Is There a Future for Tort?

John G. Fleming

Repository Citation
Available at: https://digitalcommons.law.lsu.edu/lalrev/vol44/iss5/5

This Article is brought to you for free and open access by the Law Reviews and Journals at LSU Law Digital Commons. It has been accepted for inclusion in Louisiana Law Review by an authorized editor of LSU Law Digital Commons. For more information, please contact kreed25@lsu.edu.
IS THERE A FUTURE FOR TORT?

John G. Fleming*

Wex Malone stands high on the pyramid of tort scholars. His fascination with the subtleties of the judicial process has yielded a rich harvest of insights into the operation of tort law, which has made all of us his epigones. Yet his dedication to tort law has not clouded his vision to the significance of alternative systems of accident compensation. Workers' compensation has been a life long foil. It is therefore fitting to make my salutation to him by once more reviewing the credentials of tort law against its competitors in the light of contemporary accident compensation policies.

Our legal experience has long made us aware that there are several, rather than one, possible solutions to the problem of compensating accident victims. They range from “letting the loss lie where it falls” to providing compensation for all casualties. In between, the law of torts occupies a half-way, and increasingly half-hearted, position. Indeed, so rich is our experience that we have come to live with all of these different regimes at one and the same time.

This, however, is a very modern, and probably transitional, development. Until towards the end of the nineteenth century, the law of torts offered the only means of compensation from outside sources, aside from charity. Even then, its offerings were penurious. Both the law and the social context in which it operated saw to that. Duties of care for the sake of public safety were kept under stringent control (e.g., occupiers' liability) or altogether denied (e.g., manufacturers' liability). The defenses of voluntary assumption of risk and contributory negligence denied recovery even to victims of proven negligence and virtually precluded all tort claims for work injuries. In addition, high social, informational, and economic obstacles obstructed “access to justice” for the largest proportion of the population. If, as the Pearson Commission tells us, only 6.5% of accident injuries in England nowadays attract any tort damages,¹ one can imagine the negligible role played by the tort system one hundred years earlier.²

---

¹. 1 ROYAL COMMISSION ON CIVIL LIABILITY AND COMPENSATION FOR PERSONAL INJURY, REPORT ¶ 78 (1978) [hereinafter cited as PEARSON COMM'N].
². This is not the place for entering upon the controversy of whether this state of affairs was the product, at least in America, of a deliberate judicial strategy to “subsidize” the contemporary economic power structure at the expense of public safety, as argued by scholars of the self-styled “Critical Legal Studies” circle. See L. FRIEDMAN, A HISTORY OF AMERICAN LAW (1973); M. HORWITZ, THE TRANSFORMATION OF AMERICAN LAW, 1780-1860,
If this meant that in practice few accidents were compensated, such a calamity was at the time hardly viewed as a criticism of tort law. Thus, in 1881 Oliver Wendell Holmes in his *The Common Law* staunchly defended the fault system even more for its incentive to enterprise than for its incentive to care:

As action cannot be avoided, and tends to the public good, there is obviously no policy in throwing the hazard of what is at once desirable and inevitable upon the actor.

The state might conceivably make itself a mutual insurance company against accidents, and distribute the burden of its citizens' mishaps among all its members. There might be a pension for paralytics, and state aid for those who suffer in person or estate from tempest or wild beasts. . . . The State does none of these things, however, and the prevailing view is that its cumbersome and expensive machinery ought not to be set in motion unless some clear benefit is to be derived from disturbing the status quo. State interference is an evil, where it cannot be shown to be a good. Universal insurance, if desired, can be better and more cheaply accomplished by private enterprise.³

The birth of a state-sponsored insurance scheme, foreshadowed by these remarks, in fact had to wait only two more years for the passage in 1883 of Bismarck's first workers' compensation act. A prophecy of what this newcomer portended for the future of compensation policy, and tort law in particular, was ventured in a classic article in the *Harvard Law Review* by Professor Jeremiah Smith in 1913, three years after the enactment of the first comprehensive American workers' compensation statute.

[It] seems safe to say that the basic principles of [workmen's compensation legislation and of the common law around a.d. 1900] are irreconcilable. They cannot both be wholly right, or both wholly wrong.⁴ The public are not likely to be "content for long under these contradictory systems." In the end, one or the other of the two conflicting theories is likely to prevail. There is no probability, during the present generation, of a repeal of the Workmen's Compensation Acts. Indeed, the tendency is now in the direction of extension, rather than repeal, of this species of legislation. The only present available method to remove the inconsistency is by bringing about a change in the existing common law, either by legislation or by judicial decisions.⁵

---

⁵ Id. at 363 (footnote omitted). There were early responses to this challenge. See Ballantine, *A Compensation Plan for Railway Accident Claims*, 29 Harv. L. Rev. 705 (1916);
The trend that Jeremiah Smith so dolefully forecast has gradually, but at an increasing pace, transformed the compensation picture in most countries that have entered the benign climate of the "welfare" or "post-industrial" state. Social security, another German invention, today assures free medical care and at least subsistence benefits to all needy citizens, including accident victims, regardless of cause or fault. Workers' compensation, whether in its original structure or merged into a comprehensive social security system, provides preferential benefits for job-related injuries. Specialized plans for particular types of accidents on the workers' compensation model are proliferating in such areas as road traffic, aircraft crashes,6 victims of violent crimes, drug and vaccine, even sporting injuries.7 Recently, the Pearson Commission, not content with proclaiming that social security in Britain had already reduced tort to the role of "junior partner,"8 recommended adoption of several specialized compensation plans or strict liability, with a view to eventual displacement of all tort damages.9 This ultimate objective of comprehensive and exclusive no-fault accident compensation has already been blossoming in New Zealand since 197410 and came within a hair's breadth of realization in Australia in 1975.11 In the meantime, the law of torts is being manipulated by compensation-minded judges and juries, looking more like handmaidens of collectivism than the traditional guardians of liberty. Does all of this signal the death of tort?12


6. Such plans now exist for passengers as well as for ground damage. The Warsaw Convention, reprinted in N. MATTE, TREATISE ON AIR-AERONAUTICAL LAW app. 11 (1981), and Rome Convention which were duplicated by Australian legislation for domestic as well as international flights are examples. See J. FLEMING, THE LAW OF TORTS 303-04 (6th ed. 1983); Edwards, Liability of Air Carriers, 56 AUSTL. L.J. 108 (1982).


