

## Personal Injury and Social Policy: Institutional and Ideological Alternatives

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In the four decades between the publication of the first and ninth editions of John Fleming's "The Law of Torts" his field has undergone enormous change. With respect to social policy toward personal injuries, tort law has come to play a more central role -- with respect to product injuries, medical accidents, toxic spills and more. Yet, as Professor Fleming well appreciated, today's fault-and-lawsuit-based system suffers from many shortcomings -- shortcomings that have generated a wide range of proposals, some enacted, to replace personal injury law in part or entirely.<sup>(1)</sup> In this essay, I compare the judicially-administered negligence regime with three competing institutional and ideological alternatives, and speculate about the possible ousting of tort from its current prominence over the next four decades.

### I. Social Policy Goals

Accidents happen. As a consequence, people are injured. Although society has an interest in reducing the frequency and severity of accidents, it would be foolish for society to attempt to eliminate all accidents. To try to achieve such a goal would be far too costly. Moreover, it would require restricting people's activities in a highly intrusive and undesirable way. Instead, society should be concerning about reducing accidents where the reduction can be achieved efficiently. As Guido Calabresi, the intellectual founder of "law and economics," put it years ago, there is an "optimal" level of accidents a society should aim for.<sup>(2)</sup>

Moreover, when accidents occur, society also has an interest in assuring that the costs of those accidents are distributed fairly. Yet, people may differ in their views as to what is fair. For some, the paramount concern is that economic losses are widely spread, so that no individual has to bear the full financial brunt of the harm he accidentally suffers. From this point of view, it is bad enough that he has to bear the physical consequences. For others, fairness in the allocation of costs is most importantly a matter of assigning responsibility for those costs to the party who caused the accident. From this perspective, an ex post assessment is necessary in order to determine who should pay.

### II. Institutional Alternatives

In pursuit of both efficiency and fairness objectives, there are several institutionally distinct ways a society might deal with the management of the risk of accidents and the allocation of the costs of accidents that occur. I will describe four models: (1) lawsuit-driven, fault-based compensation; (2) accident-cost-internalizing, focused compensation plans; (3) social insurance paired with government regulation; and (4) the market. In most societies the arrangements employed to address the risks and costs of accidents do not reflect purely one form. Rather, societies tend to combine elements from the different models in their own special ways. Nonetheless, the models described reflect distinctive strategies.<sup>(3)</sup>

Model one is conventional fault-based liability law, as it is generally understood throughout the common law and civil law worlds. In this model, people are threatened with financial penalties if they unreasonably fail to prevent accidental injuries to others - if they fail to exercise "due care." The financial penalties are meant to create a deterrent effect - enticing would-be injurers to take appropriate precautions. To the extent the strategy is successful, reasonably avoidable accidents do not occur. Since the accidents that do occur are, therefore, not efficiently avoidable by someone else, society leaves the cost of those accidents on the victims. However, victims are permitted, ex ante, to make private insurance arrangements to cover those losses.

Of course, in practice, fault-based tort law is not fully effective at discouraging all reasonably avoidable accidents. So, when actors fail to take reasonable precautions and injure others, the victims are permitted to sue the negligent parties so as to shift the costs of those accidents to the unreasonable injurer. This regime is considered fair because it allows innocent victims to shift costs to misbehaving injurers, and efficient because it encourages rational people to behave properly.<sup>(4)</sup> This approach puts its faith in the judicial process being able to determine, ex post, which risks of harm were unreasonably imposed and which were not.

Model two is reflected in both focused compensation schemes as well as "strict liability in tort." Workers' compensation is a good example. In this model, large organizations (often business enterprises) are asked to take responsibility both for managing the risks that fall within their domains and for paying for the accidental injuries that occur - regardless of fault. Rather than leaving the courts to decide which accidents should be reasonably avoided, the organization has the obligation to compensate all its victims thrust upon it by government. Put differently, by imposing all accident costs on the responsible organization, society gives it the incentive to take safety precautions when it is efficient to do so.<sup>(5)</sup>

This model is thought fair to the organization because it has power over, and often makes profit in, the domain of its responsibility and to the victim who benefits from an assured loss spreading regime and need not worry about arranging for private insurance. This regime is thought efficient because the organization is encouraged to decrease accidents everywhere it can do so by spending less on precaution than it would have to spend compensating victims.

This model puts its faith in the idea that the compensation obligation will cause the organization to take the socially desirable precautions, and that the right organization has been given the responsibility to do so. Notice how both workers' compensation and strict tort liability for extra-hazardous activities<sup>(6)</sup> reflect this model's key features, even though the compensation rules and the procedural settings of the two schemes differ.

In model three, government takes direct responsibility for both the accident-optimizing and the compensation objectives -- but through independent institutions. Government safety agencies adopt regulations designed to promote the right level of precaution, and governmental social insurance mechanisms provide victim compensation. The regulatory

bodies have no responsibilities for compensation. They are meant to be neutral experts in safety, and they may act by setting behavioral standards ex ante. It is in these respects that model three should be distinguished from model one in which the government acts ex post by enabling the judicial system to apply a generalized "fault" standard in awarding compensation where it is due.

