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THE POLITICS OF TORT REFORM

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My subject will be the politics of tort reform.¹ What are the prospects for replacing the tort system, in whole or in part, in the near future? Over the next decade or so, are we likely to see the adoption of a broad-ranging tort replacement scheme such as social insurance or a fairly comprehensive no-fault compensation plan? Or, is it more likely that we will see the kinds of incremental change, if any, that have been more characteristic of tort reform in recent years?

Let me begin by looking to the past and examining the historical circumstances under which relatively sweeping change -- the adoption of broad-ranging no-fault schemes -- took place. But first, a very brief digression to indicate what I mean by no-fault. I have in mind a system, such as workers' compensation, that: 1) replaces the tort system in whole or in part, and 2) provides that any person who is hurt due to a harm that comes from a particular type of activity collects, without question as to fault, simply on the basis of the fact that there was harm that arose out of the particular activity.

Now to be less abstract, let me offer a couple of examples. I will begin with workers' compensation and then discuss auto no-fault. Although there have been a number of more focused schemes that I will mention in passing, workers' compensation and auto no-fault are the two principal tort replacement schemes that have been enacted in the United States in the twentieth century.

Workers' compensation swept the country just before World War I in the heyday of the Progressive era.² With certain qualifications -- in particular, third party lawsuits (which are beyond the scope of my consideration) -- the movement did result in a total replacement of the tort system in the field of industrial accidents. Once the workers' compensation schemes were in place, workplace accident claims could no longer be litigated in the tort system. Instead, a worker who was injured because of harm that "arose out of the workplace" made his or her claim in the workers' compensation system and was compensated by workers' compensation benefits.

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1. Some of the historical discussion which follows is treated in greater detail in Robert L. Rabin, *Some Reflections on the Process of Tort Reform*, 25 SAN DIEGO L. REV. 13 (1988).

2. For discussion, see Lawrence M. Friedman and Jack Ladinsky, *Social Change and the Law of Industrial Accidents*, 67 COLUM. L. REV. 50 (1967).

From our historical/political perspective, the key factor is context -- a recognition that workers' compensation was really only one among a number of legislative initiatives that are hallmarks of Progressive reform. The Progressive era was, in fact, a period in which there was an emphasis on a wide variety of workplace reforms. Any student of Constitutional Law, or indeed of the economic history of the era, could fill in the details. During the period, landmark child labor legislation was passed, as was maximum hour and working condition legislation covering women and various dangerous and/or unhealthful activities. In addition to this workplace legislation, the Progressive era is notable for a first wave of consumer health and safety legislation. At the federal level, important food and drug legislation and meat inspection laws were enacted. To an even greater extent, the states were viewed as laboratories for experimentation in the regulatory control of health and safety.

These various cross-currents of political activity converged in the workers' compensation movement, which cannot be fully understood or appreciated, in my view, without placing it in this broader context.

Now, we should move forward almost a half century in time to the enactment of auto no-fault legislation.³ At the outset, one must recognize a distinction from the earlier movement. This time, the no-fault enactments constituted only partial replacement schemes. Those states that adopted auto no-fault schemes left the tort system partially in place -- indeed, in most instances, only a relatively limited portion of the tort damage system was displaced. In addition, only half the states saw fit to enact no-fault legislation of any kind, unlike workers' compensation which swept the entire country.

Nonetheless, it seems fair to say that auto no-fault did constitute a second dramatic assault on the tort system. And once again, the movement can only be fully understood in a broader political context. This is not to downplay factors such as rising premiums in fueling discontent with the existing tort system. But it is critical to note that the auto no-fault movement arose in the mid to late 1960s at precisely the same time that Ralph Nader had launched his campaign for auto safety and rumblings of discontent were creating a groundswell of support for a wide variety of consumer and environmental legislation.

This was the period of Earth Day, and of the enactment of both the Clean Air Act and the Motor Vehicle Safety Act. Auto safety was a major preoccupation in the political sphere. So, too, was pollution -- particularly from the automobile. Once again, in my view, the combined focus on health and

3. For discussion, see Walter J. Blum and Harry Kalven, Jr., *Ceilings, Costs, and Compulsion in Auto Compensation Legislation*, 1973 UTAH L. REV. 341.

safety, on the one hand, and the automobile as a kind of scourge of society, on the other, came together and played a dominant role in creating a political atmosphere in which tort reform -- in particular, the auto no-fault movement -- might occur.