8. 1 PEARSON COMM'N, supra note 1, ¶ 1732.


12. With apology to Grant Gilmore's The Death of Contract which noted the accelerating
This diversity of solutions raises two issues to which I address my following remarks: first, the comparative attractions and shortcomings of the principal competitors: tort, special compensation programs, or comprehensive social insurance; second, whether their contemporary coexistence is a transitory and justifiable situation—or, as Jeremiah Smith had forecast, one that cannot last in the long run because of its incongruities.

COMPENSATION POLICIES

Scholarly views on the policies underlying tort liability inevitably reflect social perceptions and values of their time. Just as Holmes and Salmond drew on the philosophical perspective of an era concerned with individualistic action and responsibility, more recent writers have turned to psychology, economics and collectivist ideals for standards of appraising tort and alternative systems of accident compensation. The most important objectives propounded over time have been (1) deterring socially undesirable conduct, (2) allocating resources efficiently by holding to a minimum the waste to society from accidents, (3) compensating deserving victims and widely distributing losses to minimize individual catastrophe, (4) minimizing transaction costs, and (5) fairly distributing the cost of compensation.13

While all of these objectives may seem desirable, there is no agreed calculus for balancing them; nor is it simply a matter of ascertaining which of the competing systems would attain the greatest number of these goals. Some goals may seem far more important than others; e.g., compensating the injured may or may not strike different policy-makers as worth sacrificing deterrence, let alone increasing costs.

Deterrence and Punishment

Emphasis on punishment rests primarily on a moral basis, while emphasis on deterrence looks more to efficiency. The first seeks to inflict pain in retribution for the wrong done to the victim; and since it is the process of tort encroachment, the trend towards social insurance is not really contradicted by the judicial tendency, especially in the United States, to make-over tort law in the image of social insurance. The reason for this development is a widespread conviction among “liberal” judges that the legislatures are too slow in increasing the benefits and coverage of social security and social welfare.

13. It was in the light of these criteria that the important policy debate of the 1960s over automobile no-fault compensation was conducted between Blum and Kalven, and Calabresi. While both sides moved from individualistic positions critical of comprehensive social security, the former ranked the tort solution at the top, while the latter ranked it at the bottom and placed automobile compensation plans at the top. See W. BLUM & H. KALVEN, PUBLIC LAW PERSPECTIVES ON A PRIVATE LAW PROBLEM (1965); Blum & Kalven, The Empty Cabinet of Dr. Calabresi: Auto Accidents and General Deterrence, 34 U. CHI. L. REV. 239 (1967); Calabresi, Fault, Accidents and the Wonderful World of Blum and Kalven, 75 YALE L.J. 216 (1965); see also P. ATIYAH, ACCIDENTS, COMPENSATION AND THE LAW (3d ed. 1980).
victim, not the state, who calls for the punishment in torts cases, punishment and vengeance are closely related. By contrast, deterrence principally aims at the reduction of accidents by imposing a toll on unsafe conduct. Since unreasonable injury to person or property causes a reduction in society’s wealth, any deterrent therefor serves the purpose of economic efficiency.

Although the twin purposes of punishment and deterrence have furnished the classic rationale of tort liability, their credibility has increasingly declined under the changing conditions of modern society. This, of course, is a criticism not of these objectives themselves but rather of the common law’s failure to attain them. Perhaps the principal cause is that the admonitory effect of an adverse judgment is today largely diffused by liability insurance which protects the injurer from having to pay the accident cost and instead distributes it among a large pool of premium payers and thereby “socializes” the loss.14 In many countries the victim no longer even in form addresses his claim to the injurer but proceeds directly against the latter’s insurance carrier or compensation fund, thereby eliminating even the symbolic tokens of individual blame.15

Other realities of tort litigation may undermine the vengeance objective. Thus, although the victim’s psychic satisfaction in making his adversary “pay” is claimed by some legal psychologists as a significant rationale of tort liability,16 the delays and aggravations of tort law in action probably impose psychological hardships and anxiety on victims that more than make up for what little satisfaction some victims receive.

Nonetheless, some of the admonitory effect of a tort award is still retained. Insurance premiums are commonly adjusted in the light of the insured’s accident record, and fear of substantial rises and possibly even policy cancellation arguably has some effect on individual conduct. The broad American consensus in favor of basing premiums for both liability and workers’ compensation insurance on the insured’s past accident record

---

14. It may strike some readers as paradoxical that socialist law is so committed to the deterrence theory of tort that it opposes even liability insurance against negligence liability, and thus does not even give lip service to “socializing” losses.