In model three, the funding of the social insurance system is independent of any accident prevention goal. So, for example, it is likely to be financed general payroll or income taxes since these are broad-based sources of revenue that are not linked to the level of accidents associated with firms or individuals. In model two, by contrast, the funding obligation is organization-specific (based on the accidents that occur in its domain), and it is this cost internalization that provides the financial incentive for safety.

Moreover, on the benefit side of model three, accident victims are not singled out for special treatment as they are in model two. Rather, they are treated in the same way as other citizens in need of health care, basic wage replacement and the like - by having access to the governmental safety net. Model three is thought fair because society collectively assures compensation to all victims and those who carelessly cause accidents are collectively punished by a regulatory agency, and efficient because society discourages avoidable accidents through its regulatory regime.

Model three puts its faith in the effectiveness of the regulatory system in managing risk. Although this model may be conventionally associated with a "command and control" regulatory style, that is not necessarily required. Regulators might choose to deploy an incentive-based regulatory strategy. The key that distinguishes this model from the others is the separation of the compensation function from the safety function.

Model four relies upon individual responsibility and the market. As for safety, private parties have the obligation to take precautions to prevent injuries to themselves. If those precautions are better taken by others, then those precautions are worked out through the market. So, for example, buyers and sellers of goods and services manage risk together by agreeing on the precautions that are to be employed in connection with their voluntary transactions. This model permits individuals with different tastes for risk to trade off risk against other factors (e.g., cost, aesthetics, performance and the like). It assumes that individuals rather than courts, agencies, or large organizations should decide what risks are reasonable to run and what risks should be reduced in the name of accident prevention. Hence, if enterprises have risk management thrust upon them, it is through voluntary contract and not through the coercive arm of the state.

Model four also relies upon individuals to make compensation arrangements for themselves. This may involve arranging for private insurance or for compensation to be tied to the provision of a product or service. Indeed, it is up to the parties to decide whether individual compensation is to be paid in case the service or product provider fails to take a promised precaution. Would-be victims might prefer to have their own insurance and to rely upon reputational concerns to entice would-be injurers to take the agreed precautions. This is to be contrasted with the other models in which compensation

is assured from some third party in all cases where an accident should have been avoided but was not.

Model four is thought fair and efficient because the parties decide for themselves what risks should be taken and how losses are to be allocated. This model puts its faith in the market. The governmental role is essentially reduced to enforcing the contracts that individual parties make.

It is easy to see, in principle, how the market might deal with those categories of accidents involving voluntary interactions - work injuries, public transportation injuries to passengers, product injuries to consumers, medical injuries, recreational injuries on commercial premises, and the like. Yet it is difficult to even imagine how the market would regulate accidents that do not arise out of market transactions - like auto accidents and other injuries to "strangers." Hence, this model might apply to only certain domains. In this respect, model four is like model two, since in model two an appropriate organization may not exist to take responsibility for all categories of accidents. Of course, inequalities in information and bargaining power make many people skeptical about the effectiveness of using the market to manage risk, even in the voluntary transaction setting.

### III. Associated Political Ideologies

Many people bring to politics, and the role of government generally, a pre-commitment to a certain ideological way of looking at things. Many have a basic attitude toward individual and collective responsibility that orients the way they think about all policy issues, whether it is a matter of welfare policy, education policy, defense policy, environmental policy, or accident policy. Moreover, these different mind-sets tend to predispose people to favor specific sorts of institutional solutions to policy issues. In this vein, the four models I have just described reflect four distinct ideological outlooks. I connect the models with (1) conservatives (2) liberals (3) communitarians, and (4) libertarians, respectively.<sup>(7)</sup>

I associate model one with conservative values because it emphasizes individual responsibility for wrong-doing. Model one focuses on providing deserving victims individual rights of redress. At the same time, it imposes on individual victims the costs that are incurred when others are not to blame for their injuries. These themes -- individual rights and individual responsibility -- reflect conservative outlooks on crime and welfare policy. By threatening punishment, it is hoped that people will take their social responsibilities seriously and that government won't be needed to intervene. Government's role is only activated when an individually aggrieved victim comes forward with a complaint against another private party, minimizing the role of government bureaucracy.

Model two reflects contemporary liberal values -- by which I mean the social ideology that led to the post-World War II welfare state. From this perspective, little weight is put on individual fault. Larger institutional forces are seen as the key actors in society. This is

reflected in liberal outlooks on unemployment and crime. Moreover, in the liberal view, it is more important that "rough justice" is achieved and people have basic needs met, than having a system of exquisite and costly individual justice with winners and losers. Capitalism is by no means rejected, but government properly forces large private organizations to carry out public purposes - here the management of the risk and cost of accidents.

Model three is connected to what I call communitarianism. The state is the larger collectivity through which we all act to serve the needs of our greater community. Those with this outlook care, for example, about the needs of disabled people generally. It doesn't matter whether people are disabled at birth, by disease, by aging, or by accidental injury. The risk of temporary or permanent disability can strike any person, and communitarians believe that society in general owes to those with temporary or permanent disabilities fair access to medical care and related services, as well as income replacement. The costs of accidents should be borne by and diffused across society. On the other side of the model three equation, communitarians also want the community, self-consciously, to set standards of conduct, at least where the risk of harm to others is at stake, to reduce the risk of accidents in the first instance. Under the communitarian ideology, individuals have a duty to participate in their collective self-government, and through that participation government becomes, neither feared nor ridiculed, but rather the voice of the people.