What does this backwards glance at earlier tort reform movements indicate? In both instances, I have suggested, tort reform was simply a single aspect of a much broader-based sense of social discontent and political activism. In my view, then, both workers' compensation and auto no-fault support the thesis that broad-based no-fault only comes on the coattails of more sweeping social reform movements. The proposition that follows, in the distinctly different political culture of the early 1990s, is that it seems highly unlikely that some sort of a comparably broad-based no-fault plan will be enacted, either at the federal or state level, in the near future.

Nonetheless, having expressed this note of skepticism, let me briefly consider some possible alternative models of tort reform, moving from the most sweeping approaches -- ranging considerably beyond the scope of workers' compensation and auto no-fault, in fact -- to a set of more constrained alternatives. The alternative model with the widest scope would be one that replaced the tort system altogether with a first-party social insurance scheme -- one that provided, at a minimum, coverage for all medical expenses and some substantial portion of lost income.

A scheme along those lines has been proposed recently by Professor Stephen Sugarman in his book *Doing Away with Personal Injury Law*.⁴ Sugarman proposes what the title suggests: that we do away with personal injury law, by providing benefits to everyone who is injured. Short term injuries (six months or less) would be compensated out of an expanded version of workers' compensation-type coverage; that is, any worker who is injured on or off the job, twenty-four hours a day, would receive medical expenses and a substantial portion of lost income during the first six months following the injury. Anyone injured for a period of more than six months, as well as non-workers, would receive benefits from a governmentally funded expansion of the present Social Security disability insurance system (which, at present, only compensates those who suffer total disability).

Thus, Sugarman's system would expand workers' compensation for short-term injuries, and, for longer-term injuries, would extend the disability coverage of Social Security. Indeed, Sugarman would draw no distinction between loss from personal injury and disease-related loss or unemployment. Whatever the

4. STEPHEN D. SUGARMAN, *DOING AWAY WITH PERSONAL INJURY LAW* (1989).

source of economic loss, there would be recovery under his system. By severing the connection between loss and injury, Sugarman would move beyond no-fault to the realm of social insurance — his underlying premise being that any source of income loss or medical expense ought to be the subject of governmental redress.

A somewhat narrower approach would be a no-fault scheme along the lines of the New Zealand system, which replaces all tort actions for accidental injury, and, consequently, also eliminates virtually all tort actions.⁵ While New Zealand's approach is comprehensive in its coverage of personal injury, it retains the "arising out of" nexus (as in workers' compensation and auto no-fault) between harm and activity — in this case all the activities of daily living. In short, the scheme draws a line between injury and naturally-occurring disease, making only the former compensable. Once again, all medical expenses and substantial lost income are recoverable — as well as scheduled pain and suffering in modest amounts.

These two schemes, a Sugarman-type approach and a New Zealand-style system, would be the broadest replacements for the tort system. Are they likely to muster serious political support in the near future? I think not, for the reasons suggested earlier. Putting political considerations aside, however, do they make sense, or are there internal difficulties with schemes of this breadth?

The most common objection to the social insurance approach, apart from its potential expense, is that it would fail to create any incentives to accident prevention since it would externalize costs rather than assigning them to "responsible" sources. A possible response, as far as institutional design is concerned, would be to enlarge greatly the scope of regulatory sanctions on risk-creating enterprises. But no one, Sugarman included, has effectively demonstrated how our patchwork scheme of health and safety regulation would be reconstituted to implement its enlarged mandate.

Whatever the shortcomings of deterrence under the tort system, critics of a social insurance approach regard the argument that agencies can achieve effective cost pressure on risk-generating industries as based on a great leap of faith. The present patchwork system does fairly well in some areas, such as food and drug regulation, and dismally in others; witness the twenty year track record of the Consumer Product Safety Commission. Indeed, in many areas of injury-generating activity — unlike food and drugs or motor vehicles — there is no agency with a specific safety regulation mandate.

