

Taking Advantage of the Torts Crisis

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I. INTRODUCTION AND OVERVIEW

Although the metaphor of a “window of opportunity” has no doubt been overused, it is difficult to resist using it to characterize the possibility of serious reform of American tort law. Even if headline-grabbing, personal injury stories remain front page news, experience teaches that it is unrealistic to expect the legislative process to give its sustained attention to any issue. This seems especially so for an issue such as tort law reform which, because it does not neatly divide people along traditional partisan lines, is rather ambiguous in its prospect of winning new voter support for candidates who either advocate or oppose change. In short, as in many such matters, timing is of considerable importance.

The time is ripe for change. Indeed, in what could prove to be a first wave of defendant-oriented reforms, a number of state legislatures during the past year and a half have enacted laws designed to assure the public, the media, and those now complaining loudest about the tort system that something is being done about the torts “crisis.”¹ Although these new laws might absorb the energies now directed at change, it is alternatively possible that they will only whet the appetites of defense lobbyists who will seek further reform, while at the same time serving as inspiration for legislators in other jurisdictions. Certainly there are organized, and apparently well-financed interest groups on the defense side who, with their laundry list of reforms at the ready, seem committed to an ongoing state-by-state campaign, hoping especially to obtain significant changes in many of the key personal injury law jurisdictions that have yet to fall into their camp.²

At the same time, several congressional committees and their staffs, as well as many torts study commissions with “balanced” or “neutral” memberships, have been at work investigating various aspects of the personal injury law problem.³ Although these projects could simply serve to dissipate reform pressures, some of them just might be the impetus for significant legislative action.

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1. For a discussion of these changes, see *infra* text accompanying notes 112–26.

2. See Strasser, *Both Sides Brace for Tort Battle*, Nat'l L.J., Feb. 16, 1987, at 1, discussing the American Tort Reform Association (“ATRA”), the American Legislative Exchange Council, and the National Coalition for Litigation Cost Containment (“NCLCC”).

3. For examples of congressional activity, see *Availability and Cost of Liability Insurance, Before the Senate Comm. on Commerce, Science, and Transportation*, 99th Cong., 2nd Sess. (1986); *Availability and Affordability Problems in Liability Insurance, Before the Subcomm. on Business, Trade and Tourism, Senate Comm. on Commerce, Science and Transportation*, 99th Cong., 2nd Sess. (1985); *The Insurance Industry's Assault on Victims Rights, Before the House Comm. on Banking, Finance and Urban Affairs*, 99th Cong., 2nd Sess. (1986). For a discussion of American Bar Association activities, see Part III, B, *infra*. Strasser, *supra* note 2, at 36, reports on study commissions at work in Alabama, Arkansas, Iowa, Kansas, Kentucky, Maine, North Carolina, Oklahoma, and Oregon. In addition to enacting some significant tort law changes in 1986, Florida also created an Academic Task Force on tort reform, before which I testified on October 30, 1986. Its report is due in March 1988.

Indeed, in this uncertain climate, legislatures could even become receptive to the bold and rather different changes that law professors have advocated or might advocate.⁴ Prospects for actual adoption of any such proposal, however, would probably greatly depend upon getting key adversaries in the current tort reform debate to view it as a workable compromise, one that embodies elements that are attractive to each group.

My proposed solution, which is detailed later, attempts to do just that. It combines certain restraints on tort law (the main objective of current reform efforts) with improved compensation for victims (a goal thus far notably absent from current political battles). Although adoption of my proposals would require altering the terms of the current debate by realigning the coalitions now engaged in battle, because it is in the nature of a compromise, this is not an inconceivable result.

Joining together on behalf of my reform package, I envision a coalition of victim, consumer, and business interests—each of which would benefit.⁵ Although my proposal ought to appeal to business interests, the initiative on its behalf realistically may have to come from the consumer and victim side. This is because those who have been protesting most strongly against the tort law in the current debate—enterprise defendants, their lawyers, and their insurers—have already formulated proposals that are largely dominating the political agenda. Their active opponents, plaintiff lawyers and consumer groups, have so far mainly felt forced to assume a defensive posture by trying to stop what appears to be a potentially out-of-control steamroller. I say “mainly” because the plaintiff side has employed one major counter-attack strategy—attempting to shift legislative attention to regulating the insurance industry. My proposal offers quite a different strategy.

The polarization that has thus far characterized the current tort reform battle is likely to lead to quite unfortunate consequences. Either substantial tort victim rights will be swept away with nothing gained for the disabled as a trade-off, or socially

4. The window of opportunity may not remain open for long, however. Experience from Great Britain is perhaps illustrative. During the early 1970s, when auto no-fault held world-wide attention and New Zealand had just enacted a comprehensive accident compensation scheme, a British Royal Commission (the Pearson Commission) was charged with looking at tort law reform. At that same time, a group of scholars at Oxford's Centre for Socio-Legal Studies embarked upon a truly impressive study of tort law in action. This eventually led in 1984 to a remarkable volume containing strong empirical support for a bold new way to think about the compensation of accident victims. The Oxford proposals stressed, on the one hand, the importance of the durational character of the injuries tort victims suffer and, on the other, the relationship of those injuries to disabilities caused in other ways, most importantly by disease. Unfortunately, by the time that the Oxford volume was published, the Pearson Commission's work was long completed (REPORT OF THE ROYAL COMMISSION ON CIVIL LIABILITY AND COMPENSATION FOR PERSONAL INJURY, Cmnd. 7054, (1978)), and whatever serious British Government interest in bold tort law reform there had been had long since dissipated. As a consequence, so far as local consumption is concerned, the recommendations contained in HARRIS, COMPENSATION AND SUPPORT FOR ILLNESS AND INJURY (1984) must probably await some future torts crisis in Britain.