Model four represents libertarian values. Like the model four solution, libertarians believe in individual choice and are skeptical about government regulation. Just as libertarians believe that government should generally take a hands-off approach to controlling the behavior of its citizens, this outlook extends to the management of risk. Individuals should be allowed to manage their own risks without government intervention. The dominant value is liberty, and libertarians highly value the market as a mechanism to both preserve and promote liberty.

#### IV. U.S. Liberals Embrace a Conservative Institution

Most societies have a complex set of institutional arrangements for dealing with the risk and costs of accidents that do not mirror, in pure form, any one of the four models set out earlier. One explanation for this layering is that, over time, the four ideological perspectives just described wax and wane and the political parties in charge of the government, each with their own mix of ideological guiding principles, come and go. Moreover, individual accident problems become politically salient in different eras, as technology advances and different modes of production are used to manufacture new products. For example, factory work injuries became prominent problems early on in the age of industrialization, auto-accidents rose to prominence in the 1950s and 1960s as more people drove larger and faster cars, and mass injuries due to prescription drugs and air plane crashes have gained prominence more recently with increasing access to those products and services.

Another explanation for this complex institutional arrangement we see is that, within any democratically run country at any time, there is likely to be a diversity of ideological opinion. This diversity of opinion among public groups usually means that advocates of each ideological perspective will be successful, at one time or another, in capturing power or influence within the system and succeed in gaining passage of a law or program that reflects their preferred view of how to manage accident risks and costs. Moreover, it is often more difficult to repeal an existing governmental program or regulatory regime than it is to add a new one. This, too, contributes to the existence of multiple, and sometimes ideological contradictory, approaches within the same society.

There is a further complication that I will now address. I have described conventional tort law as a conservative institution, and in many countries it operates in a solidly conservative manner. Moreover, in such settings the politically conservative actors in the society (the heads of large enterprises, for example) are likely to be quite content with it.

But in the United States, starting in the 1960s, tort law became identified with liberals. Why did that happen? One explanation is that at that time, it appeared to some that tort law was abandoning its commitment to the individualized determination of fault and instead embracing strict liability for injuries attributable to enterprise activities. In other words, many began to see that tort law would be transformed from a model one institution into a model two regime.<sup>(8)</sup>

The endorsement in 1964 of "strict products liability" by the American Law Institute in section 402(a) of the Restatement (Second) of Torts was seen as an important early harbinger. And yet, as the past 25 years have played out in the U.S., strict liability has really gone nowhere (at least nowhere important) as a doctrinal matter. Strict liability for product injuries now squarely applies only to manufacturing defects.<sup>(9)</sup> Moreover, these defects appear to account for a relatively small share of product accidents, and in any event, the application of strict liability to those accidents has brought about only a small change in the outcome of cases, given the availability of *res ipsa loquitur* under the fault regime. Put differently, complaints about a product's design or warnings, on the whole, must still be based in negligence.<sup>(10)</sup>

Additionally, U.S. courts have shown virtually no willingness to deem products "defective" on the basis of danger alone -- i.e., without requiring the plaintiff's to demonstrate a feasible alternative design.<sup>(11)</sup> Even more sweeping strict liability -- in which causation alone would suffice -- has never been seriously entertained.<sup>(12)</sup> Moreover, true strict liability for service-providing enterprises has hardly been given a moment's thought.<sup>(13)</sup>

Nevertheless, some people believe that American negligence law in action has often become strict liability in fact. The argument may be made in at least two ways. One is that, as U.S. courts have been increasingly allowed juries to decide whether an individual defendant was at fault, those juries have been increasingly willing to find negligence where it does not exist. The claim is that these juries find non-existent negligence in order to provide compensation for victims, who have large medical bills and lost wages, at the

expense of "deep pocket" defendants, who are not at fault but can still afford to compensate the injured plaintiffs. Yet, I consider it unproved that this is how juries usually function in the U.S. tort system, even if juries have behaved like this in some individual cases. Surely, victim lawyers go to great lengths to prove the defendant's fault in most cases; and certainly defendants win a fair share of personal injury cases that actually go to trial.<sup>(14)</sup>

A second argument is that in the settlement process defendants pay out large sums whether they are at fault or not. To be sure, strict liability may be the law in action in certain small value cases where the plaintiff's claim contains a certain nuisance value -- that is, the defendant does not want to pay to litigate and finds it cheaper just to pay the victim off. But in more serious injury cases, it seems far more likely to me that defendants settle for large sums for other reasons. Often they know they have been at fault and want to avoid the negative publicity that might come from a trial. Moreover, in these settlements their fear is not that juries will find them negligent even though they had exercised due care. Rather defendants fear that juries will impose large punitive damage awards when their conduct was merely negligent, and not reprehensible, as the doctrine is supposed to require before an award of exemplary damages is made. To the extent juries are too quick to impose punitive damages, this may reveal a discontinuity between tort law on the books and tort law in action, but it is not a problem of turning conservative fault law into liberal strict liability.