15. The action directe was pioneered by French Courts in a landmark decision by the Cour de cassation, Chevassus et Cie L’Urbaine et La Seine v. Mazet, 1927 D.P. 1 57. It has since been emulated in many countries. See, e.g., Fleming, Collateral Benefits, in 11 INTERNATIONAL ENCYCLOPEDIA OF COMPARATIVE LAW—TORTS ch. 11, ¶ 76 (A. Tunc ed. 1983). It has been emulated less often in common law countries, especially jurisdictions with jury trial. However, there are exceptions. Singleton v. Bussey, 223 So. 2d 713 (Fla. 1969).

rests largely on this belief. However, other countries, including Great Britain, are skeptical about the effectiveness and worthwhileness of such finesse, or, like Australian politicians, prefer flat rates for third-party motor insurance for the sake of their imagined popular appeal.

The admonitory effect of liability probably varies with different classes of potential defendants. Some are peculiarly sensitive to the stigma of an adverse judgment wholly apart from any financial detriment. The most obvious example is the medical profession, whose members dread liability for its adverse reflection on their professional competence or integrity. More immediate response to an adverse judgment is also likely when the censure falls on managerial failings in industry or business rather than on random human frailties like inattentiveness in the factory or on the road. This results because the former are susceptible to managerial correction and monitoring, while the latter are in practice rarely amenable to such controls. By the same token, large, stable and well-managed enterprises are far more likely to recognize and act on the potential variability in insurance premiums they face than are small firms fighting for economic survival. Indeed, because of premium-setting practices, small enterprises might not even face the opportunity to lower insurance costs through safer conduct.

Tort law may also play a key signalling role in stimulating the market to work. Tort litigation in the United States has repeatedly served as "Ombudsman," as Professor (now Justice) Linden felicitously called it, giving publicity to dangerous products (Pinto, Tampons, etc.), often with financial consequences to the producer far more devastating in terms of lost future sales than in damages awarded to the injured. Whether a system of bounties for private whistle-blowers would be as or more effective is yet untried.

Still, one must be skeptical about the effectiveness of tort law in promoting accident prevention as compared with other legal or social mechanisms. The three most important of these are government regulation, criminal sanctions and ordinary economic pressures.

Regulations can play an educational role in prescribing clear procedures designed to avoid accidents. Negligence law by contrast condemns people after it is too late. Also, while regulatory standards are established by experts, tort law leaves to inexpert juries or judges the bewildering task of resolving disputes between partisan expert witnesses. While tort law has come to take advantage of statutory standards by sometimes (though quite erratically) treating their violation as fault without more (per se), it is unwilling to treat compliance with prescribed standards as conclusively

exonerating. Thus, even licensing of products after a rigorous official testing procedure, as in the case of drugs, is not accepted as necessarily acquitting the manufacturer.\textsuperscript{19} An important advantage of the criminal sanction is its concern with punishing the offender for engaging in prohibited conduct; the sanction will fall on the culprit regardless of whether he happened to victimize anyone. By contrast, misconduct, however reprehensible, remains outside the reach of civil process so long as it does not injure anyone. This is why motorists today fear criminal penalties more than civil sanctions.

Even if there were no public controls and no tort law, potential injurers would face other substantial pressures favoring safety. Adverse publicity has repeatedly proved itself a potent sanction against defective products or accident-prone activities. Recall of motor cars by the American regulatory agency is one example. Drivers' concern for their own safety surely counts for more than the fear of having to pay damages. Potent deterrents compelling management to avoid work accidents are interruption of work schedules, demoralization of employees and, of course, sanctions under industrial safety legislation.

In any event, the tort system's residual effects of deterrence and punishment, such as they are, can also be enlisted by no-fault compensation.\textsuperscript{20} While social security and general welfare systems have a tradition of flat-rate premium rates,\textsuperscript{21} accident schemes do—and, in the opinion of many observers, should—employ differential rates as reward or rebuke of individual accident records.\textsuperscript{22} Grave misconduct can also be sanctioned by withholding benefits or imposing fines, or by means of indemnification as in the case of drunk drivers under some automobile plans,\textsuperscript{23} but these measures could be resorted to only sparingly without


\textsuperscript{21} The Beveridge Committee's recommendation for differential rates on account of abnormal risks in particular industries, REPORT OF W. BEVERIDGE, SOCIAL INSURANCE AND ALLIED SERVICES ¶ 89 (reprint 1966), was not eventually accepted. Sound economics had to yield to political considerations, resulting in a disguised subsidy of coal mining, for example.

\textsuperscript{22} All American workers' compensation and no-fault automobile insurance plans employ differential rates. In New Zealand industry differentials have been employed from the outset and computerization will now permit experiments with individual bonuses. However, the road accident scheme levies a flat rate on motor vehicle owners. Professor A.R. Prest who served on the Pearson Commission strongly advocated differential rates for work injuries in his minority statement. 1 PEARSON COMM'N, supra note 1 ¶¶ 940-948.

\textsuperscript{23} See, e.g., Motor Car Act 1958, VICT. STAT. No. 6325, § 59(2).
incurring the high costs of investigation and enforcement that no-fault programs are designed to avoid.

Efficient Loss Allocation

Advocates of individual responsibility received a timely boost of morale from the current fad of lawyer-economists. Richard Posner, formerly a professor with the Chicago Law School and now a federal appellate judge, has become the principal proponent of enlisting legal policy in the service of “free market” economics, widely known as the “Chicago school” of thought.24 Invoking Judge Learned Hand’s famous description of negligence as conduct where the loss multiplied by its probability exceeds the cost of avoiding it \(N = L \times P > C\),25 Posner applauds the negligence principle as an ideal standard for promoting the most efficient allocation of resources because its economic calculus encourages only cost-justified precautions. In other words, the actor is penalized only for underinvestment in accident prevention.26

There are several basic problems with this thesis. Its model is the calculating “economic man” with full information on the balance of costs. This character will rarely be found in the “real world.” But let us concede that at least in the case of continuing industrial processes, such as the mass production of cars, experience may permit reasonably reliable forecasts of the cost of accident-preventive measures as well as of the rate of future accidents. But how do we measure the cost of such accidents? Surely, it is a bizarre distortion of the common law to postulate that the calculus of negligence calls for striking a purely economic balance between benefits and losses, the losses being assessed solely in the cold-blooded terms of the damages that would be awarded to the victim or his survivors. While it is true that risks are sometimes worth taking and therefore considered reasonable either because the benefits or the cost of avoiding the risks are wholly disproportionate, the judgment is social, not economic.

