

Compensation for Accidental Personal Injury: What Nations Might Learn From Each Other

Stephen D. Sugarman*

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I. INTRODUCTION

Allen Linden loves torts.¹ Justice Linden also cherishes strong communities whose members care for each other. As someone who has studied and worked both in Canada and the United States, Professor Linden knows the benefits that can be gained by being less provincial and opening yourself up to the experience of other legal systems.² Not only might you realize how to improve yours, but also you might be able to offer insights to

* Stephen D. Sugarman is the Roger J. Traynor Professor of Law at the University of California, Berkeley, School of Law.

1. See *THE JOY OF TORTS* (Stéphane Beaulac et al. eds., 2003). See generally ALLEN M. LINDEN, *CANADIAN TORT LAW* (Allen M. Linden & Bruce Feldthusen eds., 8th ed. 2006) [hereinafter *CANADIAN TORT LAW*]; JEAN-LOUIS BAUDOUIN & ALLEN M. LINDEN, *TORT LAW IN CANADA* (2010).

2. Stephen D. Sugarman, *Presenting the Fleming Award to Justice Allen Linden at Pepperdine University School of Law*, 33 PEPP. L. REV. 925, 925 (2006).

others. As part of this symposium honoring Allen Linden, my contribution acknowledges all three of these values by looking at the monetary benefits provided by tort law and other compensation systems in the United States and elsewhere.

II. THREE TYPES OF COMPENSATION SCHEMES FOR ACCIDENTAL INJURY VICTIMS

I start by emphasizing three roles that government can play in providing compensation to people who suffer bodily injury by accident.

1. Government can provide accident victims with legal rights to sue those who have injured them (and make forums available where victims can enforce those rights). Tort law epitomizes this role.

2. Government can create general social insurance arrangements that provide compensation for lost income and pay for the medical (and perhaps related) expenses that accident victims incur. In the United States, Medicare pays for health care for the elderly and the totally disabled, Medicaid (and related plans) pays for the health care needs of the poor, and tax subsidies support our vast network of employer-provided health insurance. In Canada and most other rich nations, a comprehensive national health care system deals with this need. With regard to income replacement, in the United States as elsewhere, Social Security provides compensation to totally-disabled former workers and their families.³ Some other countries provide income support as well to workers who become partially disabled.

Although these schemes are available to accident victims, they do not focus on any particular type of accident, and indeed, they are not at all limited to accident victims.⁴ Those suffering from diseases and congenital problems are also covered. Moreover, unlike compensation provided by tort law that is paid for by injurers (albeit often spread to others engaged in similar activities via liability insurance), social insurance is paid for by broad funding bases, like payroll taxes and income taxes, that are not connected to the cause of the accident that generates a claim for benefits.

3. In between these two extremes is a continuum of what has been called tailored or focused compensation plans. Each of these provides compensation to victims of a specific type of injury, compensation that is made available other than through court-based litigation.⁵ Moreover, in contrast to the anchoring norm of tort law, these tailored compensation plans do not seek to blame those who cause the covered injuries.⁶ Yet, in many (but not all) instances, those whose conduct contributes to the need for

3. BARBARA SAMUELS, SOCIAL SECURITY DISABILITY CLAIMS: PRACTICE AND PROCEDURE § 5:5 (2d ed. 2010); 42 U.S.C. § 402 (2010).

4. See, e.g., CANADIAN TORT LAW, *supra* note 1, at 602 (providing an example of a court considering whether artificial insemination that led patient to contract HIV could be held as a tort).

5. ORIN KRAMER & RICHARD BRIFFAULT, WORKERS' COMPENSATION: STRENGTHENING THE SOCIAL COMPACT 7 (1991).

6. See *id.* at 2.

compensation are asked to take responsibility for funding the relevant compensation plan.⁷

America's workers' compensation system is a good example of such a plan, providing medical and income replacement benefits (as well as vocational rehabilitation benefits) to those injured by accidents and diseases arising out of their employment.⁸ Claims are made against employers (but not through lawsuits) who generally arrange in advance for the payment of valid claims via the purchase of workers' compensation insurance.⁹ Another U.S. example is the National Vaccine Injury Compensation Program.¹⁰ Children who receive vaccinations and then suffer harms that are caused by, or legally presumed to be caused by, the vaccine are entitled to receive money benefits from a fund that is financed by a charge imposed on all vaccinations.¹¹ In Canada, Quebec's pioneering automobile no-fault insurance scheme is yet another good example.¹² All drivers/car-owners are required to purchase insurance from a special governmental agency that in turns pays compensation to all of those injured in motor vehicle accidents.¹³ New Zealand has for nearly four decades run a unique plan that provides compensation to all accident victims of whatever sort—work injuries, automobile injuries, home injuries, recreational injuries, and so on.¹⁴

III. THREE KEY ISSUES IN THE DESIGN OF THESE SCHEMES

I turn next to three key parameters on which designers of these various compensation arrangements must focus. The first concerns the nature of the benefits each scheme will provide. The second concerns the way in which the different compensation schemes interrelate to each other. The third concerns whether claimants will be represented by lawyers and, if so, how the lawyers are to be compensated.

1. With respect to benefit parameters, although I will not cover all of the issues that arise in the design of a plan's benefits, the discussion will raise many of the key points. Turning first to income replacement (or compensation for lost earning capacity), it must first be decided whether the

7. See Stephen D. Sugarman, *A Restatement of Torts*, 44 STAN. L. REV. 1163, 1171 (1992).

8. See generally KRAMER & BRIFFAULT, *supra* note 5.

9. See *supra* note 7.

10. *National Vaccine Injury Compensation Program (VICP)*, HEALTH RESOURCES AND SERVICES ADMINISTRATION, <http://www.hrsa.gov/vaccinecompensation/> (last visited Oct. 16, 2010).

11. Stephen D. Sugarman, *Cases in Vaccine Court—Legal Battles Over Vaccines and Autism*, 357:13 NEW ENG. J. MED. 1275, 1276 (2007).

12. Stephen D. Sugarman, *Quebec's Comprehensive Auto No-Fault Scheme and the Failure of Any of the United States to Follow*, 39 LES CAHIERS DE DROIT, *numero special*, 303 (1998).

13. See generally, Automobile Insurance Act, R.S.Q. 1977, c. A-25 (Can.).

14. GEOFFREY PALMER, *COMPENSATION FOR INCAPACITY: A STUDY OF LAW AND SOCIAL CHANGE IN NEW ZEALAND AND AUSTRALIA* 115–30 (1979).

benefit will be standardized or whether it will vary based on the past earnings history and what is thought would have otherwise been the future earnings of the individual victim. If the latter, are victims' lost earnings to be fully replaced, or partially so? If they are to be partially replaced, which, if any, of the following sorts of limits should apply: (1) the victim bears the first period (e.g., a week) of lost income; (2) the victim's earnings are replaced, not fully but at a reduced rate (e.g., 70%); or (3) a maximum limit is placed on the amount of earning covered (e.g., twice the average weekly wage in the jurisdiction)?

With respect to medical benefits, how broadly are they defined (e.g., including renovations to the homes of victims who are wheelchair bound and/or including the cost of attendant care for the seriously disabled), what controls are put on the decision as to whether claimed treatments are needed (e.g., physical therapy sessions), what limits are placed on the specific health care providers that victims may utilize, and so on?