A more convincing explanation, I believe, for the liberal embrace of tort law -- along with its fault requirement -- is tort law's resonance with the David and Goliath story. Individual lawyers, acting, in effect, as private attorney generals, are able to expose corporate wrong-doing that government regulators have ignored (or have been pressured into overlooking). This is what Justice Allen Linden has called the "ombudsman" function of tort law.<sup>(15)</sup>

In other words, starting in the 1960s, U.S. liberals saw that a conservative institution, in which government's role was merely to referee the resolution of private disputes, could be converted, at least in some important cases, into a forum for what is in effect "public interest litigation." Just as American lawyers turned to the courts to combat civil rights violations by government, so too lawyers aroused the judiciary in the campaign against corporate misconduct in the personal injury field.<sup>(16)</sup> It is also worth recalling that during the period between 1968 and 1992, the American presidency was in the hands of Republicans for all but the four Carter years. In those circumstances especially, it is not surprising that liberals would conclude that their efforts to attack corporate wrong-doing would be better received by judges (many of whom had earlier been appointed by Democrats) than through the executive branch. The situation in many American states reflected -- indeed continues to reflect -- this same pattern.

Viewed as public interest litigation, tort law allows the previously powerless individual victim to take on the economic powerhouses of the country. With the fearless and charismatic personal injury lawyer at her side, the victim suddenly has her David to fight against Goliath. To be sure, many would argue that the victims' lawyers (i.e., the Davids)

are really in it to line their own pocket books rather than for the public good. But, even if this were true for many lawyers, it may not matter. With the U.S. system of compensating lawyers on a contingent fee basis, these two interests are basically aligned.

Of course, most torts cases are not public interest cases. Most claims involve ordinary automobile accidents and claims against other motorists.<sup>(17)</sup> Many involve routine "slip and fall" injuries, and so on. To be sure, "money" (typically an insurance carrier) is usually on the other side (otherwise victims would not bother to sue), but rarely is some important general "principle" at stake in the individual case. Still, even in these routine cases, some liberals have adopted what I have here termed a conservative perspective, by rejoicing in U.S. tort law's recognition of the victim's dignity. Never mind that most plaintiffs don't seem to enjoy the litigation experience.<sup>(18)</sup> At least, a very generous award of pain and suffering damages can put lots of cash in the victims' pockets.<sup>(19)</sup>

The upshot of the liberal embrace of the expanded U.S. tort system has been that the conservatives are the ones who have primarily complained about the American negligence law system. Tellingly, however, conservatives generally don't want to eliminate tort law -- certainly not if that risks model one being replaced by model three. Rather, conservatives seek to tame tort law - to bring it back to more of the model one institution it was in an earlier era. In practice, this has most importantly meant trying to limit the amount of damages victims can recover; to control the legal fees that victim attorneys may obtain; and to get judges (who nowadays are more likely to have been Republican appointees) to more carefully supervise the administration of the fault principle.<sup>(20)</sup> In more recent years, conservatives have somewhat successfully carried out their campaign in individual state legislatures.<sup>(21)</sup> Indeed, their general message about the "runaway" tort system has also arguably had an impact on judges and juries.<sup>(22)</sup>

## V. Proposed Reforms of Traditional Liberals

Although America's most famous consumer advocate, Ralph Nader, is wildly and resolutely in favor of tort law,<sup>(23)</sup> not all of those who might call themselves liberals are so enraptured. Indeed, from the mid-1960s onward, many have argued that the basic conservative underpinnings of tort law make it incapable of dealing properly with the contemporary accident problem. Some of their key points are: (1) tort law inevitably provides incomplete coverage of accident victims, thereby requiring an additional compensation mechanism; (2) tort law is very expensive to administer and is beset with delays; (3) akin to a "lottery," tort law is idiosyncratic in how much it pays, lavishing pain and suffering awards on some victims, while denying recovery altogether to others who are identically or nearly identically situated; and (4) tort law is not successful in shaping behavior in socially desirable ways.<sup>(24)</sup>

In short, these critics attacked model one from all angles: as they view negligence law, not only is it inadequate in theory (because it fails to compensate victims of unavoidable accidents), but worse it is especially unfair and inefficient in action. This sort of argument hasn't moved Nader. His response, as I see it, is to favor a combination of models one and three: (1) let's have lots of governmental safety regulation; and (2) let's have

comprehensive social insurance (these are the model three features); but (3) let's keep tort law (model one) especially because it allows wronged victims to strike back at corporate wrong-doers and teach them a lesson.

Unlike Nader, many liberal critics of the U.S. version of model one in action have pushed for model two reforms. Some have concluded that the compensation arrangements envisioned by model three are politically implausible, but many simply prefer the model two approach. They believe that accident cost internalization by enterprises (model two) is a more promising way to optimize safety than through regulation (model three).