This is not to say that the earlier release of the Oxford study would necessarily have made a difference, for even the milder recommendations of Pearson in favor of an auto no-fault scheme, for example, have yet to be enacted in Britain. Still, without a published volume and a detailed plan in hand, the Oxford group, as I see it, largely lost the opportunity to have an impact on the substantial debate that the Pearson Report generated.

What I favor, at least for short term disabilities, is quite similar to what the Oxford group proposed. I am hoping for the ironic result that recommendations made for Britain could be seen to have had earlier reception in the United States. My proposals are briefly described at text accompanying notes 10–18, *infra*, and in more detail in Part IV, *infra*.

5. Whether or not substantial backing could be obtained from the bar and insurance interests is less clear. For reasons explained in Part IV, *infra*, it is also the case that my proposal might find more favor among big business than with small business.

undesirable features of the current tort system will remain intact due to the efforts of self-styled friends of victims, who defend every aspect of the existing regime.

Perhaps the problem is that not enough people yet recognize the extent to which victim-aiding/tort-curtailing compromises are available for ready adoption. I do not have in mind here far-reaching reforms of the sort enacted in New Zealand,⁶ or those proposed over the years for the U.S. in somewhat different form by scholars such as Professor Franklin,⁷ Dean Pierce,⁸ and Eli Bernzweig,⁹ under which personal injury law is completely replaced by a new comprehensive accident compensation scheme. Whatever the long-run advantages of such schemes, and they are considerable, it is quite unrealistic to imagine their full-blown enactment now.

But substantial first steps in that direction are quite plausible, particularly if one thinks of victims as divided into two broad categories based upon the seriousness of their injuries. Just as criticisms of tort law differ somewhat as applied to these separate groups, so too different reforms should be directed towards them.

With regard to the great mass of personal injury claims that are made on behalf of the not so seriously injured, the basic point is that using the apparatus of the tort law/liability insurance system is intolerably wasteful. An efficient mechanism should be substituted that would deliver to these sorts of victims, on a non-fault basis, a sensible package of benefits that would cover out-of-pocket losses.

Even as to the more seriously hurt, because the "justice" that tort law provides is in practice very much like a lottery, we should give up the myth that our current adversarial system of individualized dispute resolution generates for victims the sums they precisely deserve. Here, too, it would be a substantial social gain to make legal changes that would promptly and more cheaply provide such victims with benefits based more on need.

Although there is no single way to turn these broad propositions into detailed recommendations, my proposal offers one attractive method of doing so.¹⁰ It would largely exclude from the tort system those people who are able to return to their normal activities within six months of their injury and who have not incurred a permanent impairment or disfigurement of a serious sort. In turn, however, it would assure that nearly all employees and their dependents have generous temporary disability income replacement benefits and good health care benefits to take care of the basic needs of people disabled for six months or less. These benefits would be provided by building upon existing programs.

The temporary income support scheme would build upon both existing disability income programs that five states now have¹¹ and existing sick leave and temporary

6. See G. PALMER, *COMPENSATION FOR INCAPACITY* (1979) and T. ISON, *ACCIDENT COMPENSATION* (1980).

7. Franklin, *Replacing the Negligence Lottery: Compensation and Selective Reimbursement*, 53 VA. L. REV. 774 (1967).

8. Pierce, *Encouraging Safety: The Limits of Tort Law and Government Regulation*, 33 VAND. L. REV. 1281 (1980).

9. E. BERNZWEIG, *BY ACCIDENT NOT DESIGN: THE CASE FOR COMPREHENSIVE REPARATIONS* (1980).

10. Elsewhere I describe and argue in detail for the specific reforms I favor. See Sugarman, *Serious Tort Law Reform*, 24 SAN DIEGO L. REV. (forthcoming 1987). See also Sugarman, *Doing Away With Tort Law*, 73 CALIF. L. REV. 555, 662-64 (1985).

11. See *Social Security Programs in the U.S.*, 49 SOC. SECURITY BULL. 5, 37-41 (1986).

disability benefits that a majority of employees everywhere now have through their work.¹² Under this scheme, an employee earning up to twice the average wage and disabled for any reason (accident or illness, off-the-job or on) would qualify for benefits that would provide at least 85% of his or her after-tax pay for up to six months.

Provision of medical and rehabilitation benefits would also depend on existing public and private health care plans.¹³ However, such benefits would be increased by providing employers who do not currently have a health plan with an incentive to adopt one. The incentive would be that employers with good quality health plans would no longer have to provide medical benefits to the temporarily disabled through their workers' compensation program. This modification should produce immediate dollar savings to employers.¹⁴

Moreover, by removing this medical benefits function from workers' compensation, and coupling it with my proposal to use the temporary income support plan to cover disabilities arising both outside and inside the workplace, workers' compensation, like tort law, would largely cease to cover short term injuries. That would generate yet additional administrative savings.

Let me next make clear how tort law's role for the not so seriously injured would also be minimized by my proposal. This group could sue for neither pain and suffering damages nor damages for lost earnings. Moreover, claims for medical expenses would be allowed in only those rare cases in which they were not otherwise covered. Eighty to ninety percent of personal injury claims would thereby be removed from the tort system.

For the more seriously injured tort victim, I favor various changes in tort law damages rules. Although my proposals for change bear some resemblance to a number of reforms now under consideration, they are importantly different, especially in their effort to expand some aspects of victim recovery.¹⁵

12. See generally Price, *Cash Benefits for Short-Term Sickness: Thirty-five Years of Data, 1948-83*, 49 SOC. SECURITY BULL. 5 (1986); CHAMBER OF COMMERCE OF THE U.S. SURVEY RESEARCH CENTER, *EMPLOYEE BENEFITS*, 1982 20-21 [hereinafter cited as *EMPLOYEE BENEFITS*] (1984).

13. Department of Labor surveys suggest that a very large proportion of fulltime employees of large and medium-sized firms are already covered by some form of health insurance. See BUREAU OF LABOR STATISTICS, DEPARTMENT OF LABOR, *EMPLOYEE BENEFITS IN MEDIUM AND LARGE FIRMS*, 1985 25 (Bulletin 2262, 1986).