Beyond these benefits, which are often termed "pecuniary," are benefits also to be provided with respect to "non-pecuniary" losses, and if so, how much and how are they determined? For example, should money be paid to compensate for the pain and suffering endured by the victim? What about the victim's lost ability to enjoy life in ways he or she previously did? What if the victim's body has been seriously disfigured or impaired? And what about the psychological upset of being harmed, especially if the injurer carelessly caused it to happen? As with lost income, if there is to be compensation provided for these harms, is it to be highly individualized or (relatively) uniform, and are there to be limits on recovery (like thresholds and ceilings)?¹⁵

Finally, if the victim suffers a long-term injury, should the benefits provided be paid once in a single lump sum, or should they be paid out over time? If the former, then it is likely that speculative projections into the future will be required.¹⁶ If the latter, will adjustments in the benefits being paid be made over time as events unfold, or is the periodic payment of benefits mainly intended to protect the victim paternalistically from squandering a lump sum award?¹⁷

The discussion so far has assumed that the accident victim is the claimant, but what about situations in which the accident causes the death of the victim? If death is not instantaneous, are benefits provided to cover the period between the accident and the death, and if so, which benefits (e.g.,

15. Although outside the scope of my inquiry, which looks only at accidental injuries, plan designers must also think about instances in which the victim has been harmed by intentional wrongdoing (or perhaps the reckless disregard of the victim's interest in bodily integrity). Should additional sums be paid to victims that are designed to punish injurers, and if so, how much should the penalty be (or should this function be left to the criminal law)?

16. See P.S. ATIYAH, THE DAMAGES LOTTERY 13 (1997).

17. For a brief discussion of structured settlements and periodic payments, see VICTOR E. SCHWARTZ ET AL., PROSSER, WADE AND SCHWARTZ'S TORTS: CASES AND MATERIALS 560–61 (12th ed. 2010).

non-pecuniary benefits)?¹⁸ Once the direct victim is dead, are benefits provided to survivors? If so, which survivors receive those benefits and how much do they receive (e.g., lump sums, sums relating to the deceased's lost earnings, sums for grief, etc.)?¹⁹

2. Turning now to the way that the compensation schemes interrelate, the essential point is to appreciate that there are many possible answers. At one extreme, all of the schemes could ignore each other, and victims would be able to obtain and keep all the benefits to which they are entitled, even if this meant triple recovery. At the other, victims would never gain more than "full" recovery, although this principle alone says nothing about which scheme (or schemes) winds up bearing the loss. Nor does it say whether victims could temporarily obtain benefits from one scheme while awaiting them from another with the obligation to return funds to the prior out of those obtained from the latter. In between, a variety of solutions could permit victims to receive different sorts of double, but not triple, recovery.²⁰

So far as tort law is concerned, this issue typically is addressed under the heading "collateral sources."²¹ The common law rule is that collateral sources are ignored in a tort claim, thereby making tort law always "primary" in the sense that tort defendants always bear the loss.²² The collateral source rule does not address whether victims can double-recover, however.²³ By statute, moreover, in some jurisdictions, the collateral source rule can be (and has been) revised in two major ways.²⁴ First, tort recovery may be deemed "secondary" and, hence, only available to the extent that collateral sources (or at least some of them) do not already cover the victim's losses.²⁵ Second, tort recovery simply may be repealed with respect to certain accidents and replaced with recovery via one or more collateral sources. To the extent that tort law is primary, the other schemes have to decide whether they will provide double recovery and, if not, whether they will at least advance benefits pending tort recovery.

As between general social insurance and tailored compensation plans, similar issues must be resolved, and if there is to be no double recovery, then it must be decided (a) which source is primary and (b) whether the primary source is to be a complete substitute or whether the secondary source

18. *See id.* at 603–05.

19. *See id.*

20. *See, e.g.*, M.G. WOODROOF ET AL., AUTOMOBILE INSURANCE AND NO-FAULT LAW § 5:11 (1974).

21. *See generally* John G. Fleming, *The Collateral Source Rule and Loss Allocation in Tort Law*, 54 CALIF. L. REV. 1478 (1966).

22. *Id.* at 1478.

23. *Id.* at 1496–97.

24. *See* SCHWARTZ, *supra* note 17, at 559.

25. *See* Fleming, *supra* note 21, at 548.

remains available to compensate losses not covered by the primary source.²⁶ Note further that there is more than one way to make, for instance, a tailored compensation plan that is primary to general social insurance. For example, with respect to an automobile no-fault plan, the plan might cover the victim's medical care, but if that care had already been provided by the country's national health scheme, then either the victim would be required to reimburse the health plan out of his automobile no-fault recovery or the automobile no-fault plan itself would directly repay the health plan.²⁷ But these are not the only options. For example, the health plan might provide the care, and the automobile plan could provide no health benefits to individual victims, but the automobile plan could make regular lump-sum contributions to the health plan that are designed to cover the cost (or estimated cost) of health care provided to large numbers of automobile accident victims. Indeed, in what amounts to much of the same thing, motoring could be taxed (e.g., via gasoline taxes) with proceeds used to an appropriate degree to fund the health plan.²⁸

Finally, note that the determination of which plan will pay (when it is assumed that only one will) need not be determined by law but instead by the choice of the victim. For example, a victim might be entitled to choose between claiming compensation plan benefits and suing in tort, but he may not pursue both.

3. Turning now to the role and compensation of lawyers, the pattern is mixed, not only from country to country but also among the three types of compensation schemes. In general, lawyers play substantial roles in helping victims pursue tort claims, and they play only a small or rare role in helping victims pursue general social insurance benefits. Claims against tailored compensation plans fall in between, and indeed the participation rate of lawyers varies among the plans, although it is probably fair to say that the more serious the injury, the more likely a lawyer will be brought in to represent the claimant. There are many ways to compensate lawyers for both sides, which is a matter discussed further below.

IV. THREE REASONS WHY NATIONS' COMPENSATION SCHEMES MIGHT DIFFER

Although most rich nations have all three of the compensation schemes described above, each has its own special package of plans. Moreover, in their details, the schemes vary from place to place in terms of benefit

26. See Stephen D. Sugarman, *Tort Reform Through Damages Law Reform: An American Perspective*, 27 SYDNEY L. REV. 507, 508 (2005) [hereinafter *Tort Reform*]; Stephen D. Sugarman, *A Century of Change in Personal Injury Law*, 88 CALIF. L. REV. 2403, 2422–23 (2000) (discussing the interplay of insurance and personal injury law).

27. See WOODROOF, *supra* note 20, § 5.2.

28. See, e.g., *Tort Reform*, *supra* note 26, at 516 ("Those especially concerned about social cost accounting . . . might be placated if a reversal of the collateral source rule were joined with a tax (or some suitable substitute) on activities whose costs would otherwise be shifted onto basic safety net benefit schemes.").

parameters, the interrelationship of the schemes, and the role and compensation of lawyers. In this part, I will briefly offer three sorts of considerations that might help explain these differences.

1. Societies may view the purposes of their compensation schemes differently—especially tort law. Some may see tort law's central role as deterring socially objectionable (unreasonably dangerous) conduct; others may see it as helping to put victims back in the position they were before the accident (focusing on a victim's need); still others may see it as doing justice between injurer and victim. Of course, societies may value all of these objectives, though in differing proportions. With respect to both tort law and tailored compensation schemes, nations may differ in the importance they give (if any) to internalizing the costs of accidents into the causes of those accidents.

These different social outlooks might reflect underlying differences in culture and in political ideology. Does the society think of itself as highly individualistic or more as a community? Does it believe strongly in personal responsibility, or do its members more strongly believe that “accidents happen” and that society holds a collective responsibility for repairing the consequences of those accidents?

2. Nations have their own histories and experience their own special pattern of accidents, and perhaps because of path-dependence they find that their packages of compensation schemes differ as a result.²⁹ For example, countries experienced industrialization at different times and in different ways, thereby making workplace injuries a larger social problem in some societies than in others. Automobile travel too developed differently from place to place, and likewise, automobile accidents are not equally problematic in all places. Societies experience different types and frequencies of catastrophes (whether caused by nature or man), and they face different future catastrophic risks. These differences can yield different victim-compensation paths. Further, because nations have differing governing arrangements, both adding new compensation arrangements and eliminating or limiting existing ones can be much more difficult in some places than others.

