

University of Pennsylvania Carey Law School

## Penn Law: Legal Scholarship Repository

---

Faculty Scholarship at Penn Law

---

5-3-2010

### Insurance in Sociolegal Research

Tom Baker

*University of Pennsylvania Carey Law School*

Follow this and additional works at: [https://scholarship.law.upenn.edu/faculty\\_scholarship](https://scholarship.law.upenn.edu/faculty_scholarship)



Part of the [Insurance Commons](#), [Insurance Law Commons](#), [Law and Economics Commons](#), [Law and Society Commons](#), [Other Sociology Commons](#), [Public Policy Commons](#), [Science and Technology Law Commons](#), [Social Policy Commons](#), [Social Welfare Law Commons](#), and the [Torts Commons](#)

---

#### Repository Citation

Baker, Tom, "Insurance in Sociolegal Research" (2010). *Faculty Scholarship at Penn Law*. 314.  
[https://scholarship.law.upenn.edu/faculty\\_scholarship/314](https://scholarship.law.upenn.edu/faculty_scholarship/314)

This Article is brought to you for free and open access by Penn Law: Legal Scholarship Repository. It has been accepted for inclusion in Faculty Scholarship at Penn Law by an authorized administrator of Penn Law: Legal Scholarship Repository. For more information, please contact [PennlawIR@law.upenn.edu](mailto:PennlawIR@law.upenn.edu).

# Insurance in Sociolegal Research Tom Baker

---

## Introduction

Insurance has a long history in sociolegal research, most prominently as a window on accident compensation and related tort law in action. Recent work has extended that research, with the result that tort law in action may be the best mapped of any legal field outside criminal law. Sociological research has begun to explore insurance as a form of governance, with effects in many legal fields and across the economy. This essay reviews developments in both bodies of work. Part one examines the relationship between liability insurance and tort law in action using the metaphors of window and frame. Part two reviews research on insurance as governance. The conclusion returns to insurance as governance in the context of liability insurance, arguing that this is an especially promising field for sociolegal research.

## 1. Liability insurance as window and frame

Sociolegal researchers have long realized that liability insurance can serve as a window on tort law in action. Researchers have used qualitative research with insurance adjusters, quantitative analysis of liability insurance claims data, and detailed analysis of closed claim files to measure and describe tort law in action. The first part of this section reviews this research. More recently, sociolegal researchers have recognized that liability insurance also frames – shapes – tort law in action, most obviously by serving as a funding source that attracts claimants who need money to recover their losses, but also in other ways that the second part of this section will review.

### a. Liability insurance as a window on tort law in action

As Kenneth Abraham (2008) has documented most fully, personal injury litigation – the dominant instantiation of tort law in the U.S. – developed in tandem with liability insurance. Employment liability insurance accompanied the growth of employment liability in the late 19<sup>th</sup> century, and the adoption of workers compensation statutes in the early 20<sup>th</sup> century merged employment liability and insurance into a more or less unified workers' compensation insurance system. Automobile liability insurance accompanied and fueled the rise of automobile liability into the modal tort action in the U.S. (See also Yeazell 2001) Medical liability insurance grew with medical liability and became so

inextricably associated with it that periodic medical liability insurance crises are widely interpreted as medical liability crises. (See also Baker 2005a) Products liability was understood as, and facilitated by, product liability insurance. When the U.S. government took the extraordinary step of creating an after the fact victim compensation fund following the terrorist attack of 9/11, it designed the fund as first party liability insurance (analogous to uninsured motorists insurance), with victims receiving compensatory benefits similar to those that tort law would have afforded them had the perpetrators survived with sufficient assets to bear the loss. In Abraham's evocative metaphor, tort is a "binary star," in which tort law rotates with liability insurance around a common axis, emitting a single gravitational field.

This means that when an injured person brings a tort claim, especially against an individual, it is generally a liability insurance company that defends and, if it agrees, pays the claim. (See also Gross & Syverud 1996) Importantly for sociolegal scholarship, this also means that liability insurance offers a window on the operation of the tort system.

H. Laurence Ross used this window to great effect in his ethnographic study of automobile insurance adjusters in the late 1960s, a landmark of the era of "gap studies" in sociolegal research documenting the gap between the law on the books and the law in action. Among a number of his then-controversial conclusions, the following may be the most influential, not only among sociolegal scholars but also among traditional teachers of tort law:

Adjustment of insurance claims compromises the legal mandate for individualized treatment with the need of a bureaucratic system for efficient processing of cases. This compromise can be observed at many points in the processes of investigation and evaluation. Investigation is vastly simplified, for instance, by presumptions as to liability based on the physical facts of the accident. Accidents are thus seldom individualized to an insurance adjuster or a claims attorney. Rather, they are rear-enders, red-light cases, stop sign cases, and the like, and the placement of an accident into one of these categories ordinarily satisfies the requirements for investigation of liability. ...

These observations are not meant as criticism of the good faith of the insurance industry or other parties associated in the handling of claims. Rather they are meant to put claims handling into proper context; to show that here as elsewhere – for example in handling pleas to criminal charges, or in making decisions as to whether a mental condition merits institutional commitment – a large scale society proceeds by routinizing and simplifying inherently complex and difficult procedures. This is how the work of the world is done. This is the law, as it is experienced by its clients rather than by its philosophers. Perhaps in the light of some kinds of legal philosophy it is bad law. In

my opinion, such legal philosophy has lost contact with the reality of modern society.  
(At p. 135)

Since Ross, many sociolegal scholars have used insurance data to measure and map the tort system. For example, when Kenneth Abraham and Lance Liebman (1992) conducted the background research laying out the landscape of compensation for personal injury in the U.S. that the American Law Institute used during the effort to consider enterprise liability in the early 1990s, their sources were almost exclusively publicly reported summaries of insurance data. More recently, sociolegal researchers testing assertions made in the public policy arena about the growth of medical liability have used liability insurance data to measure the frequency and severity of malpractice claims and their change over time. (Summarized in Baker 2005b. See, e.g. Black et al 2005, Vidmar et al 2005). Other researchers have used liability insurance data to measure the degree to which changes in formal legal rules, such as legislative tort reform, produce changes in claiming or claim payment behavior. (See, e.g., Yoon 2001).