This context calls for a further elaboration. We may well assume that the production manager of an assembly line will be guided by an economic judgment of the cost-justified level of quality control, obedient to Coase’s famous theorem that (in a perfect market) the most efficient (wealth-maximizing) use will prevail regardless of the initial assignment of legal rights.27 But many, perhaps most people would be tempted to argue that if our manager chooses to run the risk of accidents because it is cheapest,

he should at least pay for such accidents as occur rather than, as Posner contends, escape altogether because the risk was cost-justified and therefore not negligent. If Posner was right, that rationale would add another plausible argument for imposing *strict liability* for defective products and thus making the producer compensate the casualties of industrial efficiency.  

Posner overplays his hand even more when parading his theory as not merely normative but as descriptive of the actual operation of tort law. The individual defendant is rarely, as we have seen, influenced by Posner's recommended cost calculations; the individual plaintiff is interested in compensation, not deterrence (unless the defendant is threatening a continuing tort). Moreover, the civil, unlike the criminal law does not intervene, and therefore does not deter, unless there is damage. Posner stands this problematic feature of tort law on its head by arguing that in any event damages for the plaintiff are "from an economic standpoint, [only] a detail," justified merely as an incentive for private initiative activating efficient allocation of resources.  

A different economic argument is made in Calabresi's theory of "general deterrence." Under no illusions about tort liability's potential for "specific deterrence," he argues from the postulate of Pigou's welfare economics that all costs ought to be debited to the activity that causes them so that they are reflected in the price of the resulting product or activity. The cost of accidents, in short, is properly an item of the overhead costs of a particular enterprise. In this way activities with higher accident rates will have lesser attraction in the market place and will thus be carried on to a lesser, more socially desirable extent. By contrast, it is claimed that if activities do not bear their accident costs they are in effect subsidized and will thus be overproduced. This creates both an inefficient allocation of resources and excess accidents to boot. Thus, the market mechanism can be enlisted in pursuit of a "general deterrence" of accidents.  

Although it has become fashionable to argue that tort law should serve to internalize costs, there also are many problems with this line of analysis. First, *negligence* law does not in fact attempt to assign all accident costs to activities that cause them. Rather, it purports to assign only the cost of accidents that reasonably should have been avoided. To some,

28. This is not the occasion for a debate over whether even "strict" liability should cover risks which were unknowable or unpreventable at the time of marketing the product. Some American scholars and a few decisions have so held. An argument in its favor is that it would encourage a higher level of investment in accident prevention than the "state of the art" defense would.

29. See R. Posner, supra note 26, at 143.


like Calabresi, this is an indictment of negligence liability and an argument for strict liability. To others, it reveals a fundamental ambiguity about the internalization argument. What is the cost of what? In many situations policy-makers have acted as if there were no problem in attributing particular accidents to a specific activity. For example, work injuries are by general consensus regarded as part of the cost of industrial operations: "the cost of the product should bear the blood of the workman." But on closer examination, the problem can become very thorny indeed. Is an accident caused by failure of an industrial tool to be internalized by the maker or by the user of the tool? If mother mink eat their young when frightened by sonic booms, is this a cost of national defense or mink farming? Is a plane crash caused by a defective altimeter a risk attributable to manufacturing altimeters or airplanes or to flying of, or in, airplanes? While it has even been argued that no economic choice is possible between attributing a car-pedestrian accident to either driving or walking, Calabresi resolves the impasse by selecting the motorist as the "best cost avoider," having the better information and means to reduce such accidents.

More important yet is that, in the real world, it is frequently impossible to internalize accident costs to the specific offending product or activity. For example, not only would a drug that eventually reveals itself as dangerous in all likelihood be totally withdrawn from the market, but the cost of compensation will in any event probably be spread among all or most other products of the particular manufacturer, with the result that the consumers of the safe drugs will in effect be bearing the accident cost of the dangerous drug. This would raise the cost of all drugs and, following Calabresi’s thesis, to that extent would deter their use, a result that might have an adverse effect on public health.

The most problematic feature of Calabresi’s, as of Posner’s, approach

33. W. PROSSER, HANDBOOK OF THE LAW OF TORTS § 80, at 530 (4th ed. 1971). But as Professor Luntz has pointed out, workers’ compensation, by extending coverage beyond specific employment risks (even including in Australia, accidents to and from work), long ceased to be justifiable on the internalization rationale. See Luntz, Workers’ Compensation and a Victorian Amendment of 1965, 40 AUSTL. L.J. 179, 189 (1966). As coverage expanded, the scheme progressively assumed a social welfare profile, pointing in the direction of eventual 24-hour coverage for all employees suffering injury by accident. This trend was in effect consumated by the comprehensive accident compensation scheme in New Zealand (the Employers’ Scheme). For an American counterpart, see Henderson, Should Workmen’s Compensation Be Extended to Nonoccupational Injuries?, 48 TEX. L. REV. 117 (1969).
34. See Goldberg v. Kollsman Instrument Corp., 12 N.Y.2d 432, 191 N.E.2d 81, 240 N.Y.S.2d 592 (1963) (excusing the component part manufacturer but holding the aircraft manufacturer strictly liable; dissent arguing that the airline alone should be liable).
35. See, e.g., W. BLUM & H. KALVEN, supra note 13, at 61.
36. In general, identifying the best “cost avoider” presents a tricky problem, as Calabresi himself recognizes.
is of course its assumption of the rationality of human behavior. Market control is no more likely to make a substantial contribution to accident prevention, the avowed goal of both economic theories, than is monitoring cost efficiency. As Englard puts it so well, "the tenacious attachment to the notion of market deterrence appears to be a desperate attempt to maintain an ideal of a free-market system in a strongly socializing world." 7