3. Lawyers are a much more powerful social force in some jurisdictions than in others. Their own interests, when combined with the political and social power they can exercise, may yield differing sorts of compensation schemes. I think it is generally recognized that practicing lawyers play especially prominent political roles in the United States as compared with elsewhere.

29. See Anthony J. Sebok, *What's Law Got To Do with It? Designing Compensation Schemes in the Shadow of the Tort System*, 53 DEPAUL L. REV. 501, 501 (2003) (“It is a banal truism of life that where one starts off in a journey determines, to a great extent, where one ends up. This banal observation can be formalized under the rubric of ‘path-dependency.’”).

V. THREE AREAS IN WHICH NATIONS CAN LEARN (OR HAVE LEARNED) FROM EACH OTHER REGARDING TORT DAMAGES LAW³⁰

I will not here systematically examine all the features of compensation plans to which I referred in Part II, but rather I will look at some selected matters on which U.S. law is (or has been) quite different, in search for insights that might help improve the law in one place or another. Given the points I have made in Part III, I acknowledge that what I call an improvement may well be just my opinion arising from personal values. I also recognize that achieving change is not always easy, especially when one opens the argument by pointing to how things are done in foreign places. Still, my hope is that this comparative exploration can at least help prompt informed conversations—including among those who never realized that there are other ways in which things are done.

1. Consider tort compensation for non-pecuniary loss (“pain and suffering”). The United States is very different from other nations on this dimension.³¹ We make juries available to the parties to decide civil disputes, and they are routinely used in tort cases, whereas most other legal systems have either never used juries for such cases or have fully or largely abandoned them.³² What this means in the U.S. context is that (1) jurors have little or no past personal experience to go on in awarding to accident victims damages for non-pecuniary loss, and (2) juries are not given any instructions by judges as to past awards in similar cases.³³ As a result, in the United States, each successful claimant may be said to receive a personally tailored damages award determined by his or her peers.³⁴ On the other hand, it is widely believed, with respect to non-pecuniary loss, that similar claims are treated much more variably in the United States than elsewhere.³⁵ Moreover, for reasons that may or may not stem centrally from the use of juries, U.S. awards for non-pecuniary loss, on average, are far greater than in other nations (putting aside for the moment cases brought in U.S. states that

30. I do not address in this article the matter of substantive tort doctrine, except to note here that perhaps the most important lead role for American tort law has been to expand the sorts of accidents and injuries for which legal recovery is allowed. Starting in the 1960s, especially in California and then in New Jersey, substantive tort doctrine became more and more pro-victim. *See, e.g.*, O’Brien v. Muskin Corp., 463 A.2d 298, 303 (N.J. 1983) (establishing a pro-victim standard of analysis in products liability cases); Greenman v. Yuba Power Prods., Inc., 377 P.2d 897, 900 (Cal. 1963) (holding manufacturers strictly liable for all products placed on the market). I have in mind, for example, strict product liability rules, claims for emotional distress and wrongful birth, crimes committed by third parties on the defendant’s premises, informed consent and lost chance claims in medical injury cases, and market-share awards in certain mass injury settings. Whether or not courts in other nations explicitly chose to follow American tort law when also moving to embrace these sorts of claims (or at least some of them), surely the lawyers who brought these novel claims in other nations were, in most instances, aware of U.S. developments.

31. Stephen D. Sugarman, *A Comparative Law Look at Pain and Suffering Awards*, 55 DEPAUL L. REV. 399, 399 (2006).

32. *Id.* at 401.

33. *Id.* at 400, 417.

34. *Id.*

35. *Id.*

have imposed a statutory cap on such awards).³⁶

While it may seem like other countries might look to the United States and find our approach to this issue attractive, largely the opposite has actually occurred. Most nations have sought both to keep their non-pecuniary loss awards smaller than ours and to make their awards more consistent from case to case.³⁷

This is not to say that all other nations make similar awards for non-pecuniary loss or that the U.S. record of very high awards has gone unnoticed and is decidedly without impact. For example, in recent years in both England and Italy there has been a substantial upward adjustment in the amount paid for non-pecuniary loss—a change that, while not obviously embraced because of U.S. practice, moves those legal systems in the direction of American patterns.³⁸ Still, payments in these countries and the other more generous European (e.g., Ireland) and common law nations (e.g., Canada and Australia) still remain well below U.S. levels.³⁹

It is also important to appreciate that non-pecuniary loss awards for various serious harms vary widely among other European nations—with poorer countries, like Greece and Portugal, and countries with stronger social welfare systems, like Sweden and Denmark, providing perhaps only ten percent as much as is provided in higher paying European jurisdictions.⁴⁰

What is more common among other rich nations, however, is the existence of a strategy designed to create case-to-case consistency, however generous or un-generous the nation's legal system is overall. In England and Germany, for example, careful records are kept as to how much money is awarded for certain types of harms, such as broken legs, lost eyes, paraplegia, lost arms, and so on.⁴¹ These past award levels are then carefully followed by judges deciding new cases (with minor adjustments made where thought appropriate in individual cases).⁴² In Italy and New South Wales, Australia, for example, a slightly different approach is used, yielding essentially the same result.⁴³ There, injuries are assigned a

36. *Id.* at 418.

37. *Id.* at 432.

38. *Id.* at 410.

39. *See id.* at 422–23, 430.

40. *See PERSONAL INJURY AWARDS IN EU AND EFTA COUNTRIES* (David McIntosh & Marjorie Holmes eds., 2003); Sugarman, *supra* note 31, at 411; *PERSONAL INJURY AND WRONGFUL DEATH DAMAGES CALCULATIONS: TRANSATLANTIC DIALOGUE* (John O. Ward & Robert J. Thornton eds., 2009).

41. For England, see generally, JUDICIAL STUDIES BOARD, *GUIDELINES FOR THE ASSESSMENT OF GENERAL DAMAGES IN PERSONAL INJURY CASES* (10th ed. 2010). *See also* Sugarman, *supra* note 31, at 427.

42. Sugarman, *supra* note 31, at 427.

43. *Id.* at 426.

percentage based on severity.⁴⁴ In a case before the court, then, once the victim's disability percentage is determined, the presumptive award for non-pecuniary loss may be found on a table.⁴⁵

Together these approaches create what might be termed "scheduled" awards, a solution that has been recommended by several scholars to U.S. courts, and which I also favor.⁴⁶ Notice that this strategy need not require the elimination of American juries.⁴⁷ Rather, juries could be given this sort of data and told that they should either approximately replicate what appears to be the past pattern of awards for this victim's type of harm, or if they wish to make a different award (higher or lower), they must give specific reasons justifying a deviation.⁴⁸ Based on the reasons given, trial judges could then decide whether to affirm such deviations or to reject them (in which case the losing party would perhaps have to either agree to a more typical award or go through a new trial).

Beyond seeking consistency from case to case, the Canadian Supreme Court, for example, explicitly acted to rein in awards of non-pecuniary damages in a way that might also be appropriate for U.S. jurisdictions to follow.⁴⁹ The court initially set a maximum on the award that may be given to the most seriously harmed victim at \$100,000⁵⁰ with the understanding that this ceiling would grow over time with inflation.⁵¹ At present, the maximum is about \$300,000, which is similar to maxima recently set by legislation in Australian states.⁵² What should be emphasized here is that this sort of maximum not only limits what may be awarded to the most seriously harmed, but also the courts and statutes have made clear that other injuries are to be scaled down from that maximum. So, for example, if a victim in New South Wales with a 100% disability rating were to receive \$350,000 in non-pecuniary damages, then a victim with a 50% disability rating would receive only half as much.