14. Currently, as a result of this requirement, most employers provide duplicate arrangements for this need, and substantial administrative costs are incurred as health insurers seek reimbursement from workers' compensation insurers.

15. This package owes its inspiration to earlier proposals of Professor Jeffrey O'Connell (See O'Connell, *A Proposal to Abolish Contributory and Comparative Fault, With Compensatory Savings by Also Abolishing the Collateral Source Rule*, 1979 U. ILL. L.F. 591 and O'Connell, *A Proposal to Abolish Defendants' Payment for Pain and Suffering in Return for Payment of Claimants' Attorneys' Fees*, 1981 U. ILL. L. REV. 333) that seem to have been overlooked in most discussions of his ideas. These discussions have focused instead on various no-fault schemes that he has proposed. Indeed, most of O'Connell's efforts in recent years appear to have been devoted to developing and promoting various kinds of no-fault plans that would be optional, that is elective, in one respect or another. See, e.g., O'Connell, *Expanding No-Fault Beyond Auto Insurance: Some Proposals*, 59 VA. L. REV. 749 (1973); O'Connell, *A "Neo No-Fault" Contract in Lieu of Tort: Preaccident Guarantees of Postaccident Settlement Offers*, 73 CALIF. L. REV. 898 (1985) [hereinafter "*Neo No-Fault" Contract in Lieu of Tort*"]. As explained later, see text accompanying note 149, *infra*, I admit that there might be a place for no-fault schemes, at least as an interim solution, when it comes to dealing with seriously injured victims. But a package of no-fault plans (elective or not) dealing with different sorts of accidents seems to me not to be the right solution at all for the less seriously injured. For them, my proposed solutions that arise from existing employee benefit and social insurance arrangements, seem far more preferable. This is both a practical matter and a reflection of what is socially desirable.

More precisely, on the victim side, (1) the plaintiff's fault would no longer serve in any way to cut down on the victim's recovery, and (2) successful claimants (in suits or settlements) would, as in Great Britain, be entitled to an award of attorneys' fees from the defendant. Such fees would, in most cases, be set at a proportion of the plaintiff's award, with that percentage declining as the amount of the award increases. A declining percentage approach is now used, for example, to limit attorneys' fees in medical malpractice cases in California.¹⁶

On the defendant side, (1) the collateral source rule¹⁷ would be reversed, at least with respect to basic social insurance and employee benefits, (2) punitive damages would be better controlled by giving that responsibility entirely to trial court judges, and (3) pain and suffering awards would be limited to \$150,000. This package of changes would both reduce and stabilize defendant tort costs while simultaneously redirecting funds away from those who happen to be lucky under today's procedures and towards needy victims.

Later in this Article, I will contrast my proposed reforms with the others that are most prominent in the current tort reform debate.¹⁸ For now, suffice it to say that by offering a compromise designed to appeal to business, consumer, and victim interests, I seek to take advantage of tort reform's position on the political agenda to promote changes that are not only responsive to short run concerns, but, more importantly, are desirable quite apart from the current "crisis."

II. THE TORTS CRISIS

Before discussing the leading reform proposals currently under consideration, it is useful to examine the "crisis" that has led to the current political battles. I use the term "crisis" to convey the public's sudden view that our tort law/liability insurance system is out of control, that many people are suffering in serious ways as a result, and that therefore something quickly ought to be done about it. Although the crisis mentality is in some respects the creation of media sensationalism, there are a number of very real problems in the liability system that justify having tort law in the limelight.

The sudden unavailability of liability insurance for a large number of activities,¹⁹ as well as widespread complaints about insurance unaffordability in the face of

16. California Business and Professions Code Section 6146 permits the attorney to charge the client no more than 40% of the first \$50,000 of the award, 33% of the next \$50,000, 25% of the next \$100,000, and 10% of any amount in excess of \$200,000. It is important to reemphasize that under my proposal these fees would not come out of the victim's award, but would be added on top. The California arrangement was upheld against constitutional attack in *Roa v. Lodi Medical Group*, 37 Cal. 3d 920, 695 P.2d 164, 211 Cal. Rptr. 77 (1985).

17. Under this principle, for purposes of deciding the amount of damages a defendant owes, tort law ignores (*i.e.*, treats as "collateral") other sources of compensation a victim may have for the loss in question. See generally Fleming, *The Collateral Source Rule and Loss Allocation in Tort Law*, 54 CALIF. L. REV. 1478 (1966).

18. See *infra* Part IV. Even from this short description, however, one can see a broad parallel between my proposal and that of the Oxford Centre for Socio-Legal Studies, *supra* note 4, in the singling out for separate treatment those people who have short term disabilities, whatever their cause.

19. See U.S. ATTY'S GEN. TORT POLICY WORKING GROUP, REPORT OF THE TORT POLICY WORKING GROUP ON THE CAUSES, EXTENT AND POLICY IMPLICATIONS OF THE CURRENT CRISIS IN INSURANCE AVAILABILITY AND AFFORDABILITY 6-14 (1986) [hereinafter REPORT]. With regard to liability insurance for potential personal injury, the Report emphasizes availability problems in the day care, municipal, liquor, and motor carrier markets. For a follow-up report one year later, see U.S. ATTY'S GEN.

huge premium increases,²⁰ have clearly been the most important factors in galvanizing legislative and media attention to the tort system. These are hardly new phenomena, however. In the mid-1970s, the same problems plagued buyers of both medical malpractice insurance and product liability insurance.²¹

That these problems would recur so quickly, and that the various reforms enacted in the 1970s failed to prevent their reoccurrence, would seem to justify greater alarm this time around. But, in addition, there are several other factors involved this time that have magnified the feeling of crisis.