In addition to providing a window on the nature of tort claiming, liability insurance records also provide an important means for evaluating the accuracy of the tort claiming process. Most fully developed in the medical malpractice liability arena, this “closed claim file” research uses insurance company claims files to measure the degree to which the claiming process produces results that meet the requirements of tort law on the books. Perhaps surprisingly in light of Ross’s observations on “the need of a bureaucratic system for efficient processing of cases,” the medical malpractice closed claim research concludes that, at least as regards those claims that are actually filed, the results of medical malpractice law in action match up surprisingly well with medical malpractice law on the books. Claims that clearly do not meet the formal tort law requirements typically are not paid. Claims that clearly do meet those requirements typically are paid. And claims that are ambiguous fall somewhere in the middle. When weak claims are paid, the payment amounts are less than for strong claims, controlling for the nature of the claimants’ injuries. (Summarized in Peters 2007. See, e.g., Studdert et al 2006) The explanation may be the relatively large amounts of money at stake in medical malpractice cases. As Ross observed, “An injury situation that can qualify a claim as a ‘big case’ may receive something of the individualized treatment envisaged by the appellate courts.” (Ross 1970 at 135)

Liability insurance records also provide an important means for comparing claiming rates across different tort law subfields. For example, there is a dramatic difference between the high rate of claiming for automobile liability and the low level of claiming for medical liability. (See Baker 2003 for

one explanation) This difference, when considered with the research on the rate of medical malpractice in hospitals, allows researchers to make a strong claim that the most important gap between medical liability law on the books and law in action lies, not in the processing of the claims that are filed, but rather in the low rate of claiming. (Baker 2005) Most injured patients do not bring a claim. (Andrews 1993, Localio et al 1991) As a result, as Abraham has observed, “medical malpractice liability occupies a place in contemporary policy debates far out of proportion to its seemingly minor economic importance,” while “auto liability has considerable economic importance, but low political visibility.” (Abraham 2008 at 104) Insurance data provide the window on tort law in action that makes these and other comparisons possible. (Baker 2010)

## **b. Liability insurance as a frame for tort law in action**

In the years since Ross’s pioneering work, sociolegal researchers have shown that liability insurance shapes tort law in action even more thoroughly than Ross described. For Ross, liability insurance was a bureaucratic claims processing mechanism that rendered large swaths of tort law into an administrable, simplified set of compensation rules and procedures. This core insight has withstood the passage of time, along with two important corollaries. First, liability insurance puts a repeat player, an insurance company, on the side of the defendant in every automobile accident case. Second, as just noted, the simplifying effect of the liability insurance claim processing mechanism varies inversely with the size of the claim. (Baker 2006)

To this extent, Ross certainly appreciated that liability insurance provides not only a window on the operation of tort law, it also provides a frame. As Ross described, liability insurance frames – shapes – tort law by making tort law in action more administrable than tort law on the books. But liability insurance also frames tort law in other, even more fundamental ways.

Significantly, tort claiming is almost entirely coextensive with liability insurance across a wide range of tort subfields, not just the automobile subfield Ross investigated. Potential tort defendants without liability insurance rarely are sued (Baker 2001, Wriggins 2001), except if they have substantial assets. And defendants with substantial assets tend to have liability insurance, with the result that even tort lawsuits against large corporations become exercises in convincing an insurance company to pay. (E.g., Baker & Griffith 2010). Whether a lawsuit involves securities fraud, medical malpractice, an auto accident, or a President accused of sexual harassment, a liability insurance company most likely will be

paying the defense lawyer and deciding whether to go to trial or settle the case. If there is a settlement or a trial verdict, it will be the insurance company, not the defendant, who pays. It is no exaggeration to say that liability insurers are the bankers for the tort system.

In fields in which large corporations are the typical defendants, the effects of liability insurance may be comparatively subtle, reflecting the fact that large corporations would be worth pursuing even if they had no liability insurance. Even in that context, however, liability insurance transforms tort law's deterrence function, for example by making the liability insurance pricing and underwriting process part of tort law in action. (See Baker & Griffith 2010 for an effort to explore this in the securities liability context)

For claims against individuals, tort law's framing effects are anything but subtle. For such claims liability insurance has become a *de facto* element of liability, and liability insurance policy limits serve as *de facto* caps on tort damages. (Baker 2006, Gilles 2007) Individual defendants do sometimes pay "blood money" (i.e. money from the defendant's own pocket, not from an insurance company), and the plaintiff's legal right to demand a blood money payment plays an important role in the settlement of tort claims (Baker 2001), but the aggregate amounts of blood money actually paid are a trivial proportion of tort claim payments overall. ( E.g., Zeiler et al 2008)

In addition, exclusions in liability insurance policies (contract provisions that define categories of claims that the liability insurer will not cover) very nearly eliminate entire categories of claims. For example, the intentional injury exclusions in the liability insurance part of the ubiquitous homeowners' insurance policy helps explain why the civil justice system has not played a significant role in addressing domestic violence. (Wriggins 2001) Because the liability insurance component of homeowner's and renter's insurance does not provide coverage for assault claims, the victims of domestic violence, rape and other crime-torts cannot, as a practical matter, bring tort actions to obtain civil redress for their injuries. This "crime-tort separation" in liability insurance means that, "the more clearly intentional or criminal the harm, the less likely the perpetrator will be called to account in a civil forum, and the less likely the victim will receive real compensation." (Baker 2009 at 77) As a result, intentional harm – the easy case in tort law theory – becomes the hard case in tort practice, because of liability insurance.