This approach is to be contrasted with the way that U.S. jurisdictions impose monetary caps on awards for pain and suffering. The U.S. approach allows juries to make awards as usual, and then, if their award is above the cap, the judge cuts it off at the cap.⁵³ This means that harms of a wide range

44. *Id.*

45. For Italy, see Giovanni Comandé, *Towards a Global Model for Adjudicating Personal Injury Damages: Bridging Europe and the United States*, 19 TEMP. INT'L & COMP. L.J. 241 (2005); Sugarman, *supra* note 31, at 426.

46. See, e.g., Randall Bovbjerg et al., *Valuing Life and Limb in Tort: Scheduling "Pain and Suffering,"* 83 NW. U. L. REV. 908 (1989).

47. *Id.* at 959.

48. *See id.*

49. Andrews v. Grand & Toy Alberta Ltd., [1978] 2 S.C.R. 229, 233 (Can.).

50. *Id.* at 233.

51. *Id.* at 258.

52. For New South Wales, see *Civil Liability Act 2002* (NSW) pt 2, div 3, s 16 (Austl.) (setting maximum award for non-economic loss damages awards at \$350,000).

53. See David M. Studdert et al., *Are Damages Caps Regressive? A Study of Malpractice Jury Verdicts in California*, 23 HEALTH AFF. 54, 54 (2004).

of seriousness might wind up being compensated at the cap, and nothing is done in U.S. jurisdictions to scale down the award for less serious harms.⁵⁴ Moreover, U.S. caps are generally not adjusted for inflation which seems, frankly, rather odd.⁵⁵ Hence, even if individual states wanted to be more generous than other nations, they might consider embracing the Canadian/Australian approach⁵⁶ by setting, say, \$500,000 (adjusted for inflation) as the amount to be paid to the most gravely injured, with the understanding that those with lesser harms are to receive awards that are appropriately scaled down from that ceiling.

Other countries have also adopted strategies that U.S. jurisdictions might find attractive in dealing with non-pecuniary loss awards for minor injury cases. One approach, adopted not too long ago in New South Wales, is to impose a threshold on all personal injury tort claims.⁵⁷ There, unless the injury results in at least a 15% disability, no award is made for what we in the United States would call pain and suffering.⁵⁸ The idea is that these sorts of harms are either fairly modest or whatever pain and suffering the victim endured is gone by the time the case is resolved.

One attraction of this solution for U.S. jurisdictions is that it takes away the leverage that plaintiff's lawyers now have in settling small cases. Both sides know that defendants are eager to get these cases off their books at a small cost, and because of that they wind up willing to settle for what many would think are extravagant pain and suffering sums, given the small scale of the injury, just because the defense side would incur even higher legal and other costs in actually defending such claims in court. If one agrees that U.S. victims now get windfalls in such cases, this threshold strategy is one way to address the problem.

Indeed, notice that this is roughly the way that Michigan and New York deal with small injury automobile injury claims under their automobile no-fault plans.⁵⁹ Both of these states provide substantial, but not at all comprehensive, no-fault benefits to cover income loss and medical and related expenses.⁶⁰ Seriously harmed victims may sue in tort as well both for pain and suffering and for pecuniary loss not compensated by the plans.⁶¹ But those who do not have serious injuries are precluded from seeking

54. *Id.* at 55, 63.

55. *Id.* at 56.

56. See, e.g., Bruce A. Thomas, *A Canadian View of the Product Liability Aspects of Innovation*, 15 CAN.-U.S. L.J. 93, 96 (1989).

57. See *Civil Liability Act 2002* (NSW) pt 2 (Austl.).

58. *Id.* pt 2, div 3, s 16.

59. See N.Y. INS. LAW §§ 5101–09 (McKinney 2005); MICH. COMP. LAWS § 500.3135(1) (West 2006).

60. See N.Y. INS. LAW §§ 5101–09; MICH. COMP. LAWS § 500.3135(1).

61. See N.Y. INS. LAW § 5104(a); MICH. COMP. LAWS § 500.3135(1).

recovery for pain and suffering damages via tort law.⁶² Neither Michigan nor New York uses the 15% disabled threshold used in New South Wales. Instead, they use language, regulations, and past practice to determine whether the threshold is met or not.⁶³ Nevertheless, evidence shows that the pain and suffering thresholds in those two states—when combined with no-fault benefits for pecuniary losses—take a very substantial share of automobile cases out of the tort system.⁶⁴

Some Canadian provinces have adopted yet a different approach to minor injuries. They still allow pain and suffering awards in such cases, but they have put a fairly low statutory dollar cap (\$4000 or less) on such claims.⁶⁵ This approach allows for at least some recovery for those who may have suffered intense, but transient pain, as well as those with lingering low-level suffering. But it makes clear to both sides in their settlement negotiations what a modest ceiling on such damages would face the victims if they went to court. My personal preference is for the New South Wales approach because it helps concentrate money paid out by the tort system on the more seriously injured, but I view the Canadian strategy as a creative compromise.

One other solution worth mentioning is the German practice of giving some victims (e.g., those injured by certain public utilities) the choice of suing in tort under a regime of strict liability (i.e., not having to prove defendant's fault) if they are willing, in exchange, to give up their claim for pain and suffering damages.⁶⁶

In sum, there is a great deal that American jurisdictions might learn from the treatment elsewhere of damages for non-pecuniary loss.⁶⁷ Yet, I concede that this discussion of non-pecuniary loss recovery is incomplete without giving attention to the compensation of lawyers, a matter to which I will turn at the end.

2. More U.S. jurisdictions might consider changing the common law collateral source rule. Most states still follow the principle that tort recovery is always primary, although, during the past three decades of “tort reform,” through efforts pressed on legislatures by defense interests, several American states have already reversed the collateral source rule with respect

62. See N.Y. INS. LAW § 5104(a); MICH. COMP. LAWS § 500.3135(1).

63. See, e.g., N.Y. INS. LAW §§ 5102(d) (defining “serious injury”).

64. See U.S. DEP'T OF TRANSP., COMPENSATING AUTO ACCIDENT VICTIMS: A FOLLOW-UP REPORT ON NO-FAULT AUTO INSURANCE EXPERIENCES 114–15 (May 1985) (reporting on declines in lawsuits filed in Michigan and New York); Thomas C. Jones, *The Michigan Study, in* NO-FAULT AUTOMOBILE INSURANCE IN ACTION: THE EXPERIENCES IN MASSACHUSETTS, FLORIDA, DELAWARE AND MICHIGAN 379, 383 (1977) (showing a huge decline in minor tort liability claims in Michigan).

65. E.g., New Brunswick Injury Regulation (Insurance Act), N.B. Reg. 2003-20 § 4 (Can.) (capping non-pecuniary loss for all minor personal injuries at \$2500).

66. See B.S. MARKESINIS, A COMPARATIVE INTRODUCTION TO THE GERMAN LAW OF TORTS 516 (1990).

67. See *Tort Reform*, *supra* note 26, at 512–16 (2005) (discussing U.S. and Australian methods of compensation for non-economic loss).

to some other sorts of compensation.⁶⁸

Perhaps most significantly, many legal systems do not allow tort recovery for medical expenses because the victim pays nothing for those services and instead merely receives medical treatment from the nation's health care system. As the United States has just now moved further in that direction, it seems a good time to consider whether more states should reverse the collateral source rule with respect to government- or employer-provided health insurance, as well as with respect to Social Security benefits, workers' compensation benefits, and other routine employer-based wage-continuation benefits like sick leave.

A big advantage of such a change, in my view, is to reduce the complexity of the common law system in which these other sources of compensation must either seek reimbursement from individual victims or allow double recovery.

Making tort recovery secondary to other basic social welfare compensation schemes is generally not popular with those who see tort's main function as promoting safety by threatening to impose accident costs on careless injurers and by actually internalizing those accident costs into the injurers' product or service when harm results because the defendant has failed to take the proper precautions. But notice that this goal might be substantially served in other ways. For example, along with altering the collateral source rule, the state could surcharge liability insurance policies (or equivalent corporate self-insurance arrangements) and direct the proceeds to health insurers and other relevant social insurance plans.