Unlike the 1970s, municipalities have been especially hard hit by the insurance crunch. Whereas many legislators may choose to treat complaints about costs coming from the business sector as unreliable exaggerations, when fellow politicians start screaming about the fix their jurisdiction is in, it is perhaps harder to turn a deaf ear. After all, it is the taxpayers' money that is being directly used to pay for tort awards and for liability insurance.

Coincident with these insurance woes, considerable publicity has been given to other deep concerns about tort law. These are likely to remain even after the liability insurance market calms down and insureds have adjusted to the new higher insurance price levels.²² For example, a great deal of attention has been given to the threatened or actual withdrawal of important goods and services from the public market by those faced with serious tort liability problems. Shortages of children's vaccines,²³ doctors leaving obstetrical practice,²⁴ and childcare centers closing down,²⁵ to give but three ominous examples, understandably promote the feeling that something is drastically wrong. Moreover, there seems to be wider awareness now of some of the perverse behavioral reactions that tort law can prompt. This is illustrated by reports that, because of malpractice fears, many doctors order unneeded tests, some choose not to

TORT POLICY WORKING GROUP, AN UPDATE ON THE LIABILITY CRISIS 7-18 (1987) [hereinafter UPDATE] which finds that, while availability problems had already eased somewhat by the end of 1986, serious problems continue in some sectors.

20. *Id.* Regarding affordability, the Report emphasizes problems faced by general aviation manufacturers and nurse-midwives. The Update finds that while the rate at which liability insurance premiums increased in 1986 was generally less than in 1985, and that while insureds are becoming accustomed to the new level of charges, this has been accompanied by a deterioration in coverage—through exclusions, deductibles, and the resort to self-insurance mechanisms of uncertain long-term financial viability. UPDATE, *supra* note 19, at 7-8.

21. See Robinson, *The Medical Malpractice Crisis of the 1970's: A Retrospective*, 49 LAW & CONTEMP. PROBS. 5 (1986); *Executive Summary for the Final Report of the Federal Interagency Task Force on Product Liability*, 1977 INS. L.J. 686.

22. In other words, even if insurance difficulties have been blown out of proportion (or even if, as unlikely as it seems to me, the insurers, as some charge, have somehow conspired to create the unavailability and unaffordability problems), there is now also a broad awareness of problems surrounding tort law that will endure unless substantial changes are made.

23. See WORKING GROUP ON VACCINE SUPPLY AND LIABILITY, REPORT OF THE CABINET COUNCIL ON HUMAN RESOURCES, reprinted in *National Childhood Vaccine Injury Compensation Act of 1985, Before the Sen. Comm. on Labor and Human Resources*, 99th Cong., 1st Sess. (1985), at 120-53 [hereinafter REPORT OF THE WORKING GROUP ON VACCINE SUPPLY AND LIABILITY].

24. See, e.g., *Malpractice Insurance Trends: Impact on Access to Obstetric Care*, California Sen. Comm. on Health and Human Services (Nov. 19, 1985); *Beyond Tort Reform*, 257 J. A.M.A. 827 (1987) (noting that "over 12% of obstetricians nationwide have stopped delivering babies.").

25. Wall St. J., Dec. 3, 1985, at 30, col. 1. A survey of day care providers conducted by the National Association for the Education of Young Children found that 40% of survey participants had their insurance cancelled or not renewed and that a majority of those with coverage had premium increases of 200% to 300%. See REPORT, *supra* note 19, at 10.

recommend what they privately think is the best treatment for the patient, and growing numbers subscribe to lists of patients who have previously sued another doctor.²⁶

Another recent well-publicized problem is the tort system's difficulty in managing a wide variety of so-called "mass torts" claims. These cases typically involve victims who have been injured, often badly, by essentially the same product or activity and have collectively bombarded one or more manufacturers with claims for damages. Examples include litigation concerning asbestos,²⁷ radiation from early United States atmospheric testing of nuclear bombs,²⁸ the Vietnam War defoliant Agent Orange,²⁹ the Dalkon Shield contraceptive device,³⁰ and the drugs DES³¹ and Bendectin.³²

These cases raise numerous concerns. Sometimes there is doubt, arising from terribly complex scientific factors, over whether the product is dangerous at all,³³ or whether the plaintiff's harm was caused by the defendant.³⁴ Frequently, despite the avalanche of documents produced through discovery, the fault of the defendant remains in serious doubt, or at least there is great controversy over when the defendant knew or should have known about dangers associated with the product.³⁵ Given the seriousness of the injuries involved and assumptions about the availability of liability insurance to distribute these losses widely, some courts have adopted compensation-oriented rules, such as market share liability and hindsight tests of a product's defectiveness, which defendants claim are quite unfairly tilted in favor of plaintiffs.³⁶ Punitive damages awards have sometimes also been awarded in amounts that seem inappropriate to many, especially when the defendant is punished in case after case.³⁷ In fact, in some mass tort situations, the amounts of money sought and likely to be awarded are so great as to threaten to exhaust both the liability insurance

26. See generally *Beyond Tort Reform*, *supra* note 24. For further examples of undesirable social impacts laid at the feet of tort law, see UPDATE, *supra* note 19, at 18—20.

27. See generally D. HENSLER, W. FELSTNER, M. SLEVIN, & P. EBENER, *ASBESTOS IN THE COURTS, THE CHALLENGE OF MASS TOXIC TORTS* (1985).

28. See Ball, *The Problems and Prospects of Fashioning a Remedy for Radiation Injury Plaintiffs in Federal District Court: Examining Allen v. United States*, 1985 UTAH L. REV. 267; Williams, *Atomic Veterans' Tort Claims: The Search for a Tort Remedy Dead Ends with the Veterans Administration*, 61 NOTRE DAME L. REV. 819 (1986). For recent developments, see *Allen v. U.S.*, 55 U.S.L.W. 2596 (10th Cir. May 5, 1987).