5. The New Zealand system is described in greater detail and a bibliography discussing it is cited in MARC A. FRANKLIN & ROBERT L. RABIN, *CASES AND MATERIALS ON TORT LAW AND ALTERNATIVES* 787-91 (5th ed. 1992)

New Zealand's comprehensive no-fault scheme is, in practice, subject to similar criticisms. The funding of the scheme comes from three sources: employers finance compensation for employee injuries on or off the job, motor vehicle registration fees fund auto claims, and general revenues fund the remaining harms to injury victims. There is minimal experience rating. In short, there is no substantial effort to assign the cost of injuries to injury generating activities.

It would, of course, be possible to design a variant of the New Zealand system that provided for targeted reimbursement of the fund by responsible sources. Whether such a scheme could avoid substantial administrative costs, entirely apart from concerns about the overall direct claims costs of the system (consider, among other issues, the potential for fraudulent claims), is an open question. So, there are potentially troublesome fairness and cost concerns -- and correlative political objections -- with regard to these comprehensive alternatives to the tort system, entirely apart from the present unreceptive political environment for broad-ranging social reform.

Before concluding that substantial no-fault reform is a dead letter, however, let me examine the question from another perspective. Whatever the prevailing mood of social reform at the time workers' compensation swept the country, one cannot conclusively rebut the argument that the tort system might have fallen of its own weight. After all, the industrial injury problem had assumed awesome proportions by the turn of the century and the tort system -- having retreated, under a cloud of ambiguity, from its earlier outright hostility to workers' tort claims -- was satisfying no one. Is it not just possible then that no-fault reform might occur in our own time, despite the chill on social reform movements?

If pressed for target areas, most present day tort observers would almost certainly identify medical malpractice and/or toxic harms. In both cases, however, there is a dimension along which the compensation issue is strikingly more complicated than in the earlier, focused no-fault movements. I have in mind what has been referred to in the medical malpractice parlance as the "designated compensable event" issue -- or, more simply, the question of tracing the kinds of injuries that arise out of the particular activity.⁶

Clearly, in the earlier case of motor vehicle injuries, this identification problem was virtually nonexistent: a wide variety of immediate, traumatic injuries are the unfortunate toll of auto accidents. Of course questions of whiplash and emotional distress arise, but even then the issue is one of

6. The designated compensable event concept is spelled out in Clark C. Havighurst, "Medical Adversity Insurance" -- *Has Its Time Come?*, 1975 DUKE L.J. 1233.

truthfulness, not of identifying the source of harm. For the most part, the same can be said for workplace injuries. At the center are severed limbs and broken bones; at the periphery, backstrain, and emotional fatigue. In the latter cases, the claimant's sincerity may sometimes be in doubt, but by and large the injuries that occur can be traced to the activity.⁷

But these tracing issues are perceived as far more substantial barriers to the design of a workable medical or toxics no-fault scheme. In the case of physician-related injuries, the case for no-fault confronts the argument that individuals are, after all, suffering from some sort of disease or illness when they come to see a doctor. Is it not possible, then, that after treatment or surgical procedure, the alleged harm is a consequence, not of the doctor's making the situation worse, but simply of the fact that the patient continues to suffer in a way that could not be alleviated or eliminated -- a background consequence of living, the inevitable deterioration of one's body? Thus, the causal nexus between harm and responsible source has been a stumbling block in past efforts to generate enthusiasm for a medical malpractice no-fault scheme.

In the toxics area, the designated compensable event problem once again has been prominent, but for different reasons. Here, the causal nexus issue arises from the long latency period between the initial exposure to the supposedly responsible source and the time when the risk actually comes to fruition. In the interim, of course, individuals are exposed to all kinds of background risks of living, both from the external environment and from genetic defects.

There are, of course, "signature diseases" such as mesothelioma, which have been closely associated with asbestos exposure. But at this stage in the development of scientific knowledge, these widely-accepted associations remain relatively rare. As a consequence, the costly and time-consuming causal inquiries which have been a focal point of the criticism of the tort system would perhaps be shunted to another forum but not eliminated by the adoption of an administrative compensation scheme. The difficulties encountered by workers' compensation systems in dealing with analogous occupational disease claims do not give ground for encouragement.⁸

If the political climate for social reform were more favorable, perhaps these reservations could be overcome. Arguably, there is a case for trying no-fault in both areas. In the medical area, a recent study by a Harvard team of medical, public health, and lawyer specialists suggests, on the basis of extensive