3. In light of our growing income inequality and the popular resentment of the stratospheric earnings of Wall Street plutocrats, it might also be time for American jurisdictions to reconsider the current practice of having tort law fully replace lost income (or lost earning capacity). Defenders of the current regime will argue that individual justice demands full compensation of victims, and perhaps that this is necessary to achieve tort law's deterrence goals.⁶⁹ Yet, from other viewpoints, the common law rule seems unfair and unnecessary.⁷⁰

Generally speaking, we all pay the same price for a product that might injure people with a wide range of income levels. The same goes for those injured on the premises of others, those injured in transportation accidents, from medical injuries, and so on. Yet, the full recovery principle means that a rich victim gets more out of the tort system for the same injury than does a

68. Joseph Sanders & Craig Joyce, "*Off to the Races*": *The 1980s Tort Crisis and the Law Reform Process*, 27 HOUS. L. REV. 207, 223 n.60 (1990).

69. *Tort Reform*, *supra* note 26, at 509.

70. *Id.* at 509–10.

poor victim.⁷¹ This seems undesirably regressive. Moreover, those with high incomes typically do not, and should not, need full recovery from tort law to make them whole with respect to their lost earnings. That is because higher earners tend to have, and if prudent should have, private disability insurance that already protects their income from a variety of risks including accidents that might lead to tort claims.

One way to alter tort law to deal with this issue is to restrict damages for income replacement in some way. Indeed, this has happened recently in Australia. In a change that I find quite attractive, New South Wales tort law now replaces lost earnings up to a maximum of three times the annual average earnings of full-time adult workers.⁷² This would not be as revolutionary a change for the United States as it might appear at first blush once one considers that all of our workers' compensation plans, as well as our Social Security system, already place a limit on the amount of past wages that are considered in making benefit awards.⁷³

An additional (and I believe sensible) reform would be to impose a modest deductible on income replacement by, say, having the first week of lost earnings fall to the victim. This is an amount that can be absorbed by most workers, especially those with paid sick leave (an employee benefit that the United States should make mandatory, but alas so far has not).⁷⁴ This sort of provision would also mimic a common feature of workers' compensation laws and the laws of the five U.S. states that provide short-term income replacement for non-occupational disabilities.⁷⁵ When combined with the earlier-discussed changes in compensation for non-pecuniary losses and the collateral source rule, this would rid tort law of a huge number of small claims—leaving the tort system to focus on, and better focus its benefits on, the more seriously injured, which is a shift that I favor.

VI. THREE AREAS IN WHICH NATIONS CAN LEARN (OR HAVE LEARNED) FROM EACH OTHER REGARDING SOCIAL INSURANCE AND TAILORED COMPENSATION PLANS

Trying to get government to do more for victims is an uphill battle in a time of high unemployment and resistance to larger deficits. Moreover, in the United States especially, given the power of the plaintiffs' bar, it is never easy to make political headway with changes that would threaten lawyers' business, even if victims and consumers would, overall, be better off. Still, there are some win-win possibilities out there.

1. It is important to appreciate that nations differ in the ways they have

71. *Id.* at 509.

72. *Civil Liability Act 2002* (NSW) s 12 (Austl.).

73. Stephen D. Sugarman, *Short Term Paid Leave: A New Approach to Social Insurance and Employee Benefits*, 75 CALIF. L. REV. 465, 467 (1987).

74. *Id.*

75. *Id.*

made important tailored compensation plans either full, or only partial substitutes for tort law.⁷⁶ For example, in the United States, workers' compensation plans are, broadly speaking, complete substitutes for tort law. To be sure, in the rare instances in which employers intentionally harm victims, a tort remedy is likely to be available, and one who suffers a work injury may also sue a third party tortfeasor, such as the maker of a defective product that injured the plaintiff on the job. But, in the overwhelming share of work injuries, the victim's claim is exclusively against the employer and only under the workers' compensation scheme and not in tort.⁷⁷

The American solution may seem obvious or natural here, but in most other places with workers' compensation plans, victims may sue in tort as well.⁷⁸ Normally they may only sue for losses not already covered by the workers' compensation scheme, but still, in serious injury cases, those losses—both with respect to income and pain and suffering—could be very substantial. In my view, a better solution is to liberalize workers' compensation benefits and keep the American complete substitute solution.

By contrast to U.S. workers' compensation rules, as already noted, America's two most generous automobile no-fault states (Michigan and New York) have put in place plans that are only partial substitutes for tort law.⁷⁹ Yet, in places like Quebec and Israel, automobile no-fault plans, like our workers' compensation plans, are complete substitutes for tort claims.⁸⁰ It is also important to understand that in both Quebec and Israel, seriously injured automobile victims obtain some recovery from the no-fault scheme for pain and suffering.⁸¹ This too is sharply at odds with American workers' compensation schemes, which do not provide such benefits.⁸²

Overall, I believe that American victims and consumers would substantially benefit if (1) we adopted a Quebec/Israeli type, automobile no-fault scheme that fully replaces tort law,⁸³ and (2) we added moderate levels of pain and suffering benefits for seriously injured workers to our existing exclusive-remedy workers' compensation plans. This package, I believe, would be cheaper for consumers and would provide improved benefits for a large share of the seriously injured.

76. *Id.*

77. *See id.*

78. *Tort Reform*, *supra* note 26, at 510.

79. *See supra* note 59 and accompanying text.

80. *Tort Reform*, *supra* note 26, at 511.

81. *Id.*

82. Awards that some states make that are based upon specific impairments, like loss of an arm or loss of an eye, are usually intended more as proxies for presumed income loss than for pain and suffering.

83. STEPHEN D. SUGARMAN, "PAY AT THE PUMP" AUTO INSURANCE: THE CALIFORNIA INJURY PLAN (VIP) FOR BETTER COMPENSATION, FAIRER FUNDING, AND GREATER SAFETY 5 (1993).

2. Many nations might be well served by adopting more tailored compensation schemes than they have at present. Northern Ireland and Israel, for example, have plans that cover terrorism victims that might be explored elsewhere.⁸⁴ Sweden has a plan for medical injuries that is worth studying. Many creative compensation plans for other recurrent or potentially catastrophic accidents have been proposed over the years in the United States (e.g., for side effects of pharmaceutical drugs) and are worth reconsidering.

All countries might profit from reconsidering their compensation approach to airplane accident victims—especially those killed in commercial air crashes.⁸⁵ Rather than having heirs sue the airlines in tort, where they are required to prove negligence on the part of the defendant's employees (and then recover losses based on the victim's past earnings), perhaps it would be more fair and administratively much more efficient to provide a uniform life insurance policy (of, say, \$500,000) as part of the ticket price for all passengers, the proceeds of which would be paid out to the passenger's heirs in exchange for precluding a wrongful death tort claim.⁸⁶ This approach, which I find attractive, would treat with equal dignity the death of each passenger.⁸⁷

This solution would allow those with substantial earning power the option to buy what they believe to be an appropriate amount of personal life insurance as a supplement to the policy provided by the airlines—policies that most people would (wisely) buy that would cover death in general and would not be restricted to airplane-crash death.⁸⁸ In fact, financially better-off passengers with dependent family members already typically have general life insurance policies (or other mechanisms providing financial security to their families) with the result that the benefit paid by those policies now duplicates recovery that is currently available to survivors who succeed in a tort claim. Also, in the same vein as suggested earlier of those who are keen to have carefully calibrated financial incentives intended to stimulate airline safety, fines might be imposed on a carrier when government inspectors (who examine all commercial crashes anyway) determine that a plane crashed due to carrier negligence.⁸⁹ The proceeds of such penalties could, for example, be put toward the construction of newer and safer airports or to support the national air control system.