29. See P. SCHUCK, *AGENT ORANGE ON TRIAL* (1986).

30. See M. MINTZ, *AT ANY COST: CORPORATE GREED, WOMEN AND THE DALKON SHIELD* (1985).

31. See Note, *Bearing the Burden of DES Exposure*, 60 OR. L. REV. 309, 317—24 (1981), and Comment, *Industry-Wide Liability*, 13 SUFFOLK U.L. REV. 980, 1015—22 (1979), for discussions of DES litigation which propose replacing tort with compensation schemes to deal with DES victims.

32. For some of the history, see Lauter, *Bendectin Pact Creating Furor*, Nat'l L.J., July 30, 1984, at 1, col. 1; Lauter, *Confusion Reigns Over Bendectin*, Nat'l L.J., Nov. 12, 1984, at 3, col. 1; and Kaufman & Lauter, *Bendectin Verdict Doesn't End Suits*, Nat'l L.J., Mar. 25, 1985, at 3, col. 2.

33. As in the Bendectin situation, for example.

34. As is the case with Agent Orange and IUDs, for example.

35. As with DES and asbestos, for example.

36. New Jersey and California Supreme Court decisions have come in for special criticism. Two especially notorious decisions are *Beshada v. Johns-Manville Products Corp.*, 90 N.J. 191, 447 A.2d 539 (1982), that treated as irrelevant whether or not the defendant could have known of the dangers of asbestos at the time plaintiffs were exposed, and *Sindell v. Abbott Laboratories*, 26 Cal. 3d 588, 607 P.2d 924, 163 Cal. Rptr. 132, *cert. denied*, 449 U.S. 912 (1980), that concluded that liability could be assigned to defendants on the basis of their market share when DES victims could not identify which drug company made the product that caused their injuries.

37. See F. HARPER, F. JAMES, & O. GRAY, *THE LAW OF TORTS* § 25.5A nn.33—34 (2d ed. 1986).

and the underlying capital of the defendant enterprises.³⁸ To most observers, even when there is not a looming insolvency problem, the transaction costs of processing these mass torts claims are indecently large.³⁹

Horizontal inequity among victims is another large concern in mass tort litigation. In some situations, state law differences and individual jury idiosyncrasies have led to wildly varying outcomes for victims in essentially identical circumstances.⁴⁰ Timing has been crucial to victims in circumstances where new information has come to light and has caused the settlement value of factually similar cases to increase sharply.⁴¹ Furthermore, in several instances, the sheer number of claims involved has made the prospect of traditional one-by-one trials, or even settlements, so daunting as to cause the conversion of tort law into a mass justice system that can be considerably less individualized than are other mass justice income transfer programs like Social Security and unemployment compensation.⁴² The result is that many people, including several outspoken judges, have recently said that tort law is not well suited to these mass injury problems.⁴³

Publicity given to multi-million dollar awards in some individual cases and to what the public perceives as simply zany results in others has also contributed considerable fuel to the current crisis. After all, when it is reported that someone was

38. Both Johns-Manville, the major defendant in the asbestos litigation, and A.H. Robins, the manufacturer of the Dalkon Shield IUD, have sought reorganization through bankruptcy law as a result of their tort woes.

39. See, e.g., J. KAKALIK & M. PAGE, COSTS AND COMPENSATION PAID IN TORT LITIGATION (1986); J. KAKALIK, P. EBENER, W. FELSTNER, & M. SHANLEY, COSTS OF ASBESTOS LITIGATION (1983).

40. Some obtain extravagantly large awards, while others go home with nothing. This was vividly demonstrated in an experiment in Texas in which a federal judge simultaneously tried several asbestos cases before separate juries. Having heard the same evidence, the juries returned dramatically varying verdicts. See Johns-Manville's national advertisement in, for example, Wash. Post, Aug. 27, 1982, at F12.

41. For example, *Morning Edition* (National Public Radio, Nov. 15, 1984) discussed the increase over time in the settlement value of similar IUD cases.

42. D. HENSLER, W. FELSTNER, M. SELVIN, & P. EBENER, *supra* note 27. Focusing on the asbestos litigation to highlight the tort system's weakness in dealing with mass torts, the authors note that "[a] basic problem with asbestos litigation is that through group disposition processes, it has sacrificed attention to individualized injuries and needs . . ." *Id.* at 113-14. An even stronger stance was expressed by Gustave H. Shubert, Director of Rand's Institution for Civil Justice, in a speech before the National Conference of State Legislatures in which he stated, "We have a system which idealized individual justice, but in fact delivers justice by the carload, where the individual is submerged in the batch processing of hundreds, sometimes even thousands of cases." G. SHUBERT, SOME OBSERVATIONS ON THE NEED FOR TORT REFORM (1986).

43. See, e.g., Rubin, *Mass Torts and Litigation Disasters*, 20 GA. L. REV. 429 (1986). Judge Alvin Rubin, a U.S. Circuit Court Judge for the Fifth Circuit, argues that mass torts present unique demands with which the current tort system is unable to deal quickly, efficiently, and in a just manner. Among other things, he criticizes the system's failure to assure that persons suffering similar injuries receive comparable compensation. *Id.* at 436.

Jack B. Weinstein, Chief Judge for the District Court in the Eastern District of New York, who handled the Agent Orange litigation, points to the causation requirement as a major problem in mass toxic tort cases and notes that the problem is only exacerbated by proceeding on a claimant-by-claimant basis as our tort system now does. Weinstein, *The Role of the Court in Toxic Tort Litigation*, 73 GEO. L.J. REV. 1389 (1985). See also Rosenberg, *The Causal Connection in Mass Exposure Cases: A "Public Law" Vision of the Tort System*, 97 HARV. L. REV. 851 (1984) (criticizing the tort system's case-by-case adjudication process as prohibitively costly in mass toxic tort cases, and calling the preponderance of evidence rule an unjust burden on plaintiffs in such cases); and Feinberg, *The Toxic Tort Litigation Crisis: Conceptual Problems and Proposed Solutions*, 24 HOUS. L. REV. 115 (1987) (citing inconclusive evidence of causation, long latency periods before injuries are manifested, multiple plaintiffs and defendants, and enormous unpredictable liabilities as characteristics of mass tort cases that cannot be adequately dealt with under a traditional tort model).