How do compensation systems measure up to Calabresi's prescription? The more you fine-tune internalization or risk-avoidance, the more you get away from the principle of insurance, that is, risk spreading. Strict liability and special compensation plans, such as for road traffic victims, function alike in focusing on one specific target, arguably so as to internalize and place the cost on the best cost-avoider (e.g., motorists as to road traffic victims). By contrast, comprehensive accident compensation, precisely for the sake of wide loss-distribution, sacrifices the opportunity for such channeling insofar as the cost incidence is undifferentiated, as when premiums are levied on all tax-payers. 8 Even road traffic compensation plans would "externalize" the cost of accidents due to equipment failures by placing the cost on motorists rather than on manufacturers or repairers. 9 However, it is possible to reduce such externalizations even within the framework of a general compensation scheme by distributing the cost on a more differentiated basis. In New Zealand, for example, the road traffic scheme is financed separately from the general accident fund, and even a road traffic scheme could place separate levies on car manufacturers were it not for the fact that the cost would ultimately also be passed through to motorists.

**Compensating Deserving Victims**

Thirty years ago Glanville Williams concluded that the only defensible "aim of the law of tort" was compensation. 40 Yet the law fails to achieve that purpose. The most controversial aspect of the negligence system is that it discriminates between different accident victims not according to their deserts but according to the culpability of the defendant: a claimant's success is dependent on his ability to pin responsibility for his injury on an identifiable agent whose fault he can prove. Put differently, negligence deems as deserving only those who can trace their harm to someone's wrongdoing. To critics, this causes unfairly unequal treatment in several ways: between victims of the same kind of injury, one of whom can but another of whom cannot point to a responsible cause; e.g., one who breaks his leg in a car accident and another who

---

38. *See supra* text accompanying note 21.
39. That is if all tort liability for personal injury is abolished as in New Zealand. Most such plans actually retain the manufacturer's tort liability at the suit of either the victim or the compensation fund (subrogation).
40. *See Williams, The Aims of the Law of Tort, 4 CURRENT LEGAL PROBS. 137 (1951).*
slips in the bathtub;\footnote{Hence widely known as the "bathtub argument." Home accidents account for 50\% of all injuries, industrial accidents for 12\%, road accidents for 10\%, recreational and school accidents for 8\% each. See E. Bernzweig, By Accident Not Design: The Case for Comprehensive Injury Reparations 15 (1980). Likewise the Pearson Commission attributed 10\% to road accidents, 25\% to work and the remainder elsewhere—"bathtubs." 2 Pearson Comm', supra note 1, annex, tables 2, 4.} between one who does and one who does not succeed in proving fault in a defendant—a distinction exacerbated by the vagaries of jury trial long after the accident in question and the fine line that often divides minimally acceptable and culpable conduct; between those who are personally attractive victims and those who are not—both of which are thought by critics to influence juries unduly. Not least of all is the fortuitous exclusion of victims unable to collect from responsible defendants who turn out to be judgment proof in that they lack liability insurance or other financial resources to pay.

Even among those fortunate enough to obtain some damages, studies show a capricious relation between the total amount of compensation recovered from all sources and the gravity of the injury.\footnote{See Conard, The Economic Treatment of Automobile Injuries, 63 Mich. L. Rev. 279, 291 (1964); U.S. Dep't of Transp., Economic Consequences of Automobile Injuries (1970).} While slight injuries tend to be over-compensated (because of medical insurance and other sources of compensation which do not set off each other or reduce tort damages and because of the nuisance value of small claims), yet the graver the injury the smaller the share of compensation. This problem is particularly acute in the United States because of the low liability insurance coverages held by many motorists and the gaps in tort recovery. With much justification, the process has been called a "forensic lottery."\footnote{See T. Ison, The Forensic Lottery (1967).}