In the spirit of treating all victims the same, it is worth noting how the

84. *But see* Robert L. Rabin & Stephen D. Sugarman, *The Case for Specially Compensating the Victims of Terrorist Acts: An Assessment*, 35 HOFSTRA L. REV. 901 (2007).

85. *See* 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*, 52 J. AIR L. & COM. 681 (1987).

86. *See id.* at 686 (proposing an ideal plan in a "typical" no-fault system).

87. *See id.* at 687.

88. *See id.* at 686-88 (comparing two different no-fault systems using insurance).

89. Cf. 49 U.S.C.A. §§ 40113-14 (West 2006) (describing the Federal Aviation Administration's responsibility to investigate and report).

U.S. 9/11 Victim Compensation Fund treated the families of those killed by the terrorists who crashed the four airplanes in the September 11, 2001 attacks.⁹⁰ The scheme's special administrator, Kenneth Feinberg, first decided that the fund would award \$250,000 in non-pecuniary benefits for each life lost,⁹¹ wisely and fairly refusing to treat families differently based on claims about how much the deceased suffered in the final moments before death.⁹² To that flat sum, he also added flat sums if the deceased left a surviving spouse and/or children.⁹³

Feinberg was additionally required by statute to pay benefits that reflected the lost earning power of the deceased to survivors.⁹⁴ This, all other things being equal, meant paying much larger sums to the families of high-wage earners as compared with low-wage earners—which, of course, is the tort law tradition, as well as the way Social Security works and the way workers' compensation generally works.⁹⁵ But after the program was wound up, Feinberg wrote that he felt it would have been fairer, as a special one-time benefit that acknowledged that these nearly 3000 people had altogether involuntarily lost their lives to terrorism, if the entire award to each surviving family would have been the same amount.⁹⁶ Some, both in the United States and abroad, might find this to be an attractive way to deal with death caused in a wide range of ways.

3. Nations might learn from each other about how tailored compensation plans are meshed with other forms of recovery. For example, if a society has a true national health insurance scheme, what is the point of having medical care connected to work-related injuries be separately covered by workers' compensation plans as it is today in the United States? So, as America moves toward finally catching up with the rest of the world in having a comprehensive health care scheme,⁹⁷ I believe that our states should consider stripping those benefits from workers' compensation. Those benefits made much more sense a century ago when there was no other source of health insurance for workers. For those who are eager to

90. See generally Robert L. Rabin, *The Quest for Fairness in Compensating Victims of September 11*, 49 CLEV. ST. L. REV. 573 (2001).

91. See *id.* at 582.

92. See *id.* at 585.

93. See *id.*

94. KENNETH R. FEINBERG, *WHAT IS LIFE WORTH?: THE UNPRECEDENTED EFFORT TO COMPENSATE THE VICTIMS OF 9/11* 34–35 (2005).

95. See, e.g., Sugarman, *supra* note 85, at 685 (workers' compensation is based on lost earning power); see also Rabin, *supra* note 90, at 584 n.60 (benefits in workers' compensation cases are usually calculated by a percentage of decedent's weekly wage).

96. FEINBERG, *supra* note 94, at 182–83.

97. See *Health Care Reform*, N.Y. TIMES, http://topics.nytimes.com/top/news/health/diseasesconditionsandhealthtopics/health_insurance_and_managed_care/health_care_reform/index.html (last updated Dec. 13, 2010).

have these work-related costs internalized into the cost of the relevant employer's goods or services, note that this already happens if the employer provides health insurance to its employees. Indeed, at present, the vast share of workers has duplicate sources to cover health care benefits for work-related injuries. As a result, workers and the two relevant insurers have to go through administrative busywork to sort out regarding which carrier should ultimately bear the cost.

The 9/11 Compensation Plan ("9/11 Plan") contained one highly controversial feature for a tailored compensation plan: the benefits otherwise payable to survivors of those killed on 9/11 were fully reduced by the amount of life insurance the victim had.⁹⁸ This is a very rare feature, as normally workers' compensation, automobile no-fault plans, and other tailored compensation schemes ignore life insurance, which is treated as intended—to serve as a voluntary supplement to other benefits.⁹⁹ Indeed, even the jurisdictions that have reversed somewhat the collateral source rule for torts cases have not included life insurance proceeds as money to be deducted from the otherwise appropriate tort damages award.

Nonetheless, this feature of the 9/11 Plan had the twin virtues of making the plan benefits more carefully tailored to the actual need of the survivors and helping to keep the plan benefits from being even more heavily concentrated on the families of high earners. On the other side, however, survivors understandably howled when they received less from the plan than did otherwise identically situated families whose now deceased breadwinner voluntarily and irresponsibly chose not to purchase life insurance for his or her family but instead, for example, spent those would-be premium dollars on an expensive automobile.¹⁰⁰ Moreover, it is rumored that a large share of the relatively few families (perhaps 100 of 3000) that refused to seek funds from the 9/11 Plan and instead sued the airlines (and others) in tort did so because their now-dead loved ones had large life insurance policies, and as a result their 9/11 Plan benefits would have been very small. This experience suggests that Congress may have gotten the social balance wrong in the way it meshed 9/11 Plan benefits with other compensation sources.

Lastly, in meshing compensation plans and tort, several U.S. plans, both existing and proposed, include creative and somewhat varying options. Under the National Vaccine Injury Compensation Program ("Vaccine Plan"), for example, those who say that they or their children have been injured as a side effect of having been vaccinated must first file a claim for benefits under the program.¹⁰¹ The plan administrators then determine whether the claimant is eligible¹⁰² and, if so, how much money is

98. FEINBERG, *supra* note 94, at 35–36; see Rabin, *supra* note 90, at 578.

99. See Rabin, *supra* note 90, at 579–80.

100. See *id* at 583.

101. *Filing a Claim with the VICP*, HEALTH RESOURCES AND SERVICES ADMINISTRATION, http://www.hrsa.gov/vaccinecompensation/filing_claim.htm (last visited Dec. 20, 2010).

102. *Persons Eligible to File a Claim*, HEALTH RESOURCES AND SERVICES ADMINISTRATION, http://www.hrsa.gov/vaccinecompensation/persons_eligible.htm (last visited Dec. 20, 2010)

appropriate to distribute. At that point the claimant has a choice—either accept the plan's offer or reject it forever and, if he or she wishes, then sue in tort. In this way the two compensation arrangements are exclusive from one another, but it is up to claimants to choose a scheme.

The 9/11 Compensation Plan had a somewhat similar feature. If one filed a claim against the Fund, one could not sue in tort.¹⁰³ Unlike the Vaccine Plan, survivors were not required to first file with the fund to see what it would offer. To the contrary, if they did that, they were bound by what the fund decided to provide to them and forfeited their right to opt out and to sue the fund.¹⁰⁴ To help potential claimants figure out for themselves which route to take, the 9/11 Plan's administrator published extensive documentation setting out how benefits would be determined so that potential claimants and their advisors could be reasonably sure of what their benefit under the plan would be were they to file.¹⁰⁵

Professor Jeffrey O'Connell has proposed a wide range of cleverly constructed choice schemes. To give but one example here, O'Connell designed a scheme in which motorists would, in advance of any accident, decide whether they wanted to be in the tort system or the no-fault system by buying one or the other type of insurance.¹⁰⁶ If two no-fault electing drivers crashed into each other, each of them could claim only no-fault benefits and only from his or her own insurer.¹⁰⁷ If two tort-electing drivers crashed into each other, they could claim from each other in tort, provided, of course, they could prove the other was at fault.¹⁰⁸ In one-car crashes, the no-fault electing driver could claim no-fault benefits from his or her insurer, and the tort-electing driver presumably would get no automobile insurance-related recovery, as he or she would have no one to sue in tort (putting aside situations in which the crash came about through a defective car or unreasonably maintained roads, etc.).¹⁰⁹

If a no-fault plan driver and a tort-system driver were involved in a crash, O'Connell proposed that the no-fault driver would claim from his or her no-fault plan.¹¹⁰ The tort system driver could not sue the no-fault plan driver because the latter was immune from tort claims by having elected the

(outlining the parameters for eligibility).