For an earlier insightful comment on how tort law fails to serve the public interest, see Kinsley, *Fate and Lawsuits*, 182 THE NEW REPUBLIC 20 (1980). See also TRB, *The Tort Explosion*, 193 THE NEW REPUBLIC 4 (1985).

awarded a million dollars because some product destroyed her psychic powers,⁴⁴ that a half a million dollars was paid to a robber who fell through a roof skylight,⁴⁵ and that someone who was hit by a careless driver while in a phone booth was allowed to sue the phone company,⁴⁶ the perception that in America today people can and do sue for anything and win is not surprising. That some of these reports are incomplete or distorted is irrelevant since the public will rarely learn of that—especially if the reports initially come from prominent figures such as the President of the United States, or syndicated columnists.⁴⁷ Regardless of the representativeness of those anecdotes, very large awards in personal injury cases do appear to be on the rise, making up an increasing share of the total of tort damages awarded. Moreover, a large proportion of the award in many of these jackpot-hitting cases is for pain and suffering.⁴⁸

The belief that we are in the midst of an unhealthy litigation explosion is now widely held—whether or not it is true.⁴⁹ Moreover, because personal injury problems are in the news so much, tort law has become a convenient hook upon which to hang dissatisfaction with lawyers generally. Indeed, the widespread and unfavorable publicity that many plaintiff personal injury lawyers received in the aftermath of the Bhopal disaster⁵⁰ probably helped to reinforce the stereotypical negative view of lawyers held by many ordinary citizens. Although the benefits of healthy skepticism of professionals by laymen are not to be gainsaid, it is nonetheless potentially quite a bad thing for the public at large to hold both lawyers and the law in low esteem.

44. See Strasser, *Tort Tales: Old Stories Never Die*, Nat'l L.J., Feb. 16, 1987, at 39, col. 1, reporting that the trial judge set aside the jury's \$1 million award.

45. See *id.*, explaining that the robber was a teenager who was never charged with a crime and who was injured on a roof that the defendant school district apparently knew was dangerous.

46. *Bigbee v. Pacific Telephone*, 34 Cal. 3d 49, 665 P.2d 947, 192 Cal. Rptr. 857 (1983). Strasser, *supra* note 44, reports that following the remand from the California Supreme Court and before the case was tried, a sealed settlement was reached.

47. In remarks made to the American Tort Reform Association on May 30, 1986, President Reagan offered *Bigbee v. Pacific Telephone*, *supra*, as evidence that "[t]wisted and abused, tort law has become a pretext for outrageous legal outcomes—outcomes that impede our economic life, not promote it." Remarks to Members of the American Tort Reform Association, May 30, 1986, 22 WEEKLY COMP. PRES. DOC. 720, 721 (June 2, 1986). See also San Francisco Examiner, Nov. 25, 1985, at 11, col. 4 for commentary by syndicated columnist Thomas Sowell criticizing the California case noted above, which was ultimately settled, in which a "burglar" was allowed to sue for injuries incurred while breaking into a high school, as just another example of "dangerous judicial activism."

Reagan's and Sowell's examples have been criticized as distortions. The Association of Trial Lawyers of America, for example, argues that Reagan's example is misleading because he failed to add that the victim alleged that the phone booth was 15 feet from a busy road, that it had been struck at least once before, and that its jammed door had prevented the occupant from exiting safely when he saw the oncoming car. N.Y. Times, May 31, 1986, at 28, col. 1. Besides, the California Supreme Court's decision in the case was only that the victim had the right to take the case to the jury.

As already briefly explained in note 45, *supra*, Sowell's "burglar" example apparently actually involved a recent high school graduate trying, as a prank, to take a roof floodlight to light a basketball court. N.Y. Times, May 25, 1986, Sec. 4, at 18, col. 4. Apparently also, the roof's skylight through which the victim fell was painted the same color as the roof and the school district officials knew or should have known about the dangers it posed because only a year earlier a graduation night reveler had been killed after crashing through a similar skylight on the roof of another school building in the district. See Kirsch, *Rob 'Em; Sue 'Em*, 16 CALIF. J. 387 (1985).

48. See M. Peterson, *CIVIL JURIES IN THE 1980s* (1987).

49. Compare Galanter, *The Day After the Litigation Explosion*, 46 MD. L. REV. 3 (1986) with Civiletti, *Zeroing in on the Real Litigation Crisis: Irrational Justice, Needless Delays, Excessive Costs*, 46 MD. L. REV. 40 (1986); Saks, *If There Be a Crisis, How Shall We Know It?*, 46 MD. L. REV. 63 (1986); and UPDATE, *supra* note 19, at 41-46.

50. See Magraw, *The Bhopal Disaster: Structuring a Solution*, 57 U. COLO. L. REV. 835 (1986).

Finally, the effort on the part of some conservatives to transform tort law into a broad ideological issue is an additional aspect of the current crisis that deserves attention. The main theme has been to link the current infirmities of personal injury law to the allegedly lawless and misguided decisions of liberal judges.⁵¹ The message that an all too unaccountable judiciary is once more engaged in illegitimate social engineering is not simply being sounded within the legal profession or by those officials whose central responsibility concerns tort law. Rather, this is the common law counterpart to the broad conservative attack on the Warren Court's legacy in the field of constitutional law.