Hence proposals have been floated for all sorts of focused compensation plans (variations on workers' compensation) that would internalize accident costs to an appropriate organization or industry -- giving that enterprise the twin duties of both managing risk and compensating victims regardless of fault. Proposals have covered injuries such as those caused by pharmaceutical drugs,<sup>(25)</sup> airplane crashes,<sup>(26)</sup> medical accidents,<sup>(27)</sup> and toxic chemicals.<sup>(28)</sup>

Some more adventuresome scholars have envisioned even more sweeping reforms in the model two vein. These all owe their debt to Judge Calabresi's pioneering work. For example, Professors Franklin and Pierce advanced rather similar proposals that go beyond tailored compensation schemes to cover accidental injuries in general.<sup>(29)</sup> Although both Franklin and Pierce included some model three features in their schemes (i.e. some victims would be compensated from money raised from general taxes), both rely on cost internalization as the key strategy for enticing large enterprises to take safety precautions. Later, Professor Latin took a similar position, although his reforms would rely upon sweeping enterprise liability in tort, rather than imposing accident costs on organizations via a new compensation scheme.<sup>(30)</sup> Most recently Professors Nolan and Ursin, writing together, have renewed the Calabresi-Latin line on behalf of enterprise liability.<sup>(31)</sup>

However, in practice, in the U.S., little has come of these efforts. A modest childhood vaccine injury scheme is in place.<sup>(32)</sup> Sweeping strict liability in tort stands ready in case there is a large scale calamity at a nuclear power plant.<sup>(33)</sup> A few small arrangements exist at the state level -- such as compensation schemes for badly injured newborns in Virginia and Florida.<sup>(34)</sup> But the more ambitious proposals have languished.

Indeed, even auto no-fault plans (which don't really fit model two very well because they don't impose strong responsibility on organizations) have made few inroads since when they first burst onto the U.S. scene at the end of the 1960s.<sup>(35)</sup> By now only a couple of states have ambitious no-fault schemes (Michigan and New York), a few others have modest schemes, and none has anything approaching, say, Quebec's comprehensive no-fault approach to auto accidents.<sup>(36)</sup>

## VI. A Libertarian Counter-Attack

Some U.S. scholars have responded to what they saw as a liberal high-jack of tort law by proposing libertarian solutions.<sup>(37)</sup> At least in settings in which the injurer and victim were in an economic relationship prior to the accident, libertarian scholars have advocated that the parties should be able to make their own "deal" as to who should take responsibility for managing the risk and what would be the financial consequences were there an accident. This regime could cover, for example, the highly contentious areas of product injuries and medical accidents.

Doctrinally, this libertarian approach has meant arguing that individuals ought to be able to waive their tort rights in advance of an accident. More precisely, for this approach to work would-be injurers need to know that courts would uphold "agreements not to sue" that they would have their customers and patients enter into. Therefore, as a practical matter, this approach translates into the deployment of exculpatory clauses, regardless of libertarian philosophy's reliance on individual market-based solutions. This is not a judgment on the whether it would be right or wrong to let would-be victims waive their right to sue. Rather, it is only a recognition that proponents of libertarian contractual agreements are unlikely to urge would-be injurers to agree to be strictly liable. The whole thrust of the libertarian argument is that individuals can count on market pressures to manage risks, and that, in return for a lower price for a product or service, they might well prefer to take on the financial risk of loss themselves -- especially if they were already well insured.

However, little has happened on this reform front either. Some may fear that to ask for an agreement not to sue will harm the enterprise's marketing efforts. But the most likely explanation for the lack of uptake of the libertarian program is that potential defendants fear that courts will not respect exculpatory clauses. Such attempts to limit liability were harshly treated early on,<sup>(38)</sup> and they seem to crop up these days primarily in the recreational activity setting. In the recreational setting, some risk of non-negligent injury is usually pretty clear, and the parties may rationally decide that it is, therefore, not worth it to ask the legal system to make what might be a very difficult ex post decision as to who was at fault. Moreover, these activities are clearly voluntary activities (i.e., they are neither necessary medical interventions nor basic consumer products).

Yet even these most logical agreements not to sue have not fared very well in state courts and legislatures.<sup>(39)</sup> Rather, courts are more likely to uphold a tort waiver only when a reasonable compensation substitute is offered in its place.<sup>(40)</sup> However, this isn't the libertarian way; it is rather the solution sometimes suggested by pragmatic liberals, with model two in mind.<sup>(41)</sup>

## VII. A Communitarian Future?

Most writing on behalf of model three reforms has come from outside the U.S. For example, Terrence Ison from Canada has promoted this point of view for decades.<sup>(42)</sup> A British group, headed by Donald Harris at Oxford's Centre for Socio-Legal Studies, also pushed this way of thinking for a short while.<sup>(43)</sup> I have been something of a lonely voice

for this approach in America.<sup>(44)</sup> Most important, of course, has been the embrace by New Zealand of an accident compensation scheme that closely resembles model three.<sup>(45)</sup>

Understandably, at a time when capitalism is reigning and former socialist economies are in disarray, and when the large social insurance schemes of many western European welfare states, as well as the U.S. social security system, are under great financial pressure, it might seem odd to talk about a communitarian future in which other countries would follow and expand upon the New Zealand approach.