103. See Rabin, *supra* note 90, at 586; Rabin & Sugarman, *supra* note 84, at 908.

104. See Rabin, *supra* note 90, at 586.

105. See *id.*

106. See Jeffrey O'Connell, *No-Fault Auto Insurance: Back by Popular (Market) Demand?*, 26 SAN DIEGO L. REV. 993 (1989).

107. *Id.* at 996.

108. *Id.*

109. See *id.*

110. See *id.*

no-fault regime.¹¹¹ But the tort system victim could claim from the “uninsured motorist” portion of his own automobile insurance—provided he could prove that the no-fault system driver had been at fault in causing the accident.¹¹² While it might at first seem unfair that the tort system driver had to pay for “uninsured motorist” insurance in this setting, notice how, as an offset, the tort system driver’s liability insurance premium would be reduced under O’Connell’s scheme as other drivers opted for no-fault and thereby gave up their right to sue tort system drivers.¹¹³

In fact, O’Connell believed that this ingenious scheme would function only in rare cases because he was confident that in short order most drivers would opt for the no-fault alternative, finding it not only substantially cheaper but also to provide no- (or lower-) hassle benefits regardless of who was at fault.¹¹⁴ But so far, we have had no opportunity to test this prediction, as no state has embraced his proposal. Indeed, when Arizona voters were presented with the opportunity to put it into play, they rejected the idea.¹¹⁵ For now, it is important at least to note that, in contrast with the choice features of the 9/11 Plan and the Vaccine Plan, O’Connell’s automobile no-fault choice plan calls for people to make a choice before any injuries take place.

VII. THREE WAYS IN WHICH LAWYER COMPENSATION MIGHT BE ARRANGED

1. Defense lawyers under the American tort system are paid by defendants or by defendant insurance companies as part of the insurance contract¹¹⁶ (a routine feature of motor vehicle liability insurance policies, for example). These lawyers are normally paid on an hourly basis.¹¹⁷ Claimant lawyers under the American system are almost always paid on a so-called contingent fee basis.¹¹⁸ This arrangement has two important features. First, it means that the lawyers are only paid if they win, so that to some degree, winning claimants help fund the work done for losing claimants. The other feature is that when they win, the lawyers are paid a percentage of the award. This need not be the only form of payment. They could simply receive, for example, an extravagant hourly rate if they win. Nonetheless, the percentage-fee system is solidly in place, and a typical fee in torts cases is 33%, at least if the case settles. Sometimes, however, claimants can

111. *Id.*

112. *Id.*

113. *See id.*

114. *See id.* at 994; *see also* Gary T. Schwartz, *Auto No-Fault and First Party Insurance: Advantages and Problems*, 73 S. CAL. L. REV. 611, 621 (2000).

115. *See* ROBERT H. JOOST, *AUTOMOBILE INSURANCE AND NO-FAULT LAW* § 1:2C, at 26 (2d ed. 2002).

116. Robert H. Mnookin, *Negotiation, Settlement and the Contingent Fee*, 47 DEPAUL L. REV. 363, 365 (1998).

117. *Id.*

118. *Id.*

negotiate a lower percentage, and sometimes the agreed percentage can go up to, for example, 50% if the lawyer has to try the case and further defend a verdict on appeal.¹¹⁹

California has restricted attorneys' fees in medical malpractice cases by statute, allowing lawyers to charge no more than 40% of awards up to \$50,000; 33.33% of the next \$50,000 of recovery; 25% of the next \$500,000; and 15% on all recovery beyond that.¹²⁰ This schedule appears to be based on the theory that relatively little extra work is required to obtain higher sums for victims. Because most medical malpractice cases that are brought involve substantial injuries, the upshot of the schedule is to reduce considerably the fees that successful lawyers would otherwise earn.¹²¹ While this has the effect of allowing victims to keep a greater share of their recovery, it has reportedly also meant that many experienced trial lawyers have left the practice of medical malpractice cases, leaving claimants potentially without representation or representation by less competent counsel.¹²² Sometimes, then, victims might be financially worse off under the restricted fee regime than they would be under the conventional U.S. fee arrangement.¹²³

2. This American practice of each side paying its own fees is atypical worldwide.¹²⁴ Many legal systems use a "loser pays" scheme.¹²⁵ This means that if the case goes to trial and the defendant wins, the plaintiff not only must pay his or her own lawyer (note the contrast with the U.S. system, where 33% of 0 is 0), but the plaintiff must also pay the defendant's legal fees (as approved by the court).¹²⁶ As this could be a considerable sum, this rule is said to discourage many claimants who do not feel confident that they have a winning case.¹²⁷ From the societal perspective, this contrast means that in the United States the lawyers who represent victims play the role of screening out weak cases because they will earn nothing if no recovery is obtained.¹²⁸ In other systems, victims themselves (to be sure after obtaining

119. See *Miss. State Bar v. Blackmon*, 600 So. 2d 166, 176 (Miss. 1992) (Banks, J., dissenting); *Hayseeds, Inc. v. State Farm Fire & Cas.*, 352 S.E.2d 73, 80 (W. Va. 1986).

120. See CAL. BUS. & PROF. CODE § 6146(a) (West 2003).

121. See Jane E. Reames, *Contingency Fees: Victim or Contributing Cause of Medical Malpractice Reform Acts?*, 62 CHI.-KENT L. REV. 271, 283 (1985).

122. See *id.* at 284.

123. See *id.* at 288.

124. See W. Kent Davis, *The International View of Attorney Fees in Civil Suits: Why Is the United States the "Odd Man Out" in How It Pays Its Lawyers?*, 16 ARIZ. J. INT'L & COMP. L. 361, 400 (1999); see also Walter Olson, *Loser Pays*, POINTOFLAW.COM (May 21, 2004), <http://www.pointoflaw.com/loserpays/overview.php>.

125. See Davis, *supra* note 124, at 400.

126. See *id.* at 403.

127. See *id.* at 408.

128. See *id.* at 377-78.

initial legal advice) must serve the function of holding back on bringing weak cases.¹²⁹ Of course, victims with no real assets and little income would be in no position actually to pay either side's legal fees if their cases were lost.¹³⁰ In the United States, they can still find representation for decent claims.¹³¹ Elsewhere, usually some legal assistance scheme is required to ensure representation in what might be viewed as somewhat borderline cases.¹³²

Note also that in most places under the "loser pays" scheme, the lawyers are paid for the work they do—either so much for each task or so much per hour—although England recently has begun to introduce percentage fees on the claimant side. It is widely believed that lawyers on both sides of cases earn considerably less outside the United States than they do here for the handling of similar cases.¹³³

Of course, if the claimant wins in court or obtains a settlement, then—at least in principle—in most other countries the claimant is able to retain the full amount of his or her recovery because the other side must cover his or her legal fees.¹³⁴ This principle is sometimes breached in countries where the loser is required to pay a sum that is understood to be well less than the fair legal cost of representing the victim and where the claimant's lawyer is permitted to charge the client the difference. In those instances some of the recovery goes to the lawyer, but as a general rule that amount is far less than it would be in the United States.