Casting tort law developments in broad ideological terms was apparent in the recent election battle involving former California Supreme Court Chief Justice Rose Bird and several of her colleagues.⁵² To be sure, the campaign that overthrew three of the liberal incumbents was most importantly fought on the death penalty issue; yet, the court's torts decisions were also widely attacked.⁵³ This clearly partisan effort perhaps explains the equally fervent defense of tort law by the likes of consumer advocate Ralph Nader, who is ideologically committed on the other side to the idea that activist courts are needed to protect otherwise politically weak interests from powerful corporations and abusive government officials.⁵⁴

In such a heated political climate there is potentially room for many legislative solutions to blossom. In the next section I examine recent tort reform efforts emanating from four important forums: the Administration, the American Bar Association, state legislatures, and the Congress.

III. RESPONSES TO THE CRISIS

A. *The Administration—A Return to the 1950s?*

In the face of the torts crisis, or, as some might argue, seizing the occasion of a torts crisis that it helped create, the Reagan Administration in October 1985 formed a Tort Policy Working Group. Chaired by Richard K. Willard from the Department

51. See, e.g., L.A. Daily J., Nov. 20, 1985, at 1, col. 2 (describing a speech by Assistant Attorney General Richard K. Willard in which he blamed activist judges for "outrageous decisions" which are the result of their efforts "to destroy traditional tort law doctrines that limit liability so that the legal system can be used as a vehicle to restructure society and administer a massive scheme for the redistribution of wealth."); N.Y. Times, May 31, 1986, at 28, col. 1 (quoting Attorney General Edwin Meese III's statement that "what some of the liberal attorneys and liberal judges did to criminal law in the 1960s and 70s they are now, in the 1980s, trying to do to the civil law."); Remarks to Members of the American Tort Reform Association, *supra* note 47. See also UFDATE, *supra* note 19, at 53-59, discussing a New Jersey swimming pool injury case said to illustrate "some of the worst excesses of our tort liability system" *Id.* at 55.

52. For the first time in California's history, the voters decided in November, 1986 not to retain sitting justices—Chief Justice Bird, Associate Justice Cruz Reynoso, and Associate Justice Joseph Grodin.

53. See, e.g., "Crime Victims for Tort Reform White Paper on the Supreme Court Confirmation Elections: The Civil Issues" (processed, 1986). For earlier background, see Fairbanks & Deen, *Supreme Court Decisions Create Controversy Over Damage Awards*, CALIF. J. 185 (May, 1984).

54. See, e.g., *The Insurance Industry Assault on Victim's Rights Before the Economic Stabilization Subcomm. of the House Comm. on Banking, Finance and Urban Affairs*, 99th Cong., 2d Sess. (1986) (testimony of Ralph Nader). See also Nader, *The Corporate Drive to Restrict Their Victims' Rights*, 22 GONZ. L. REV. 15 (1986/87). For another attack on the insurance industry's attempt to rollback victim's rights, see Moskal & Berge, *Tort "Reform": Minnesota Does Not Need Legislation That Makes Victims Pay for the Negligence of Others*, 13 WM. MITCHELL L. REV. 347 (1987).

of Justice, the Working Group's Report, issued in February 1986, put forward a number of tort reform proposals.⁵⁵ These recommendations were recently endorsed by President Reagan, at least as applied to products liability, in his 1987 State of the Union Address.⁵⁶

Does some broad principle underlie the Administration's proposals? One possibility is found in the Executive Summary of the Report, which argues that its recommendations "should significantly alleviate the crisis in insurance availability and affordability."⁵⁷ Even if it were true that the adoption of these recommendations were just what was needed to end the insurance crunch, this is a narrow criterion to select. Why should the ability of the traditional private liability insurance market to administer tort liability determine what is the best tort policy?⁵⁸

Later, the Report offers a different criterion for reform by greatly emphasizing the need to preserve a tort system that rests on the principle of individual responsibility for fault.⁵⁹ Yet, some of the Report's important recommendations are hard to reconcile with a strong commitment to the fault principle. The Report's call for the reversal of the collateral sources rule is one example.⁶⁰ If individual recompense for wrongdoing is to be key, then why should an injurer obtain what then ought to be seen as a windfall by, for instance, not having to pay for the medical expenses he causes when the victim happens to have health insurance available?

Perhaps the best way to characterize the Working Group's Report is as a wish to return to the 1950s. Consider, for example, the Report's repudiation of the application of strict liability to many product injuries,⁶¹ a doctrine that only really began in the 1960s.⁶² Or consider the Working Group's concern that de facto strict liability now often occurs when juries are permitted to express their sympathies for victims in cases that traditionally would have resulted in directed verdicts for defendants.⁶³ Once again, it was the 1960s (importantly reflecting the egalitarianism of the times) that saw appellate courts give more power to juries by increasingly ordering trial courts to take a much more hands-off approach to the negligence issue.⁶⁴

55. REPORT, *supra* note 19.

56. See State of the Union Address Delivered Before a Joint Session of Congress 24 WEEKLY COMP. PRES. DOC. 59 (Feb. 2, 1987) (calling for legal and regulatory reforms to remove obstacles to competitiveness); see also 616 PROD. LIAB. REP. (CCH) 6 (1987) (referring to fact sheets released with the President's State of the Union Address, describing the Administration's proposed tort law reforms). They were largely reaffirmed by the Working Group in March 1987. See UPDATE, *supra* note 19, at 75-87.

57. REPORT, *supra* note 19, at 4.

58. Furthermore, since insurance affordability is a rather anchorless objective and availability seems to turn most on the predictability and stability of losses, what reason is there to prefer the Working Group's recommendations over many other, presumably equally promising strategies that could be developed if managing the insurance crisis was the only concern?

59. See REPORT, *supra* note 19, at 30-33, 61-62.

60. *Id.* at 70-72.

61. *Id.* at 61-62.

62. Two seminal cases embracing strict liability for product injuries were decided in the early 1960s: *Henningsen v. Bloomfield Motors, Inc.*, 32 N.J. 358, 161 A.2d 69 (1960), and *Greenman v. Yuba Power Products, Inc.*, 59 Cal. 2d 57, 377 P.2d 897, 27 Cal. Rptr. 697 (1963). Section 402A of the RESTATEMENT (SECOND) OF TORTS, embracing strict products liability, was adopted in 1964.