To recover, victims must shape their tort claims to match the available insurance. An intentional high school shooting becomes a negligent supervision claim against the shooters' parents. A rape in a

hotel becomes a premises liability claim against the hotel management company. And when a doctor's liability insurance policy is inadequate to cover the plaintiffs' damages, her momentary mistake becomes a claim against the hospital for failure to anticipate and prevent the doctor's mistake. Each of these "enabling torts" may have sound doctrinal foundations (Rabin 1999), but it is liability insurance that motivates plaintiffs' lawyers to push tort law in this direction. (Yeazell 2001) The primary defendants do not have insurance that covers the victims' losses; the secondary defendants do. In the words of a Florida personal injury lawyer:

I was taught on my first day of practice there are three things: liability, damages, collectability. I need collectability first. I need damages second. I'm a good lawyer, I'll prove liability. (Baker 1998 at 22)

"Collectability" means a well-insured defendant. The impact on tort law in action is most obvious and expected for claims against individuals. But field research on securities litigation shows that it occurs in the corporate context as well. Plaintiffs' lawyers plead strategically, crafting their pleadings to avoid coming within exclusions in the liability insurance policies that provide coverage for their claims. (Baker & Griffith 2010) The lawyers explain that, even in the corporate context, "it is just easier to get money out of an insurance company." (*Id*)

Because of this framing role of liability insurance, negotiations about the boundaries of liability insurance – who gets insurance, at what price, and against which liabilities – are also negotiations about the boundary of the civil justice system. (Baker 2006) Statutes and standard contract provisions that require people to buy liability insurance (e.g., automobile financial responsibility statutes and standard home mortgage contracts) extend the boundaries of the civil justice system by making more people potential tort defendants. (Yeazell 2001) Insurance law statutes and doctrines that require liability insurers to offer insurance, or that limit liability insurers' authority to handle claims as they please, also extend those boundaries. (Pryor 1997) By contrast, marketing efforts that withdraw "good" homeowners' insurance policies from "bad" neighborhoods shrink the boundaries of the civil justice system. (Heimer 1982, Squires 1997, Glenn 2000) So, too, does legislation reducing the required mandatory minimum automobile liability insurance, as well as medical malpractice insurance purchasing patterns that ignore the impact of inflation over time. (Zeiler et al 2008)

## Ideological effects on tort law

Liability insurance has also exerted ideological effects on tort law. The recognition that liability insurance allowed tort law to function as a victim-compensation, risk-spreading system provided fuel for the extension of tort law during much of the 20<sup>th</sup> Century. (Sebok 2003, Priest 1990) Indeed, one proof of this ideological effect can be seen in the passion with which some traditional tort scholars have denounced it, as exemplified by Jane Stapleton's jeremiad against the insurance approach to tort law in the 1995 *Modern Law Review*. While tort law never became an effective insurance mechanism – among other reasons the transaction costs are far too high – this understanding of tort law nevertheless played an important role in the development of products liability law; and it was the road not taken for both automobile and medical liability. (Simon 1998, Abraham & Weiler 1998. See also Steele 2004 reviewing the tort law as insurance debate.)

More recently, the understanding of tort law as insurance has provided fuel for the retrenchment of tort damages, especially in the medical malpractice arena. Because tort law functions as a mandatory form of insurance, the amount and extent of that insurance should be based on what people are willing to buy in the voluntary insurance market, or so the argument goes. Because people do not buy insurance for emotional distress, they do not adequately value compensation for emotional distress and, thus, tort law should not provide compensation for emotional distress. (E.g. Cook and Graham 1977) That this argument has been challenged on a variety of theoretical grounds only demonstrates the attention it has received. (E.g. Geistfeld 1995; Croley & Hanson 1995) On the ground, the tort law as mandatory insurance argument has provided intellectual support for legislative efforts to place caps on non-economic damages. (It is worth noting that the empirical basis for this argument is more contestable than commonly acknowledged: uninsured motorists insurance is widely purchased in the U.S. in amounts that greatly exceed the minimum required by law; for a typical middle class purchaser the primary benefit of uninsured motorists insurance is compensation for pain and suffering; therefore, pain and suffering insurance is widely purchased.)

Perhaps more controversially, a third set of ideological effects follows from the fact that liability insurance organizations control access to much of the data through which the shape and operation of tort law in action can be known. Inevitably, insurers will exercise this control so that researchers and analysts they trust receive exclusive, or at least preferential, access to their data, thereby shaping the raw material out of which legal policy is made. (Baker 2010, Cf. Lukes 1974) Evidence that this control



matters can be seen by comparing the results of research based on access to private insurance industry data with the results of research based on the public access closed claim file reports deposited with the Florida and Texas Departments of Insurance. Researchers granted access to private medical malpractice insurance data have tended to emphasize research questions and policy recommendations congenial to the data providers, while researchers using public access data have tended to emphasize research questions and policy recommendations that are less congenial to the liability insurance industry. (Compare, e.g., Studdert et al 2006 and Yoon 2001 with, e.g., Black et al 2005 and Vidmar et al 2005).

## 2. Insurance as Governance

The understanding of liability insurance as both a window and a frame connects the research on tort law in action with sociological research on the insurance field, where insurance has come to be understood as a form of governance beyond the state. (Ericson et al 2003, Ericson & Doyle 2004) Beginning with Carol Heimer's study of how insurers manage moral hazard in property and fidelity insurance relationships (1985) and continuing through Richard Ericson and Aaron Doyle's research on the Canadian insurance industry, sociologists have identified insurance as an institutional force with effects on individuals, organizations, and institutions within and outside the insurance industry.

In this regard, Francois Ewald's categories of institution, form, technology and imaginary provide a helpful conceptual tool. (Ewald 1991) Insurance *institutions* are the various kinds of organizations in the insurance field, ranging from publicly traded life insurance companies, to fraternal organizations, to state-owned and operated social insurance agencies. Insurance *forms* are the various kinds of insurance, such as the property insurance, automobile insurance, and life insurance sold in the private market, and the life, disability, and retirement income aspects of the U.S. Social Security program, as well as the variations within those kinds. Liability insurance is one category of insurance form and within that category there are subcategories, and further variations and divisions within those subcategories. The invention of new insurance forms, and changes within existing forms, expand (and sometimes contract) the range of risks, and corresponding categories of agents and behaviors, that are subject to insurance governance.