By contrast, compensation plans avoid most, if not all of the preceding inequities by focusing not on the injurer's misconduct but on the victim's injury. Compensating the injured by "spreading the loss broadly"\footnote{This "loss distribution" rationale goes back to the beginnings of workers' compensation, was later extended to vicarious liability (Jeremiah Smith, Harold Laski, and William O. Douglas), and eventually applied to tort generally as "enterprise liability" (Leon Green, Albert Ehrenzweig, and Fleming James). Its most extreme reach, nominally within the framework of tort, is reflected in decisions like Hall v. E.I. Du Pont de Nemours & Co., 345 F. Supp. 353 (E.D.N.Y. 1972); Sindell v. Abbott Laboratories, 26 Cal. 3d 588, 607 P.2d 924, 163 Cal. Rptr. 132 (1980), which allow a plaintiff to recover from all manufacturers of a defective generic product without having to identify the source of the particular product that injured him.} instead of crushing the random victim has wide appeal to modern man as a mark of compassion and social solidarity, and arguably even as an aid for rehabilitation and thus reduction of the cost of accidents.\footnote{Calabresi, disdainful of moral values like the first two, (over)emphasizes the last factor (economic) for its "secondary cost reduction."} The only constraint is society's willingness and ability to bear the cost. This con-
constraint is reflected in a number of ways. In the first place, benefits are usually less generous than the "pot of gold" promised by torts. Mostly, they are limited to out-of-pocket loss (medical expenses and loss of earnings, the latter sometimes with low ceilings). Nonpecuniary losses are usually excluded in order to spread benefits over a much wider class of beneficiaries and in order to save high administration costs of evaluating such losses. However, some schemes lose sight of our cultural legacy of nonpecuniary tort damages, especially those replacing rather than complementing tort liability, such as the schedule lump-sum awards for loss of faculty under workers' compensation and somewhat similar awards under the New Zealand comprehensive accident compensation scheme. Moreover, compensation systems often set ceilings on their total liability corresponding to the maximum available insurance coverage or other limits on funding. For example, the liability of nuclear facilities under the United States' law is limited to $560 million; that of the German drug compensation scheme is limited to about $80 million (DM 200 million). Compensation systems thus serve to protect not only victims but also would-be defendants from financial catastrophe. The technological advances of our time have armed individuals with a capacity to cause almost unimaginable losses which, under the individualistic principles of tort damage assessment, can entail the ruin of whole industries, as illustrated by Johns-Manville Corp. and several other asbestos producers recently petitioning for bankruptcy in consequence of pending tort claims amounting to more than their multi-billion dollar assets. A similar fate might be in the offing for pharmaceutical manufacturers in the wake of DES claims.

The second constraint affects coverage. The broadest schemes would provide compensation for income loss regardless of cause, including illness and even unemployment. But pessimism about the political prospects of such ambitious plans has caused most reformers to narrow their focus. A first line of retreat is to limit compensation to the disabled, including disability resulting from congenital defects and illness, as contemplated in the two-stage Woodhouse proposal for Australia. More practical,
however, is to retreat one more step and cover only accidents on the model of tort liability, as New Zealand has done, since the ambitious but politically most negotiable compensation plans are those limited to particular kinds of accidents, like workers’ compensation, compensation for victims of crime, and so forth.

Varying by the breadth of their coverage, accident compensation funds raise two main problems. The first is the administrative burden of determining boundary issues. For example, has someone who bicycles into a parked motor car suffered an injury that was “caused by or arose out of the use . . . of a motor car”? Or, looking to a more familiar situation, has a worker who suffers a heart attack incurred “personal injury [from accident] arising out of or in the course of the employment”? Broad coverage of accidents in general promises the least difficulty in this respect but by no means completely solves the problem, as the New Zealand experience illustrates.

This administrative burden is overshadowed by a more insidious philosophical problem. What are the credentials for preferential treatment of these beneficiaries compared with others who fall outside the coverage of the plan? In the case of ethical drugs, why do some plans cover only research volunteers, while others cover vaccine victims, and yet others cover victims of drugs in general? Why not extend compensation to all dangerous products, rather than only to drugs? Why were the thalidomide children more deserving of public generosity in Britain than the 1,000 other handicapped children born every week or the 100,000 severely handicapped children under sixteen who must be content with general social security benefits? One way out of this dilemma is to argue that a proposed change is a politically ripe part of an evolving pattern that over the long haul is headed toward consistency. In short, when public and official attention is focused on a specific class of injuries, the opportunity for reform should be grasped, even if it is only part of the package ultimately desired. This


53. The New Zealand statute specifically excludes heart attacks and strokes unless shown to be the consequence of personal injury by accident or of some effort or stress in the course of employment that was abnormal, excessive or unusual. See A. v. Accident Compensation Comm’n, [1978] 2 N.Z. Awards 25 (N.Z. Ct. Arb.). Troublesome questions have arisen over “medical misadventure.” See, e.g., Accident Compensation Comm’n v. Auckland Hosp. Bd., [1980] 2 N.Z.L.R. 748 (N.Z.H.C.) (unsuccessful sterilization).

seems to have been the lodestar of the Pearson Commission in England and of the Law Reform Commission in New South Wales. On the other hand, there are those who strenuously criticize special plans, not only for the horizontal inequity they entail, but for diverting efforts from enacting a system of comprehensive social insurance.

Minimizing Transaction Costs

The most formidable criticism that can be levied against the tort system is its inordinate expense. Two recent sets of figures tell the story. The Pearson Commission estimated that in England it cost eighty-five cents to deliver one dollar in net benefits to the victim. Studies in the United States upped operating costs to one dollar and seven cents for automobile accidents and one dollar and twenty-five cents for products liability. These staggering transaction costs of the tort system compare most unfavorably with the cost of compensation plans. In New Zealand administrative costs are under ten percent, and a similar experience is claimed for Ontario workers' compensation. In New Zealand the savings from lower transaction costs account far more than somewhat lower benefits for the ability to provide compensation for all accident victims for the same price ticket.

The high transaction costs of the tort system are inherent in the system itself. The primary cause is the adversary relationship between claimant and the compensation source. Compensation is dependent on issues of causation and fault, which require investigation and are frequently contested. The assessment of damages, tailored to each case, invites addi-

55. See 1 Pearson Comm'n supra note 9, ¶¶ 272-325. Even the New Zealand development, see supra note 10, was progressive, since the scheme as originally enacted in 1972 excluded non-earners except with respect to motor accidents. The exclusion was eliminated in 1974, the cost being borne by a supplementary fund—in 1978-1979, 13% of total claims and 11.2% of total costs were attributable to this category.


57. See supra note 9.

58. 1 Pearson Comm'n, supra note 1, ¶ 261. Otherwise expressed, operating costs amounted to 45% of the premium dollar. The Minogue Report estimated that legal expenses in Victoria "can exceed 20% of the total payouts." Minogue Rep. para. 8.15 (1978).


