation of many potentially legitimate tort claims for diseases caused by toxic environmental exposures. Remedies for these barriers include not only the science panel just mentioned and the class action measures proposed below, but also adoption of the

11. See Chapter 11 on Scientific and Legal Causation.
12. See Chapter 12 on Standards of Environmental Liability, and also Chapter 11 on Environmental Injuries in the companion volume.
following specific features of environmental liability law.

1. As is now the case under CERCLA, tort claims for long-latency diseases arising out of environmental hazards should not be time-bared until after a reasonable time has elapsed for the plaintiff to discover the disease and identify the causal connection between disease and hazard.

2. Strict liability should be recognized as the principal basis for legal responsibility of enterprises that create substantial environmental risks which cause personal injury. This principle, based in part on Sections 519 and 520 of the Restatement (Second) of Torts relating to “abnormally dangerous” activities, should still permit a defendant to avoid liability by proving that, given the state of scientific knowledge at the time, it had no reason to believe that its emission, waste, deposit, or other activity in question was hazardous.

3. In situations in which the causal connection between toxic exposure and eventual disease must be established on the basis of epidemiological studies of large classes of victims, the amount of damages awarded to any one claimant should be prorated in accordance with the probability (as revealed by the epidemiological studies relied on by the court or science panel) that the disease was caused by the exposure.

4. In cases in which the toxic exposure has already occurred and been identified but the disease has not yet manifested itself, courts should entertain tort actions for the creation of a fund to pay the financial costs of appropriate medical surveillance of the population at risk, with full damages to be awarded (on the proportionate basis described above) to victims of the disease when the condition manifests itself.

C. Mass Torts

Mass tort litigation may arise from and produce difficulties in the product as well as the environmental setting. We explore a variety of possible solutions that might be adopted in either a judicial or administrative context. With respect to processing mass tort claims in court, we present the following two models of reform.

1. We endorse the proposal advanced by the American Law Institute Complex Litigation Project and by the American Bar Association Commission on Mass Torts for expanding the existing federal multidistrict consolidation procedure by authorizing courts to order

class actions for trial and post-trial as well as pre-trial processing of claims; for the mandatory aggregation of claims pending in state as well as in federal courts; for the disposition on a class-wide basis of specific issues that multiple claims have in common, without regard to the predominance of other individualized issues; and for the use of class-wide disposition for resolution of the same issues in other claims that have accrued but are not yet pending. Such a consolidation procedure would, however, include a carefully tailored right of individual plaintiffs to opt out of the class proceeding for those issues (in particular, the amount of damages) that turn especially on personal circumstances. It is our judgment that these procedural changes are responsive to the barriers that mass torts pose to the accomplishment of substantive tort policies, as well as to the concerns that such cases have raised for the administration of procedural justice.

2. With respect at least to large-scale, long-latency mass-exposure disasters, exemplified by asbestos, Agent Orange, the Dalkon Shield, and DES, we believe that even greater changes are necessary in the standard individualized approach to tort litigation. In addition to the above model of class actions, we envision a greatly augmented collective regime to handle such disasters. When triggered, this procedure would govern future risks as well as already incurred injuries; it would authorize insurance fund judgments to cover future losses predicted to ensue from the past exposures, and for this purpose would calculate damages using schedules of average losses developed for different subclasses of victims. Chapter 13 elaborates on the need for, present experience with, and appropriate design of such extraordinary procedures.

D. Administrative Compensation Schemes

Our extended review of the experience and design of administrative compensation alternatives did not persuade us that this option had a marked advantage over collective judicial processes, at least for the general run of injuries. On the other hand, in any future mass-exposure disasters of the type and dimensions of asbestos, Agent Orange, and the like, we believe that the case for administrative no-fault is strong, even by comparison with a drastically reshaped collective tort regime as sketched above. If implemented, such a compensation scheme should feature the following elements:

1. A Broad definition of “toxic harm”—that is, the compensable event—that would include chemical substances for which an identifiable threshold of exposure had been linked with serious illness or

14. See Chapter 14 of this title, and also the prior volume's Chapter 3 on No-Fault Workers' Compensation, and Chapter 15 below on Elective No-Fault Medical Liability.
disease by scientific consensus.

2. Claimants would be required to establish exposure to a designated source of the substance in order to create a rebuttable presumption of harm.

3. The requisite exposure/source/substance connection could be established either by reference to a Toxic Substance Document adopted by the administrative compensation board, or by judicial referral the board when a court determined that filed claims indicated the likelihood of a significant number of related, long-latency toxic harm cases.

4. Compensation would be for pecuniary loss, on the model of workers' compensation, with modest allowance for reschedule nonpecuniary loss in serious cases.

5. The tort system might be retained, but a claimant would be required to choose between no-fault benefits and a possible tort award. The tort option would be scaled down by allowing only scheduled damages for nonpecuniary loss and by reversing the traditional collateral source rule.

6. The system would be financed, at least at the outset, by a flat tax on the gross revenues of toxic producers.

Outside the mass tort area, we also believe that administrative no-fault is a model worth serious exploration in the case of pharmaceutical injuries (a domain in which a version of the no-fault model is already in operation under the National Childhood Vaccine Injury Act of 1986) and with respect to medical injuries. As to the latter, we recommend in Chapter 15 that hospitals and other health care organizations be permitted to establish on an elective basis a no-fault patient compensation alternative to malpractice liability (within program parameters that would have been carefully considered and approved by the state government). In Chapter 16 we consider possible further uses of this elective no-fault model for certain categories of product injuries. Chapters 17 and 18 conclude with our analysis of possible improvements in the liability and social insurance systems respectively and the implications these changes may have for the operation of tort law.