Insurance *technologies* are the knowledge practices developed in and used by insurance organizations, such as "the mortality tables, underwriting classifications, and inspection procedures of ordinary life insurance; the incentive-based medical provider contracts, retrospective review, and

computerized claim processing procedures of managed health care companies; the payroll tax, disability schedules, and administrative review procedures of the social security program; and the standard-form insurance contracts used in almost all private insurance.” (Baker & Simon 2002 at 8). These technologies are the primary means through which insurance governance takes place, and their adoption by institutions outside the immediate insurance field extends the impact of insurance. One simple example can be seen in the invention of what is known as “self-insurance.” Someone who self-insures chooses not to buy insurance and, thus, the choice to self-insure might be thought to be a decision to step outside the field of insurance, at least for those risks that are self-insured. Yet the concept of self-insurance involves taking on a self-conscious attitude about risk that incorporates such insurance technologies as risk assessment, loss prevention, setting aside funds in reserve, and being prepared to actively manage the losses that do occur. (Id.) The claim departments of large organizations that fully or partly self-insure resemble, and are modeled on or in contrast to, liability insurance company claim departments. (Schlanger 2008)

Insurance *imaginaries* are “ideas about and images of (or, alternatively, discursive practices regarding) insurance that animate the development of insurance technologies, institutions, and forms.” (Baker & Simon 2002 at 9). The understanding of tort law as a form of insurance that spreads the risk of accidents is an example of an insurance imaginary. Other examples include the understanding of insurance as mechanism for subdividing populations into comparatively homogeneous risk categories (Simon 1998) and, by contrast, the understanding of insurance as a means for promoting solidarity. (Baker 2002) Ewald summarized how these concepts fit together, and added some useful cautions with which Ericson and other sociolegal researchers would surely agree:

So one has an insurance technology which takes a certain form in certain institutions, thanks to the contribution of a certain imaginary. The way these categories – technology, institution, form, imaginary – articulate together is a problem of logical description which of course does not correspond to the real historic process by which [for example] maritime and terrestrial insurances were constituted. Insurance technology and actuarial science did not fall from the mathematical skies to incarnate themselves in institutions. They were built up gradually out of multiple practices which they reflected and rationalized, practices of which they were more effects than causes, and it would be wrong to imagine that they have now assumed a definite shape. Existing in economic, moral and political conjunctures which continually alter, the practice of insurance is always reshaping its techniques. (Ewald 1991 at 198).

Richard Ericson and Aaron Doyle’s research on the Canadian insurance industry identified a set of insurance imaginaries that will next be examined in some detail, to illustrate both the concept

of an insurance imaginary and the range of insurance as governance research. (Ericson & Doyle 2004. See also Ericson, Doyle & Barry 2003).

### **a. The uncertain business**

In *Uncertain Business*, Ericson and Doyle (2004) investigated the strategies that insurance organizations employ to manage uncertainty in different contexts. They found that, on the whole, the greater the certainty with which the probability of a loss can be calculated, the more readily available insurance is against that loss. Accordingly, their research can be read as providing empirical support for the practical significance of the distinction between risk and uncertainty identified by Frank Knight. (O'Malley 2006) But – and this is the key empirical insight of their research – competition among insurance organizations pushes the organizations well beyond the boundaries of the probable or the calculable, so that insurance remains a very uncertain business, notwithstanding the advances in actuarial science of the last 200 years.

The clearest example of this competitive dynamic appears in their discussion of life insurance. Life insurance protects people against mortality risk, surely among the most calculable of all the uncertainties that are subject to risk spreading technology of insurance. Yet, on close examination, the life insurance industry faces uncertainty in nearly every direction. Risk selection splinters the population into pools for which there are not good mortality data. Life insurance product innovation spurs customers to replace existing policies (whether on their own or encouraged by unethical agents) with new ones, complicating insurers' ability to recover the costs of obtaining new business. Even slight changes in interest rates or the investing environment produce large, surprisingly unpredictable changes in customer behavior. And lurking behind almost everything in the life insurance business stands the uncertain future of the taxing authorities' favored treatment of life insurance products. What looks from a distance to be the cool, measured application of actuarial science to an old, steady business, appears in close up to be riddled with uncertainty.

In addition to emphasizing the importance of (non-calculable) uncertainty in the insurance business, Ericson and Doyle developed a useful framework for describing how insurance organizations manage that uncertainty in different parts of the insurance field. The framework appears in the following partial table reproduced from the book:

<b>Uncertainty</b>	<b>Risk</b>	<b>Responsibility</b>
Life	Embracing	Prudence
Disability	Spreading	Solidarity
Earthquake	Absorbing	Mitigation

In this table, the “uncertainty” column refers to the category of uncertain harms that the insurance institutions are addressing, the “risk” column refers to the most notable approach to risk employed in relation to this set of harms, and the “responsibility” column refers to the conception of personal responsibility embodied in this approach to risk. (Id. at 22-23) The categories that appear in the risk and responsibility columns are examples of insurance imaginaries: ideas about insurance that are embodied in organizations and incorporated into the practical belief structure of people interacting with these organizations.

For example, as just noted, Ericson and Doyle’s research on the life insurance industry describes how competition leads life insurance organizations to venture farther from the actuarial ideal of insurance than commonly understood either by the consuming public or within the academy. One important way that life insurance organizations manage the resulting uncertainty is by encouraging their customers to embrace risk, most notably by purchasing life insurance products that are exposed to investment risk, most commonly in connection with products designed to produce retirement income or transfer wealth to the next generation. The strategy of embracing risk assumes a concept of responsibility that emphasizes the prudent individual who chooses among the investment opportunities offered by insurance (and competing financial) organizations. (See also Baker & Simon 2002)

Ericson and Doyle’s disability research identified a different set of uncertainties – those regarding the nature of the insured-against condition itself (disability) – and a dynamic relationship between insurers and their customers that keeps those uncertainties just beyond the edge of control. Their research illustrate the illusiveness of this control through their description of “Precision” –a name they give to a technology that some insurers and consultants have developed in an attempt to measure the extent of disability. As Ericson and Doyle clearly intend, Precision calls to mind Jeremy Bentham’s Panopticon and the utopian belief in social control through observation (as well as the corresponding dystopian possibilities of such observation). Instead of the top-down control that Bentham imagined, however, what we see is a feedback loop. Insurance organizations create, tighten, manage, measure, and re-create the category “disability” while their customers and service providers conduct, manage,

define and redefine their lives, work, and to some degree even their identities in response. An uncertain business indeed.