63. The average levy for employers is now only 1.07% of wages, which is 1/3 of the average premium rate paid by employers in New South Wales for workers' compensation and common law liability.
tional controversy. In sum, the system is geared to individualized processing and does not favor economies of scale. Finally, these costs are incurred in the processing of all claims, not only those that are eventually successful.\textsuperscript{44}

Thus, critics reserve their strongest condemnation for the tort system's misallocation of resources, arguing that no countervailing benefits could come anywhere close to justifying these transaction costs which flow into the pockets of the insurance industry and the legal profession instead of benefiting the injured. Significantly, most tort apologists confine themselves to arguments over deterrence and fairness in who should pay, but turn away from the critical issue of whether any imagined superiority over compensation is not bought at too high a price.\textsuperscript{6}

The least transaction costs are of course incurred by letting the loss lie where it falls. In "bargaining situations" like those between buyer and seller or doctor and patient, the option of the potential victim assuming the risk without recourse is not implausible. In a perfect market it would cost the victim no more than its mirror image, absolute liability. Whether it is efficient in terms of "general deterrence" would depend on who of the two parties is the best "cost avoider." This party will, however, usually be the supplier of the goods or services who has better access to information about the risks and the means to reduce them. This approach is broadly reflected by contemporary law. Historically, the common law has been tolerant of exemption clauses, whereby the potential victim assumes the legal as well as the physical risk of injury, at least in the absence of overreaching or gross bargaining inequality. In recent years, however, legislation has intervened more paternalistically either by vitiating such bargains completely, as in the case of consumer products,\textsuperscript{67} or by subjecting to judicial monitoring "unreasonable" or "unconscionable" disclaimers. The solution of letting the victim bear the loss is obviously least attractive when the parties are unrelated as in the case of motorist and pedestrian and the opportunities for bargaining are nonexistent.\textsuperscript{70} Moreover, under modern conditions, individuals (as

\textsuperscript{44} Thus, the reluctance of the drug companies and their insurers to participate in the 1976 swine flu program in the United States stemmed less from their fear of successful claims than from concern over the cost of handling claims, spurious no less than meritorious. In the upshot, the government had to agree that rather than indemnify the manufacturers against successful claims, it would handle (defend) all claims directly with a mere right of reimbursement from negligent manufacturers. 42 U.S.C. § 247b(j), (k) (1976). See R. Neustadt & H. Fineberg, The Swine Flu Affair 52-53 (1978).

\textsuperscript{65} See, e.g., Blum & Kalven, supra note 13.

\textsuperscript{66} Calabresi, supra note 13, at 224.


\textsuperscript{68} England's Unfair Contract Terms Act 1977 (in relation to "business activities").

\textsuperscript{69} Restatement (Second) of Contracts § 208 (1979); U.C.C. § 2-302 (1977).

\textsuperscript{70} Coase's "ingenious" attempt to resolve even such situations in bargaining terms
distinct from commercial enterprises) have only limited opportunities for
efficient first-party or self-insurance, besides being generally risk-averse.

_Fairly Distributing Costs_

Fair allocation of the cost of accidents (the "justice factor") is at
the core of the fault theory of torts. Damages are awarded not on the
basis of the plaintiff's merits but on the basis of the defendant's demerits,
the rationale being that only fault justifies imposing the loss on a defen-
dant. Opposition to no-fault is based principally on two grounds. First,
such liability is considered unfairly onerous; second, it tends to discourage
enterprise. These suppositions were truer when Holmes and Salmond wrote
than they are today. Liability insurance has done for defendants what
damages and first-party insurance do for victims: it deflects the catastrophic
impact of the loss from a single individual by spreading it among a larger
segment of the population. By thus collectivizing the loss, the individualistic
rationale of traditional tort law has largely eroded.

A realistic view of the distribution of losses in modern society also
suggests that in many situations the cost of accidents, if originally im-
posed on the tort defendant, will in fact be passed on to his customers
in the form of higher prices for his goods or services, thus assuring a
further spreading in addition to that accomplished by liability insurance.
Thus the beneficiaries of the dangerous activity will eventually be footing
the bill. In some situations, it will be the class of potential victims, like
consumers of defective products, airline passengers, and so forth. This
may explain the greater appeal of strict liability or no-fault compensation
in the latter instances, since they operate in effect as a form of compul-
sory self-insurance. Less enthusiastic are "free-marketeers" concerned
with offering a consumer choice, especially to risk-takers.

In summary, the actual operation of the tort system today rarely fits
the classic model of individual loss-bearing but rather results in collect-
tivization of losses much as under compensation plans. This effect largely
undermines the argument that it is unfair to allocate costs to the non-
negligent. Indeed, modern opponents of compensation plans tend to dwell
more on the supposed accident-deterrent effect of the negligence doctrine
than on its comparative fairness. Such criticism as exists on that score
is more likely directed at aspects of cost-allocation involving externaliza-

(has been rightly rejected. See Blum & Kalven, _supra_ note 13; Calabresi, _supra_ note 13,
at 231; _see also_ S. Rea, _Disability Insurance and Public Policy_ (1981) (advocates in
general private disability insurance in preference to mandatory schemes from the point of
view of economic theory but unrelated to practical realities).

71. These situations do not include _private_ motorists whose stake in automobile com-
   pensation plans is therefore much greater than that of commercial enterprises.

72. The costs of liability insurance being included.

73. This insight has become common coin in modern tort literature. See, _e.g._, P. Atiyah,
   _supra_ note 13; J. Fleming, _supra_ note 6, at 8-11.
tions, such as not taxing pedestrians and car manufacturers under road accident plans—externalizations which tend to increase the broader the coverage of the plan.