Yet, tort law's shortcomings are obvious and they have yet to be eliminated or even substantially reduced by recent reforms. Tort law remains heavily laden with transactions costs. Tort law can never provide the compensation security that all accident victims need. The system continues to deliver uneven individual justice, and whatever its positive effects toward safety are (if any), they are plainly insufficient.

Victims still rely on other compensation arrangements (including private insurance and social insurance) that tort law duplicates, and society still needs more effective risk management mechanisms. Although the solutions could follow a model two approach, I think that approach is unlikely for the long run, if for no other reason than significant model three compensation arrangements are already in place that would be duplicated by a comprehensive model two strategy.

In short, if more is to be done about the problem of accidents and their costs, I foresee that the changes will have a communitarian cast. Here are two plausible examples. First, the government transforms workers' compensation into a more general model three social insurance scheme -- by having it provide around-the-clock coverage for workers and their dependents. In the U.S., this would not only broaden the availability of health insurance, but it would also greatly strengthen workers' income disability protection. Second, the government creates a "whistle blower" scheme that rewards individuals and their lawyers for exposing enterprise misconduct that creates or increases the risk of accidents.<sup>(46)</sup> This scheme would be designed to allow society to capture whatever whistle-blower benefits tort law now provides.

Were both of these (or similar) reforms enacted, then tort law's compensation and behavioral control functions would have been primarily consigned to other institutional arrangements. As a result, tort law's continued application to personal injury cases (apart from instances of deliberate harm that merit punitive damages) becomes a redundant and an excessive luxury that mainly benefits lawyers. This thought experiment leads me to conclude that the prospect for a communitarian future depends upon convincing the public that: (1) tort law is not and cannot achieve society's accident policy goals; and (2) that a model three substitute would serve society more efficiently and effectively than layering on one more partial supplement attempting to fill the substantial gap in coverage of tort law.

Although one way to reach a communitarian outcome is to adopt a substitute regime all at once, as New Zealand did, this is not the only possible scenario. Alternatively, tort law

might be eroded from within. Suppose, as an initial step, tort law were made secondary -- and in two senses. One, as John Fleming wrote so thoughtfully,<sup>(47)</sup> the collateral sources rule could be reversed, so that tort would, at most, serve a gap-filling role on the compensation side. Two, compliance with regulatory standards could increasingly count as a complete defense to a suit in negligence -- so that tort would be understood to play only a back-up role in terms of risk regulation. In this posture, as communitarian solutions expanded, tort law's role would be naturally undermined -- until such point as it might become sufficiently marginal as to be abandoned.

I recognize that this is unlikely to happen very soon (at least in the U. S.), and my crystal ball gazing for the longer run may be way off the mark. Twenty-five years ago John Fleming attributed the replacement of personal injury law in New Zealand with a what I have called a communitarian solution at least partly to the existence of "a strong sense of group identity, a feeling that one's neighbour's welfare is almost as important as one's own."<sup>(48)</sup> Yet, during the 1980s and 1990s, selfish individualism has triumphed around the globe. Even so, I still find it hard to imagine that tort law will become even more prominent in the future than it has become during its chronicled ascendancy through the many editions of Professor Fleming's great treatise. Rather, if we adopt a generous time horizon, I still think he was right to predict in 1984 that "the law of tort will yield more and more ground to accident compensation in the coming years."<sup>(49)</sup>

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1. *See generally*, John G. Fleming, *The American Tort Process* (Clarendon Press, Oxford, 1988); John G. Fleming, "Is There a Future for Tort?" (1984) 58 *Australian L. J.* 131; John G. Fleming, "The Pearson Report: Its 'Strategy'" (1979) 42 *Modern L. Rev.* 249; John G. Fleming, "The Decline and Fall of the Law of Delict" (1973) vi *Comp. and Int'l L. J. Of Southern Africa* 259.

2. Guido Calabresi, "Optimal Deterrence and Accidents" (1975) 84 *Yale L. J.* 656.

3. American Law Institute Reporter's Study, *Enterprise Responsibility for Personal Injury*, Vol. 1, The Institutional Framework (American Law Institute, Philadelphia, 1991) Ch B, p 55-233 & Ch D, p 351 - 448.

4. For simplicity sake, I ignore here the situation when both injurer and victim can efficiently avoid the accident. Contemporary tort law, of course, largely deals with this via a regime of comparative negligence.

5. Again, I put aside for simplicity sake situations in which the victim could have readily avoided the accident but did not. In practice, focused compensation schemes tend to ignore all be the most egregious cases of victim fault.

6. *Restatement of the Law (Second) of Torts*, Abnormally Dangerous Activities, 519 - 520 (American Law Institute, St. Paul, 1977), p 34 - 45..

7. For earlier thinking of mine along these lines, see generally Stephen D. Sugarman, "Proposals for Reform" (1993) 15 U. Haw. L. Rev. 659; Stephen D. Sugarman, "A Restatement of Torts" (1992) 44 Stan. L. Rev. 1163.