The disability insurers' risk management strategy is the classic spreading risk approach, with its solidaristic conception of responsibility and dependence on welfare institutions. But the well known moral hazards of insurance lead to enforcement crackdowns like Precision, the splintering of insurance pools, and the responsabilization of individual customers and service providers. "Each insured and professional service provider is expected to do his or her part to prevent disabilities in the first place and to reduce expectations for compensation when disabilities cannot be suppressed." (Ericson & Doyle 2004 at 179) These responses undermine the solidarity of the risk spreading approach, so that "embracing risk, prudence, and investment sit in uneasy relationship to spreading risk, solidarity, and welfare in contemporary disability insurance systems." *Id.*

Ericson and Doyle's earthquake insurance research illustrated a very different approach to uncertainty. Earthquakes cannot be prevented, and the uncertainties are so great that the concept of "risk spreading," with its underlying image of the near cancellation of risk through the law of large numbers, suggests a greater degree of security than is warranted. So Ericson and Doyle invented a new term for the industry's approach to earthquake risk: "absorbing risk." Absorbing risk requires creating an infrastructure that can withstand the shock. This includes a physical infrastructure (buildings and bridges that will not collapse during an earthquake) and a financial infrastructure (an insurance industry that will remain solvent after an earthquake).

The concept of responsibility embodied in the absorbing risk approach is mitigation – being prepared to manage "the effects should a 'big one' occur." (*Id.* 192) Yet, individuals are not fulfilling their responsibility to "improve the quake-resistant features of their built environment," and, in part as a result, insurers offer earthquake insurance coverage that promises more protection than the financial capacity of their industry is capable of providing. Accordingly, "The state ends up as the ultimate risk manager, both through spearheading the strengthening of the physical infrastructure and by being left on the hook for insurers' inability to meet promises to pay." (*Id.* at 211) (Cf., Moss 2002)

## **b. Reactive risk**

Each of the insurance subfields that Ericson and Doyle investigated and, indeed, all of the insurance subfields investigated by sociolegal researchers illustrate the *reactive* nature of risk first

explored in institutional detail by Heimer. (Heimer 1985) As participants in the insurance industry have long recognized, insurance poses a “moral hazard” – the industry term, later adopted and generalized by economists, for the reactivity of insured risk. (Baker 1996) Because the behavior of insured individuals and organizations can affect both the frequency and the severity of the losses that are insured, insured risks are not fixed. They react. As a result, “the [insurance] market is not a market but a game,” as Heimer described, so that insurers “not only invest in information but will also behave strategically and try to alter and constrain the behavior of others.” (Heimer 1985 at 8-9). This means that “social interaction and strategically devised patterns of interdependence thus emerge in what is seemingly a market situation.” (Id.) The reactive nature of risk and the related moral hazard of insurance provide insurers with an incentive to engage in social control (hence “insurance as governance”) by attempting to influence behavior in order to reduce the frequency or severity of insured-against losses.

Heimer identified the following basic techniques to manage the moral hazard of insurance. First, insurers evaluate the degree to which the loss is within the control of the insured person or entity. The greater the control, the less willing an insurer is to provide insurance and the greater the efforts the insurer will take to address the moral hazard. For example, property owners have greater potential control over fires than earthquakes or floods, with the unsurprising result that there is no analog in earthquake and flood insurance coverage to the arson exclusion and investigative apparatus developed in connection with fire insurance. Second, insurers evaluate their applicants’ commitment to loss prevention and attempt to influence that commitment through pricing incentives, including frequent repricing (hence the relatively short time periods of most insurance contracts).

Third, insurers evaluate the social distance in an organization between the behavior that influences insured losses and the benefits provided by insurance against that loss. The greater that distance is, the more willing an insurer will be prepared to provide insurance to the organization and the less the insurer will increase the price to reflect the moral hazard. For this reason it is easier for a bank to buy insurance against theft by its tellers than it is for a law firm to buy insurance against a partner’s theft of funds from client accounts.

Fourth, insurers sometimes engage in direct command-and-control style regulation by requiring applicants to undertake certain activities as a condition of receiving the insurance, for example by requiring the installation of sprinklers to reduce damage from fire, or, in the law firm context, requiring multiple signatures and other controls over the disbursement of client funds. Fifth, insurers also engage

in *indirect* command-and-control regulation, either by placing loss control activities in the hands of third parties (for example by requiring the installation of centrally monitored and hard wired smoke detectors) or by lobbying governments to mandate loss prevention (for example through supporting efforts to strengthen building codes or improve auto safety).

Finally, insurers attempt to maintain at least some incentive to avoid loss by leaving some of the risk on the insured, through the use of coinsurance and deductibles, creating what Heimer called a “community of fate” between the insurer and the insured. (Id. at 11-13) In situations in which the loss cannot be made whole by insurance money, those non-financial injuries – most prominently pain – may serve the same function.

### **c. Insurance as governance field research**

Other sociolegal researchers have also conducted field research on the governance role of insurance in a variety of social settings. A sampling of that research is reviewed here.

Pat O’Malley’s research on the role of property insurers in governing security in the home represents what may well be the first field research self-consciously within what came to be known as the insurance-as-governance theoretical framework. (O’Malley 1991) After experiencing first-hand the social control of insurance when his home was burgled, O’Malley interviewed home insurance personnel, accompanied them to their meetings with other homeowners who had filed theft claims, and investigated the role of the private insurance industry in what he identified as the field of domestic security. He found a complex set of relationships among private insurers, the police, and households. Insurers and police work cooperatively to encourage property owners to “harden the target” to reduce theft losses. Insurers facilitate the collection of crime statistics and the involvement of the police by requiring homeowners to file police reports as a condition of making a claim. The police treat insurers as security experts able to make neutral, technical recommendations to homeowners in relation to the prevention and management of crime losses.