COEXISTENCE OF TORT AND COMPENSATION

Any merit-grading between the several methods of accident compensation so far considered should allow for the additional possibility of coexistence between tort and no-fault compensation. Indeed, this is precisely our contemporary situation in which social security provides a minimum welfare net for all disabled regardless of cause, and special schemes like workers’ compensation offer more generous benefits for certain accident victims without excluding tort recourse.

Such a mixed system can take one of two forms, one vertical, and the other horizontal. The compensation plan might replace tort liability completely for a particular type of accident—a solution in many countries for work injuries—leaving tort liability intact for other accidents. Alternatively, and more commonly, the tort remedy serves a complementary function, promising additional benefits over and above those of the basic plan. Both methods can serve as stepping stones towards an eventual complete displacement of tort. The Pearson Commission’s declared long-term objective envisaged a progressive piecemeal accumulation of compensation plans (including strict liability) which would eventually cover all victims, perhaps in the form of a single comprehensive compensation plan. A second strategy, far advanced in Sweden, is to squeeze tort liability by augmenting already high social security benefits with first-party insurance.

Notwithstanding Jeremiah Smith’s prognosis, the two-tier system also has its proponents as a definitive rather than an interim solution. Examples include many of the contemporary road accident compensation plans which set limited maxima for no-fault benefits but allow recourse

75. See 1 Pearson Comm’n, supra note 1, ¶ 272-325. Even the New Zealand development, see supra note 10, was progressive, since the scheme as originally enacted in 1972 excluded non-earners except with respect to motor accidents. The exclusion was eliminated in 1974, the cost being borne by a supplementary fund—in 1973-1979, 13% of total claims and 11.2% of total costs were attributable to this category.
76. See Fleming, supra note 7, at 301-03, and references cited therein.
77. See supra text accompanying notes 4-5.
78. This includes the Victorian and South Australian and all American no-fault schemes. By contrast, Quebec and Israel have abolished all tort liability for road accidents, and so would the New South Wales Law Commission. See supra note 56. The Minogue Report in Victoria also favored in principle abolition of tort, but concluded that it was sufficient at present to extend the existing no-fault plan by providing benefits of 85% of pre-accident earnings until the age of retirement. For Quebec’s approach, see Baudouin, supra note 46;
to tort for additional or alternative damages. The real motivation behind that strategy is not ideological but practical; that is, to assuage the opposition of the legal profession, while bringing under compensation the largest number of claims (which are small) and reducing their disproportionately high handling costs, without incurring the very substantial extra cost of the relatively few catastrophic cases. This posture is open to criticism for denying compensation to those claimants who are least well served by the tort system and therefore in greatest need of prompt and adequate support. But some tort apologists defend this arrangement as an acceptable compromise that would tolerate minimum no-fault compensation as a welfare measure but leave additional recovery contingent on proof of fault.

**Conclusion**

As mentioned at the outset, there is no objective calculus for deciding which of the three basic methods of dealing with the accident problem—tort, special, or comprehensive compensation—best meets the several goals we have considered. The reason is that both the degree to which each method meets these goals as well as the relative order of priority among them are debatable. Moreover, even a principled choice along these lines must confront practical realities, like power relations at the legislative level and the resistance of vested interests, not the least of which is that of the legal profession. Still, if, as I predict, the law of tort will yield more and more ground to accident compensation in coming years, tort practitioners may yet take heart in the prospect of making up lost ground in for Israel's approach, see Miller, *supra* note 46, at 565. See generally Tunc, *Traffic Accident Compensation: Law and Proposals*, in *International Encyclopedia of Comparative Law—Torts* ch. 14 (A. Tunc ed. 1983).

79. On the basis of costs prevailing in the late 1960s, 90% of all persons suffering personal injuries in automobile accidents in the U.S. sustained economic losses not exceeding $1,000, and 97% did not exceed $5,000, but the 1% with losses of $10,000 or more absorbed 9% of the total aggregate. Source: U.S. DEP'T OF TRANSP., *Economic Consequences of Automobile Injuries* (1970).

80. In the United States, under-compensation of accidents is aggravated by the low limits of automobile liability insurance, and by over-compensation of trivial accidents by the "collateral source" rule. See Conard, *supra* note 42. On the other hand, to the extent that these high losses are attributable to exceptionally high income, for example, of professional athletes and artists, their claim for inclusion is weak, since the risk would be subsidized by the poor. Limitation of benefits to average earnings rather than to aggregate maxima would meet this problem.

81. Most notable are Blum and Kalven, *supra* note 13, arguing that such a mix retains a measure of "corrective justice" in addition to the welfare function, and treats all tort victims alike by not depriving serious automobile victims of the "excess." Both arguments, especially the second, were also invoked by the Pearson Commission. 1 *Pearson Comm’n*, *supra* note 1, ¶¶ 272-325.

82. See Ison, *supra* note 50.
expanding areas of economic losses and in the civilized mission of furthering civil rights, privacy, and other personality interests.\textsuperscript{83}

\begin{quote}
\textsuperscript{83} Cf. Pedrick, \textit{Does Tort Law Have a Future?}, 39 Ohio St. L.J. 782 (1978). Pedrick predicts a rosy future for "relational torts" (a Leon Green \textit{composium}) for "assorted harms to personal dignity, to financial interests, to interests in relationships with the changing family, groups, traders, the community, the political system and a variety of now unimaginined claims to protect the quality and opportunities of life for the individual citizen." \textit{Id.} at 790.
\end{quote}