This difference in the compensation of lawyers is one very important reason why comparisons of gross awards in tort cases between the United States and elsewhere are misleading. If one assumes, as I do, that as a psychological matter, the American claimant thinks of his or her legal fees as coming out of the portion of the recovery allocated to pain and suffering, then one must take that into account when discussing the enormously higher awards for non-pecuniary loss made in the United States.¹³⁵ I have shown elsewhere that unless U.S. pain and suffering awards are several times the amount awarded for pecuniary loss, then the U.S. situation is no longer the outlier that it initially appears to be in comparison with the higher-paying European and common law nations.¹³⁶ To be sure, in many individual cases American claimants do win pain and suffering awards that are a very large share of the total award, but in cases where plaintiffs are gravely injured, this

129. *See id.* at 408.

130. *See id.* at 410.

131. *See id.* at 377–78.

132. *See id.* at 410; *see, e.g.*, MINISTRY OF JUSTICE, LEGAL AID: REFOCUSING ON PRIORITY CASES, 2009, C.P. 12/09, at 8 (U.K.) (demonstrating that "borderline" cases may be considered for legal assistance schemes where public interest considerations outweigh benefits to the individual litigants alone).

133. *See* Sugarman, *supra* note 31, at 401.

134. *See id.* at 419.

135. *See id.* at 401.

136. *Id.* at 421–22.

may not be so because the pecuniary award is so enormous.¹³⁷

To me, this means that in the United States, any statutory reform of rules governing pain and suffering should take into account—and perhaps also reform—the rules on legal fees.¹³⁸ This has not happened, with the result that where pain and suffering awards are now limited in some U.S. jurisdictions to \$250,000 or less, the actual sum retained by victims is much less than in comparable cases in other nations.¹³⁹ Indeed, often the victim's legal fee will be more than the full amount of his or her pain and suffering award so that some of the fee will have to come out of the rest of his or her damages.¹⁴⁰ In such cases, claimants are probably financially worse off in those states than are their counterparts in even those European nations that pay very little for non-pecuniary loss (like Denmark).¹⁴¹

3. These considerations lead me to favor a reform in the United States that would simultaneously change both the rules for recovery for pain and suffering and the rules for compensating lawyers. As for the former, I will add nothing here to the idea advanced in an earlier section about limiting pain and suffering recovery to, say, \$500,000 (adjusted for inflation) for the most seriously injured, with recovery scaled down from there for lesser injuries (perhaps with juries being informed of the pattern of past awards in the hope of gaining greater consistency).¹⁴²

As for legal fees in this new regime, I suggest a third way. Victims would never pay. If they lose, their own lawyer remains uncompensated (as they do now), but defendants would still have to pay their own lawyers (as they do now). But if claimants win, instead of their legal fees coming out of their award, defendants would pay those costs. While this is, of course, a new cost to defendants, it is offset by the reduced cost of pain and suffering awards that is part of the package.

Moreover, I also propose altering the way in which the victim's legal fees would be determined. I recommend keeping a percentage-fee basis but altering the percentage amount from the somewhat typical 33% now used. Instead, I would favor a regime something like the following.¹⁴³ If the defendant offers a settlement within, say, ninety days of the time the case is filed and the settlement is accepted, the lawyer for the claimant is paid an

137. *Id.* at 422.

138. *See id.* at 430–33.

139. *Id.* at 427–28.

140. *See id.* at 428.

141. *See id.*; Stephen D. Sugarman, *The Legal Sting of Pain and Suffering*, L.A. TIMES, June 5, 2005, <http://articles.latimes.com/2005/jun/05/opinion/oe-sugarman5>. To be sure, this analysis is further complicated to the extent that nations also differ in the amounts they award for pecuniary loss in comparable cases, a matter I put aside here.

142. *See supra* text accompanying note 56; *see also* Sugarman, *supra* note 31, at 430.

143. *Cf. Tort Reform*, *supra* note 26, at 522 (offering an earlier version of this proposed regime).

amount equal to 10% of the settlement amount as the fee. If no settlement offer is made or if there is no settlement, and the case goes ahead, then the claimant's lawyer's fee is 10% of the amount of the initial settlement offer (if any) plus 40% of any amount obtained above the initial settlement offer.

This approach is based on the idea that at the start of the case, the claimant's lawyer has made only a modest effort, and hence a 10% fee is fair enough. Moreover, this arrangement strongly encourages the defendant to make a fair offer early on so as to keep her cost of the claimant's lawyer to a minimum. If the defendant is not forthcoming, then the claimant's lawyer's work typically becomes substantial and would be generously rewarded under my proposal.

This same sort of solution might be employed to compensate lawyers who represent claimants seeking benefits from tailored compensation plans and social insurance. Today, most people who file for Social Security do not use lawyers, but most of those claims are for retirement and survivor benefits that are usually not controversial as to eligibility or amount. On the other hand, many claimants seeking total disability benefits, especially those initially rejected, do turn to legal help in proving their disability. The same pattern applies to workers' compensation claims. The vast majority of claims are handled without lawyers, but when it comes to claims for permanent partial disability or total disability, lawyers often appear. For the 9/11 Plan, plaintiff tort lawyers around the nation volunteered to help people with claims against the plan on a pro bono basis, although a small number of families eventually hired attorneys to represent them.¹⁴⁴ Many—perhaps most—claimants under the Vaccine Plan have lawyers representing them.

Most of the lawyers who get involved with these cases today generally take them on a contingency fee basis with the fee paid out of the claimant's award. But the percentage of the award the lawyers take as a fee is generally considerably lower than in tort cases. For example, the traditional workers' compensation fee has been 10%, and often in these cases the client and the defendant insurer agree to a lump-sum payment insisted of ongoing monthly benefits. Among other things, this allows the lawyer to get the fee all at once, and the amount on which it is based is clear. Lawyers handling Social Security disability claims tend to get 25% of the back benefits they win for their clients (which generally is far less than 25% of the discounted present value of the entire award that has been won).

The Vaccine Plan, however, provides something of a precedent for my proposal. There, provided some minimal requirements are met, the plan will pay reasonable legal fees to lawyers who help people file claims. Indeed, reasonable legal fees are paid by the plan even in cases where benefits are denied. It might have been wise to have a similar arrangement for the 9/11 Plan. But as already noted, that turned out to be unnecessary. Wanting to appear patriotic and not wanting to appear to be profiting off the terrorist

144. See Kenneth R. Feinberg, *Speech: Negotiating the September 11 Victim Compensation Fund of 2001: Mass Tort Resolution Without Litigation*, 19 WASH. U. J.L. & POL'Y 21, 29, (2005).

events of 9/11, the personal injury plaintiffs' bar generously agreed to pitch in for free on behalf of those who lost a loved one.¹⁴⁵

The general principle I support, then, is that instead of having the claimant pay for his or her lawyer, the compensation plan should pay a reasonable fee to the claimant's lawyer in situations where we can have some confidence that the lawyer made a difference. For some plans, perhaps this means the plan should only have to pay after the claimant made an initial claim that was rejected (or only a low sum was offered) and now a lawyer participates so that the claim is recognized (or a much larger sum is offered). As with tort claims, the fee should be structured both to reward the effective lawyer without having to take the fee out of the victim's recovery and to entice the plan to make a reasonable offer before the lawyer must make a substantial effort on behalf of the client. Schemes like the Vaccine Plan seem to be different because the mounting of the initial claim can be quite difficult and waiting for a claim to be denied before offering to pay the claimant's lawyer does not make sense.

VIII. CONCLUSION

When it comes to the money paid to those who suffer personal injury by accident, U.S. law has not had a major impact on the laws of other rich nations, and perhaps that is just as well. To the contrary, the United States could benefit substantially by embracing aspects of the laws of other nations with respect to social insurance, tailored compensation plans, and tort law. These changes would still leave the United States with a robust (albeit reduced) tort law and a much stronger set of other compensation arrangements. These together, I believe, would constitute a package that would be more attractive to Justice Linden than our current package. If so, I urge advocacy on behalf of these reforms as a tribute to him.

145. *See id.* at 29.