Although O’Malley did not use Heimer’s framework, his research shows insurers managing reactive risk. They engage in direct command and control regulation, for example by requiring households to undertake security improvements as a condition of maintaining their insurance. They engage in indirect command and control regulation, for example by working with the police to improve

domestic security. And they investigate their policyholders' commitment to loss prevention, as well as honesty and reliability, in both the sales and claims end of the insurance relationship.

Luis Lobo-Guerrero is engaged in a promising long term investigation of insurance as a "biopolitical security technology." (Lobo-Guerrero 2010). Two published pieces from that research investigate kidnap and ransom insurance (Lobo-Guerrero 2007) and the activities of maritime insurance associations in relation to marine piracy. (Lobo-Guerrero 2008) Both pieces explore how insurance helps keep global commerce flowing in the face of criminal activities that individual states have difficulty controlling. Insurance underwriting and claims management activities shape the flow of that commerce and the behavior of states and other actors in relation to that flow.

For example, a decision by the Lloyd's Market Association's Joint War Committee to put the Malacca Strait on what is known as their "War List" (because of piracy losses) increased the price of shipping goods through the Strait, prompting coordinated action by Malaysia, Singapore and Kuala Lumpur to expand naval patrols and related security measures in the Strait, eventually resulting in the removal of the Strait from the War List. (Lobo-Guerrero 2008) Relatedly, the underwriting standards of kidnap and ransom insurers shape the risk management practices of prospective insureds, sometimes even requiring firms to hire approved private security providers to establish and audit their "insurability level." (Lobo-Guerrero 2007 at 328) Like the private investigation firms Ericson et al encountered in their study of Canadian property insurance (Ericson et al 2003 at 330-33), these private security providers are networked with insurance companies, public authorities, and perhaps, through informants, with the criminal enterprises themselves, constituting an immediately recognizable – once the research brings it into view – example of how insurance governs beyond the state.

As with O'Malley's field research, it is possible to reinterpret Lobo-Guerrero's findings using Heimer's risk management framework. For example, the war risk premium is a price-based incentive that led shipping companies and their customers to persuade Malaysia to crack down on piracy. The security providers required by kidnap and ransom insurers are a form of indirect command and control regulation. And the personal peril faced by ship captains and the high level executives protected by kidnap and ransom insurance functions as a non-monetary deductible or coinsurance "payment" that very substantially reduces the likelihood that the presence of insurance reduces their vigilance.



Surprisingly, sociolegal field research has not yet extended to health insurance, despite the obvious regulatory role of health insurance managed care organizations in the health care field. Very recent work suggests that the insurance-as-governance theoretical framework may be gaining ground among health researchers, creating the possibility that some of the substantial resources devoted to health care research may be turned in this direction. (Hunter 2008; Hoffman 2010) For example, Nan Hunter has advocated using “risk-centered governance” as the paradigm for health law and policy. (Hunter 2008) She begins by noting that debate in the U.S. about “universal access to health care” focuses entirely on “universal access to health insurance” and then connects that debate to the rise of “actuarial medicine.” (See also Simon 1988) Like other sociolegal researchers, she argues that “the political valence of ‘risk’ is subject to multiple appropriations, including ones that could generate ongoing pressures to move in a more egalitarian fashion.” (See also Baker 2002, Stone 2002) In conceptually related work, Allison Hoffman has examined the Massachusetts experiment in health insurance mandates, identifying how the fragmentation of health insurance risks pools that results from actuarial risk rating limits the ability of private insurance markets to carry out the social goal of health redistribution. (See also Baker 2003). Both efforts are more conceptual than empirical, but the frameworks that they employ could easily be used to guide field research.

Other noteworthy field research efforts in the insurance and governance area include: Hubbert’s research on the governance role of insurance companies in the motion picture industry in the U.S., Simon’s analysis of the rise of the risk management approach to campus drinking, particularly the role of the Fraternity Insurance Purchasing Group; Glenn’s research on character-based underwriting in the U.S. homeowners’ insurance industry; and Scale’s research on the tort settlement factoring industry in the U.S. (Hubbert 1996-97, Simon 1994, Glenn 2001, Scales 2002). Like insurance as governance work more generally, this research highlights the role of insurance institutions in the social construction of risk and responsibility. “Seen in this way, insurance institutions cease to play only a passive, loss spreading role and, instead, actively construct (and are constructed by) the world they inhabit.” (Baker 2002 at 48).

### **3. Conclusion: Liability insurance as governance**

As the frame metaphor employed earlier in this essay suggests, liability insurance can easily be understood as a form of governance. Indeed, it is possible to find all of Heimer’s risk management techniques employed in the liability insurance context. Liability insurers investigate applicants’

commitment to loss prevention; liability insurers vary the extent and price of coverage in relation to the degree of control the policyholder exercises of the liabilities insured; liability insurers engage in direct and indirect regulation; and liability insurers employ deductibles and coinsurance to maintain a community of risk with the people and entities that they insure. The extent and mix of these techniques varies considerably across liability insurance forms and organizations, but examples of all of these can be found in the sociolegal literature. (E.g., Baker & Griffith 2010, Baker 2002, Abraham 1986). In that regard, liability insurance provides one more field in which sociolegal researchers can investigate the limits and possibilities of insurance as governance.