8. See generally Guido Calabresi, *The Cost of Accidents* (Yale University Press, New Haven, 1970).

9. Restatement of the Law (Third) of Torts, Products Liability, 2, Proposed Final Draft (American Law Institute, Philadelphia, 1997).

10. Ibid.

11. *O'Brien v. Muskin Corp.* (N.J. 1983) 463 A.2d 298 is the exception to this general rule and it has been overturned by the New Jersey Legislature. N.J.S.A. 2A:58C-3 (West, 1998). The California Supreme Court's passing mention of allowing liability on the basis of danger alone, in *Barker v. Lull Engineering Co., Inc.* (Cal. 1978) 573 P.2d 443, fn.10, has never gone anywhere.

12. This position has lately been revived in the literature by Professors Croley and Hanson, but with no indication yet that any courts are at all interested. See Steven P. Croley & Jon D. Hanson "Rescuing the Revolution: The Revived Case for Enterprise Liability" (1993) 91 Mich. L. Rev. 683.

13. California flirted slightly with this idea in *Becker v. I.R.M. Corp.* (Cal. 1985) 698 P.2d 116 (imposing strict liability on purchaser of apartment building when a tenant was injured by a shower door that was in defective condition at the time the defendant purchased the building). However, that case was overturned in *Peterson v. Superior Court* (Cal. 1995) 899 P.2d 905 (denying strict liability claim of guest against hotel owner where the guest slipped in a defective bath tub).

14. See Theodore Eisenberg, John Goerdts, Brian Ostrom and David Rottman, "Litigation Outcomes in State and Federal Courts: A Statistical Portrait" (1996) 19 Seattle U. L. Rev. 433, 436 (reporting that for 1991-92, defendants won 51% of cases in state court jury trials; 45% of cases in federal court jury trials).

15. Allen M. Linden, *Canadian Tort Law* (5th ed. Butterworths, Toronto and Vancouver, 1993), Ch 1, 20-27.

16. Ralph Nader & Joseph A. Page, "Automobile Design and the Judicial Process," 55 Calif. L. Rev. 645.

17. See Eisenberg et al., op cite n 14, table 1.

18. See E. Allan Lind and Thomas Tyler, *The Social Psychology of Procedural Justice* (Plenum Press, New York, 1988).

19. Some scholars have estimated that pain and suffering damages account for 50% of many personal injury damage awards, see Stephen P. Croley & Jon D. Hanson, "The Nonpecuniary Costs of Accidents: Pain-and-Suffering Damages in Tort Law" (1995) 108 Harv. L. Rev. 1785, 1787; Edward J. McCaffery, Daniel J. Kahneman and Matthew L. Spitzer, "Framing the Jury: Cognitive Perspectives on Pain and Suffering Awards" (1995) 81 Va. L. Rev. 1341, 1346; *but see*, Deborah R. Hensler et al, *Compensation for Accidental Injuries in the United States* (RAND Institute for Civil Justice, Santa Monica, 1991), 100-101 (estimating that out of a total of \$15.7 billion dollars a year in liability payments for accidental injuries, damages for pain and suffering amounted to \$5.2 billion dollars).
20. George L. Priest, "Economic Problems of Accidents and Compensation" (1993) 15 U. Haw. L. Rev. 544; *see also* Peter W. Huber, *Liability: The Legal Revolution and its Consequences* (Basic Books, Inc., New York, 1988).
21. *See, e.g.*, Stephen J. Carroll, *Assessing the Effects of Tort Reform* (Rand Institute for Civil Justice, Santa Monica, 1987) (discussing tort reforms enacted in 1986); Robert L. Rabin, "Federalism and the Tort System (1997) 50 Rutgers L. Rev. 1, 3-4 (noting tort reform campaigns from the 1970s - 1990s).
22. *See* Theodore Eisenberg and James A. Henderson, Jr., "Inside the Quiet Revolution in Products Liability" (1992) 39 UCLA L. Rev. 731, 794 (discussing how judges may have been influenced by negative public opinion about the tort and product liability systems); Marc Galanter, "Real World Torts: An Antidote to Anecdote" (1996) 55 Md. L. Rev. 1053, 1110-12 (noting contemporary juror research that shows juror scepticism towards personal injury plaintiffs).
23. Andrew Tobias, "Ralph Nader is a Big Fat Idiot" (Oct. 1996) *Worth* at 93.
24. Jeffrey O'Connell, *The Lawsuit Lottery : Only the Lawyers Win* (Free Press, New York, 1979).
25. Richard A. Merrill, "Compensation for Prescription Drug Injuries" (1973) 59 Va. L. Rev. 1.
26. Stephen D. Sugarman, "Right and Wrong Ways of Doing Away with Commercial Air Crash Litigation: Professor Chalk's "Market Insurance Plan" and Other No-Fault Follies" (1987) 52 J. Air L. & Com. 681.
27. Paul C. Weiler, *Medical Malpractice on Trial* (Harvard University Press, Cambridge, 1991); Stephen D. Sugarman, Review, "Doctor No" (1991) 58 U. Chi. L. Rev. 1499.
28. Robert L. Rabin, "Some Thoughts on the Efficacy of a Mass Toxics Administrative Compensation Scheme," (1993) 52 Md. L. Rev. 951.