7. Occupational disease cases are an exception, *see infra* note 8.

8. For discussion, see PETER S. BARTH AND H. ALLEN HUNT, *WORKERS' COMPENSATION AND WORK-RELATED ILLNESSES AND DISEASES* (1980).

review of iatrogenic injury claims in New York, that the difficulties in identifying genuine instances of medical mishap may not be insurmountable.⁹ In the toxics area, an expert board might be able to identify relationships between a growing number of sources, illnesses, and exposures which could be designated as compensable under a toxics no-fault scheme.¹⁰ But long-standing skepticism is not easily eroded in an era that is unreceptive to major social reform; consequently, the perceived difficulties in sorting out the "deserving" claims from those which are based on life's inevitable misfortunes are likely to cut strongly in favor of maintaining the status quo.

What about less far-reaching tort reform? Narrowly focused no-fault initiatives have, in fact, met with some success. At the national level, a child vaccine no-fault plan was enacted in recent years and a black-lung compensation plan for coal miners was adopted twenty-three years ago. Recently, two states, Virginia and Florida, have enacted no-fault schemes covering birth-related neurological defects. Do these scattered activities presage some broader movement to limit the reach of the tort system? It seems doubtful. Each of these initiatives is directly traceable to discrete "tort crises" and intense lobbying by highly focused special interest groups -- which does not necessarily mean that similar outcroppings of isolated political activity are unlikely, but does suggest that no broader no-fault movement is impending.

What remains is incremental tort reform -- tinkering with the existing system -- which, in fact, has been much in vogue in the past decade.¹¹ Most of this activity has been aimed at the remedial side of the tort system, addressing a variety of aspects of damage recovery. It has taken the form of limitations on punitive and compensatory damages, joint and several liability, and the collateral source rule, among other measures. Particularly in the mid-1980s, the legislative fervor to adopt such measures reached epidemic proportions.

Periodic "crises" of the sort that arose in 1985-86, triggered by both the rising costs of the tort system and cyclical disturbances in the liability insurance market, seem almost certain to recur. And when the costs associated with the tort system loom large, the most direct (and popular) response is simply to cut back on the size of awards in some way -- rather than to ask more fundamental "engineering" questions about the carrying capacity and design features of the

9. See Report of the Harvard Medical Practice Study to the State of New York, *Patients, Doctors and Lawyers: Medical Injury, Malpractice Litigation, and Patient Compensation in New York* (1990).

10. See discussion in 2 REPORTERS' STUDY TO THE AMERICAN LAW INSTITUTE, *ENTERPRISE RESPONSIBILITY FOR PERSONAL INJURY*, Chapter 14 (1991).

11. Developments are discussed in Sanders & Joyce, "Off to the Races": *The 1980s Tort Crisis and the Law Reform Process*, 27 HOUS. L. REV. 207 (1990).

tort process.

Those features raise serious doubts about the potential efficacy of remedy-oriented, incremental tort reform. The tort system is characterized by open-textured liability rules (such as concepts of "due care" and "defective design," personalized damage awards (in particular, individualized determinations of lost income and pain and suffering), and nonexpert jury administration. These features of the system emerged in a horse-and-buggy era of two-party interpersonal conflict that bore very little resemblance to the context in which most accidental harm arises today, and which is distant in political culture from present day sentiments about a social safety net to avert extraordinary hardship. Because of this poor "fit" between institutional form and contemporary function, the tort process is problematic along every critical dimension: from a deterrence perspective, the system is undermined by its unpredictability; from a compensation perspective, it is flawed by its failure to treat like cases in like fashion (entirely apart from cases in which harm is wholly uncompensated); and from an administrative cost perspective, it is far more expensive to run than alternative compensation approaches.

Where does that leave us? If comprehensive overhaul of the system seems politically infeasible and incremental reform appears ineffectual, are we destined to experience continuing dissatisfaction with the way our society deals with the problem of accidental harm? Ironically, the answer may be no, for reasons that have little to do with the tort system itself. It may well be that the continuing growth of first party health insurance and income replacement benefit systems, complemented by new regulatory strategies, will, in tandem, make tort appear increasingly superfluous in the not-so-distant future. Those systems have their own difficulties, of course -- the performance of the regulatory agencies, and health care reimbursement systems like medicare, has been fair game for criticism for as long as they have been with us. But that is a story for another day.