In another regard, however, liability insurance differs from other kinds of insurance, in a way that should be of special interest to sociolegal researchers. With liability insurance, the risks insured – and thus the subject of governance – are the direct products of legal institutions. Consider, for example, the “insuring agreement” in the standard form commercial liability insurance policy, which sets out the central promise of that form of insurance:

*We will pay those sums that the insured becomes legally obligated to pay as damages because of “bodily injury” or “property damage” to which this insurance applies. We will have the right and duty to defend the insured against any “suit” seeking those damages.* (Baker 2008 at 358, emphasis supplied)

Notice the centrality of law to this promise. The liability insurance company promises to pay the insured’s *legal* obligations and to defend the insured against suits seeking to establish those obligations. While of course there are limits on this promise, the insurance coverage is to a substantial extent coextensive with liability, meaning that the risks insured are nearly coextensive with the range of potential liabilities that the insured faces. If we consider law in action, the overlap between liability and insurance is even more complete.

As Legal Realism made plain, the law is deeply entwined with the property, bodies, and income sources insured by other forms of insurance, such as property, life, health, disability, marine, and kidnap and ransom insurance. Moreover, a legal system consisting, at a minimum, of contract enforcement and solvency regulation is necessary to sustain all these insurance enterprises. Accordingly, all forms of insurance need law, are shaped by law, and in some indirect and difficult-to-chart sense surely shape

law (for example through the indirect regulation earlier described). But the relationship between law and liability insurance is more complete – perhaps even total.

With liability insurance, liability itself falls within the range of risks subject to governance by insurance. “Liability itself” includes not simply the individual acts or organizational arrangements that may lead to liability in particular cases, but also the entire liability production system, including courts and legislatures.

This relationship between liability insurance and liability production system is implicit in the familiar sociolegal concept of the “repeat player,” who has an incentive to manage encounters with the legal system from a long term perspective, distinct from the “one shotter.” But the concept of repeat player, as important as it may be to sociolegal thought, is not adequate to describe the relationship between liability insurance and legal institutions. Liability insurance companies are massively repeat players, so much so that including them in the same category with landlords, banks, utility companies, airlines, municipalities and other, more typical repeat players threatens to obscure rather than reveal the relationship between liability insurance and the law. Liability insurance is involved in almost every tort and tort-like claim (including statutory torts such as securities fraud, civil rights actions, and sexual harassment and other forms of employment discrimination). Either (and in most cases) one or more liability insurance companies will be responsible for paying the damages or the absence of insurance in a particular case means that the case is consciously understood by the lawyers and other personnel in the liability production system to be different from the ordinary liability claim in that regard (much as a case involving a pro se defendant is different in the criminal context because of what the pro se defendant does not have). In addition, disputes between liability insurance companies and their policyholders constitute an important subset of contract actions filed in state and federal courts.

As a result, liability insurance as an institution has an enormous stake in the liability production system, well beyond that of other repeat players. Given this reality, it should surprise no one to learn that that liability insurers are involved whenever a state or federal legislature considers a change in liability law, liability insurers fund judicial education programs, and that international liability insurance and reinsurance companies are engaged in understanding and shaping liability around the globe. Yet, notwithstanding the long history of insurance in sociolegal research, these institutional connections between liability insurers and the liability production system remain largely unexplored. Prior research

provides some models for how to engage in this research and suggests some ideas about what researchers may find, but there is much more work to be done.

## LITERATURE CITED

- Abraham KS. 2008. *The Liability Century: Insurance and Tort Law from the Progressive Era to 9/11*. Cambridge: Harvard Univ. Press
- Abraham KS. 1986. *Distributing Risk: Insurance, Legal Theory, and Public Policy*. New Haven: Yale Univ. Press
- Abraham KS, Liebman L. 1993. Private insurance, social insurance, and tort reform: Toward a new vision of compensation for illness and injury. *Colum. L. Rev.* 93:75-118
- Abraham KS, Weiler PC. 1994. Enterprise liability and the evolution of the American health care system. *Harv. L. Rev.* 108:381-436
- Andrews LB. 1993. *Medical error and patient claiming in a hospital setting*. Work. Pap., American Bar Foundation
- Baker T. 1996. On the genealogy of moral hazard. *Texas L. Rev.* 75:237-92
- Baker T. 2001. Blood money, new money and the moral economy of tort law in action. *Law & Society Rev.* 35:275-319
- Baker T. 2002. Risk, insurance and the social construction of responsibility. In *Embracing Risk: The Changing Culture of Insurance and Responsibility*, ed. T Baker, J Simon, 2:33-51. Chicago: Univ. of Chicago Press
- Baker T. 2004. Insuring liability risks. *Geneva Pap. Risk Ins.* 29:128-49
- Baker T. 2005. *The Medical Malpractice Myth*. Chicago: Univ. of Chicago Press
- Baker T. 2006. Insurance as tort regulation: Six ways that liability insurance shapes tort law. *Conn. Ins. L. J.* 12:1-16
- Baker T. 2009. Liability insurance at the tort-crime boundary. In *Fault Lines: Tort Law as Cultural Practice*, ed. DM Engel, M McCann, 4:66-79. Stanford: Stanford Univ. Press

- Baker T. forthcoming 2010. Transparency through insurance: Mandates dominate discretion. In *Transparency in the Civil Justice System*, ed. J Doherty, RT Reville
- Baker T, Griffith SJ. forthcoming 2010. *Ensuring Corporate Misconduct: How Liability Insurance Transforms Shareholder Litigation*. Chicago: Univ. of Chicago Press
- Baker T, Simon J, eds. 2002. *Embracing Risk: The Changing Culture of Insurance and Responsibility*. Chicago: Univ. of Chicago Press
- Black BS, Silver CM, Hyman DA, Sage WM. 2005. Stability, not crisis: Medical malpractice claim outcomes in Texas, 1988-2002. *J. Empirical Legal Stud.* 2:207-59
- Bourdieu P, Wacquant LJD. 1992. *An Invitation to Reflexive Sociology*. Chicago: Univ. of Chicago Press
- Cook PJ, Graham DA. 1977. The demand for insurance and protection: The case of irreplaceable commodities. *Quart. J. Econ.* 91:143-56
- Croley SP, Hanson JD. 1995. The nonpecuniary costs of accidents: Pain and suffering damages in tort law. *Harv. L. Rev.* 108:1785-1917
- Ericson RV, Doyle A. 2004. *Uncertain Business: Risk, Insurance and the Limits of Knowledge*. Toronto: Univ. of Toronto Press
- Ericson R, Doyle A, Barry D. 2003. *Insurance as Governance*. Toronto: Univ. of Toronto Press
- Ewald F. 1991. Insurance and risk. In *The Foucault Effect: Studies in Governmentality*, ed. G Burchell, C Gordon, P Miller, 10:197-210. Chicago: Univ. of Chicago Press
- Geistfeld MA. 1995. Placing a price on pain and suffering: A method for helping juries determining tort damages for nonpecuniary injuries. *Cal. L. Rev.* 83:773-852
- Glenn BJ. 2000. The shifting rhetoric of insurance denial. *Law & Soc'y Rev.* 34(3):779-808
- Gross SR, Syverud KD. 1996. Don't try: Civil jury verdicts in a system geared to settlement. *UCLA L. Rev.* 44:1-64