29. Marc A. Franklin, "Replacing the Negligence Lottery: Compensation and Selective Reimbursement" (1967) 53 Va. L. Rev. 774; George L. Pierce, "Encouraging Safety: The Limits of Tort Law and Government Regulation" (1980) 33 Vand. L. Rev. 1281.

30. Howard A. Latin, "Problem-Solving Behavior and Theories of Tort Liability" (1985) 73 Calif. L. Rev. 677. Whereas Calabresi seemed to envision imposing strict tort liability on the "cheapest cost avoider," Latin would impose it on enterprises that could be counted on to engage in "problem solving behavior." Both of them rejected the idea that juries should ordinarily determine fault on a case by case basis.

31. Virginia E. Nolan & Edmund Ursin, *Understanding Enterprise Liability: Rethinking TORT REFORM for the Twenty-first Century* (Temple University Press, Philadelphia, 1995).

32. Rabin, op cit n 28.

33. See Price-Anderson Act 42 U.S.C. 2210 (1988) (creating strict liability in tort nuclear licensees involved in an "extraordinary nuclear occurrence");

34. See Birth Related Neurological Injury Compensation Act (Injured Infant Act), Va. Code Ann. 38.2-5000 - 5021 (Supp. 1987); Fla. Stat. Ann. 766.301-766.316 (West 1988).

35. Robert E. Keeton & Jeffrey O'Connell, *Basic Protection for the Traffic Victim* (Little & Brown, Boston, 1965).

36. Stephen D. Sugarman, "Quebec's Comprehensive Auto No-Fault Scheme and the Failure of Any of the United States to Follow" (forthcoming 1998) Cahiers de Droit, Universite Laval, Quebec.

37. Paul H. Rubin, *Tort Reform by Contract* (AEI Press, Washington, 1993); Huber, op cit 20; Peter Charles Choharis, "A Comprehensive Market Strategy for Tort Reform" (1995) 12 Yale J. on Reg. 435; Richard A. Epstein, "Medical Malpractice: The Case for Contract" (1976) 1976 Am. B. Found. Res. J. 87.

38. See, e.g., *Henningsen v. Bloomfield Motors, Inc.* (N.J. 1960) 161 A.2d 69 (striking down express disclaimers limiting liability); *Vandermark v. Ford Motor, Co.* (Cal. 1964) 391 P.2d 168 (rejecting contractual disclaimers limiting tort liability); *Tunkl v. Regents of Univ. of Cal.*, 383 P.2d 441 (Cal. 1963) (rejecting a release from liability for future negligence imposed as a condition for admission to a charitable research hospital).

39. *Dalury v. S-K-I, Ltd.* (Vt. 1995) 670 A.2d 795 (rejecting a broad release from liability required by a ski resort); N.Y. General Obligations Law 5-326 (declaring void against public policy efforts to contract out of liability by health clubs) (McKinney 1997); compare *Barnes v. New Hampshire Karting Ass'n, Inc.* (N.H. 1986) 509 A.2d 151 (upholding a release-from-negligence agreement signed as a condition of participating in karting races); *Okura v. United States Cycling Federation* (Cal. App. 1986) 186 Cal.App.

3d 1462 (upholding release covering negligence as a condition of participating in bicycle race).

40. *See, e.g.* Jeffrey O'Connell, "An Alternative to Abandoning Tort Liability: Elective No-Fault Insurance for Many Kinds of Injuries" (1976) 60 Minn. L. Rev. 501, 519.

41. Jeffrey O'Connell, "Expanding No-Fault Beyond Auto Insurance: Some Proposals" (1973) 59 Va. L. Rev. 749. *See also* Stephen D. Sugarman, *Doing Away with Personal Injury Law* (Quorum Books, New York, 1989), Ch 9.

42. Terence G. Ison, *The Forensic Lottery: a critique on tort liability as a system of personal injury compensation* (Staples Press, London, 1967); Terence G. Ison, "The Significance of Experience Rating" (1986) 24 Osgoode Hall L. J.; Terence G. Ison, *Compensation Systems for Injury and Disease: The Policy Choices* (Butterworths, Toronto, 1994).

43. Donald Harris, et al, *Compensation and Support for Illness and Injury* (Clarendon Press, Oxford, 1984).

44. *See generally*,. Sugarman, op cit n 41.

45. *See* G.W.R. Palmer, *Compensation for Incapacity* (Oxford University Press, Wellington, 1979). For recent developments in New Zealand, see Rt. Hon. Professor Sir Geoffrey Palmer "The Design of Compensation Systems: Tort Principles Rule, O.K.?" (1995) 29 Val. U. L. Rev. 1115.

46. Sugarman, op cit n 41, Ch 7.

47. John G . Fleming, "The Collateral Source Rule & Loss Allocation in Tort Law" (1966) 54 Calif. L. Rev. 1478.

48. Fleming, *The Decline and Fall of the Law of Delict*, op cit n 1, p. 271.

49. Fleming, *Is There a Future for Tort?*, op cit n 1, p. 142.