- Heimer C. 1982. The racial and organizational origins of insurance redlining. *J. of Intergroup Relations* 10(3):42-60
- Heimer C. 1985. *Reactive Risk and Rational Action: Managing Moral Hazard in Insurance Contracts*. Berkeley: Univ. of California Press.
- Heimer C. 2002. Insuring more, ensuring less: The costs and benefits of private regulation through insurance. In *Embracing Risk: The Changing Culture of Insurance and Responsibility*, ed. T Baker, J Simon, 6:116-145. Chicago: Univ. of Chicago Press
- Hoffman A. Forthcoming 2010. Oil and water: Mixing individual mandates, fragmented markets, and health reform. *Am. J.L. & Med.*
- Hubbart EO. 1996-1997. When worlds collide: The intersection of insurance and motion pictures. *Conn. Ins. L.J.* 3:267-304
- Hunter ND. 2008. Risk governance and deliberative democracy in health care. *Geo. L.J.* 97:1-60
- Lobo-Guerero L. 2007. Biopolitics of specialized risk: an analysis of kidnap and ransom insurance. *Security Dialogue* 38:315-334
- Lobo-Guerrero, L. 2008. 'Pirates', stewards, and the securitization of global circulation. *International Political Sociology* 2:219-35
- Lobo-Guerrero, L. 2010. *Insuring Security: Biopolitics, Security and Risk*. New York: Routledge
- Localio, AR, Lawthers AG, Troyen A, Brennan NM, Laird LE, et al. 1991. Relation between malpractice claims and adverse events due to negligence, results of the Harvard medical practice study III. *NEJM* 325:245-251
- Lukes S. 1974. *Power: A Radical View*. London: Macmillan.
- Moss D. 2002. *When All Else Fails: Government as the Ultimate Risk Manager*. Cambridge: Harvard Univ. Press

- O'Malley P. 1991. Legal networks and domestic security. *Studies in Law, Policy and Society*. 11:171-190
- O'Malley, P. 2006. *Risk, Uncertainty and Government*. London: Glass House Press
- Peters PG. 2007. What we know about medical malpractice settlements. *Iowa L. Rev.* 92:1783-835
- Priest G. 1990. *The New Legal Structure of Risk Control*. *Daedalus*. 119:207-27
- Pryor ES. 1997. The stories we tell: intentional harm and the quest for insurance funding. *Tex. L. Rev.* 75:1721-64
- Rabin RL. 1999. Enabling torts. *DePaul L. Rev.* 49:435-54
- Ross HL. 1970. *Settled Out of Court: the Social Process of Insurance Claims Adjustments*. Chicago: Aldine Publishing Company
- Scales AF. 2002. Against settlement factoring? The market in tort claims has arrived. *Wis. L. Rev.* 2002:859-964
- Schlanger M. 2008. Operationalizing deterrence: claims management (in hospitals, a large retailer, and jails and prisons). *J. of Tort Law*. 2(1):1-50
- Sebok AJ. 2003. The fall and rise of blame in american tort law. *Brook. L. Rev.* 68:1031-53
- Simon J. 1988. The ideological effects of actuarial practices. *Law & Soc'y Rev.* 22:771-800
- Simon J. 1994. In the place of the parent: risk management and the government of campus life. *3 Soc. & Legal Stud.* 15:29-31
- Simon J. 1998. Driving governmentality: automobile accidents, insurance and the challenge to the social order in the inter-war years. *Conn. Ins. L. J.* 4:521-588
- Squires GD, ed. 1997. *Insurance Redlining: disinvestment, reinvestment, and the evolving role of financial institutions*. Washington, D.C.: Urban Institute Press
- Stapleton J. 1995. Tort, insurance and ideology. *Mod. L. Rev.* 58: 820-845
- Steele J. 2004. *Risks and Legal Theory*. Portland: Hart Publishing



- Stone D. 2002. The moral opportunity of insurance. In *Embracing Risk: The Changing Culture of Insurance and Responsibility*, ed. T Baker, J Simon, 3:52-79. Chicago: Univ. of Chicago Press
- Studdert DM, Mello MM, Gawande AA, Gandhi TK, Dachalia A, et al. 2006. Claims, errors, and compensation payments in medical malpractice litigation. *NEJM*. 354:2024-33
- Vidmar N, Lee P, MacKillip D, McCarthy K, McGwin G. 2005. Uncovering the 'invisible' profile of medical malpractice litigation: Insights from Florida. *DePaul L. Rev.* 54:315-56
- Wriggins J. 2001. Domestic violence torts. *So. Cal. L. Rev.* 75:121-184
- Yeazell SC. 2001. Refinancing civil litigation. *DePaul L. Rev.* 51:183-217
- Yoon A. 2001. Damage caps and civil litigation: An empirical study of medical malpractice litigation in the South. *Amer. Law Econ. Rev.* 3:199-227
- Zeiler K, Black BS, Silver CM, Hyman DA, Sage WM. 2008. Physicians' insurance limits and malpractice payments: Evidence from Texas closed claims, 1990-2003. *J. Legal Stud.* 36