63. See REPORT, *supra* note 19, at 33, 35, 62-63.

64. This is well illustrated by *Rowland v. Christian*, 69 Cal. 2d 108, 443 P.2d 561, 70 Cal. Rptr. 97 (1968).

In addition, in the 1950s, the plaintiffs' bar seemed to have been far less sophisticated in its presentation of individual cases to juries.⁶⁵ While there can be no undoing of the increased expertise of the plaintiffs' bar, the Report's proposals to impose stronger proof requirements on the plaintiffs, especially on matters involving scientific uncertainty,⁶⁶ and to limit the contingent fees paid to victims' attorneys,⁶⁷ can be understood as further efforts to reduce the proportion of cases that plaintiffs' lawyers will be able to bring before juries.

The Working Group's call to limit awards for pain and suffering and for punitive damages to an aggregate of \$100,000 also can be seen as an effort to reinstate the de facto ceiling of those earlier days.⁶⁸ Even in liberal California, for example, it appears that the first reported award of more than \$100,000 for pain and suffering damages did not occur until 1961,⁶⁹ and, of course, the economy has experienced considerable inflation since then. With respect to punitive damages awards, the Working Group also envisions a return to the prior era when a standard approaching "actual malice" was required, effectively precluding such awards in virtually all cases brought against enterprises.⁷⁰

As a formal matter, the Report's proposal to reverse the collateral sources rule means overturning not a recent, but rather a very long-standing doctrine. Yet, it is important to appreciate that in the 1950s the extent of people's collateral sources was altogether different from what it is today.⁷¹ Then, Medicare did not exist, and the Social Security disability insurance program was just being launched.⁷² Moreover, in the 1950s, many fewer employees had job-related medical insurance, sick leave benefits, disability pensions, and the like.⁷³ Those collateral sources available were often paid for by the victims or voluntarily provided by friends, family, or employers who plainly did not intend to benefit the tortfeasor.⁷⁴ Given the vast new array of social insurance and employee benefits that the intervening years have brought, the

65. Although there clearly were talented and legendary trial lawyers in earlier years, it is only in the last couple of decades that so many personal injury specialists have emerged (*e.g.*, in medical malpractice or aviation law, and even in highly specific kinds of cases, such as asbestos litigation specialists). The growth in continuing education programs and other outreach efforts presented by a great variety of lawyers' groups, such as the Association of Trial Lawyers of America, has also importantly contributed to a more widely trained and talented plaintiffs' bar. For further comments on the growing sophistication of the plaintiffs' bar, see M. PETERSON, *CIVIL JURIES IN THE 1980s* 20 (1987).

66. See REPORT, *supra* note 19, at 63-64.

67. *Id.* at 72-74.

68. *Id.* at 66-68. In view of the political realities of what states have been doing, the Working Group has more recently increased its proposed ceiling on pain and suffering to \$200,000. This figure would also no longer include payments for punitive damages, which would be separately controlled. See UPDATE, *supra* note 19, at 78-83.

69. *Seffert v. Los Angeles Transit Lines*, 56 Cal. 2d 498, 364 P.2d 337, 15 Cal. Rptr. 161 (1961).

70. For its proposals concerning punitive damages, see REPORT, *supra* note 19, at 68-69. For discussions of, and expressions of concern about, the changing role of punitive damages, see, *e.g.*, Owen, *Problems in Assessing Punitive Damages Against Manufacturers of Defective Products*, 49 U. CHI. L. REV. 1 (1982); Schwartz, *Deterrence and Punishment in the Common Law of Punitive Damages: A Comment*, 56 S. CAL. L. REV. 133 (1982); Metzger, *Corporate Criminal Liability for Defective Products: Policies, Problems and Prospects*, 73 GEO. L.J. 1 (1984); and Sales & Cole, *Punitive Damages: A Relic That Has Outlived Its Origins*, 34 DEF. L.J. 429 (1985).

71. See generally A. CONARD, *AUTOMOBILE ACCIDENT COSTS AND PAYMENTS* 62-74 (1964).

72. Medicare was enacted in 1965; the disability benefits to Social Security were phased in between 1956 and 1960. See *Social Security Programs in the U.S.*, *supra* note 11, at 6-8.

73. See generally EMPLOYEE BENEFITS, *supra* note 12.

74. See, *e.g.*, *Harding v. Town of Townshend*, 43 Vt. 536 (1871); *Motts v. Michigan Cab Co.*, 274 Mich. 437, 264 N.W. 855 (1936); *Conley v. Foster*, 335 S.W.2d 904 (Ky. 1960).

collateral sources rule must be changed in order to return to the practice of the 1950s in which tort damages largely did not duplicate such sources of recovery.

More complicated analysis is also required to view the Report's proposal to eliminate joint and several liability⁷⁵ as a return to the old days. After all, it is a long-standing American rule, unchanged in recent decades, that two defendants, even if not acting in concert, are both fully liable for the victim's loss so long as both are the proximate cause of the victim's injury.⁷⁶ Since the victim cannot recover twice, and since reasonably sensible rules for cost allocation among multiple defendants have long existed,⁷⁷ the most important consequence of the principle of joint and several liability has been that the risk of insolvency of one of the defendants is born entirely by the other and not by the plaintiff.⁷⁸

Serious objections to joint and several liability have been caused by two recent changes. First, the widespread introduction of comparative fault, largely a product of the 1960s and 1970s,⁷⁹ has meant that innocent victims are not the only beneficiaries of this doctrine. Rather, a victim may now be considerably more at fault than is the solvent ("deep pocket") defendant from whom he or she collects. Second, cutbacks in old "no duty" rules, and less aggressive determinations by judges that defendants are either not at fault or not the proximate cause of the victim's harm "as a matter of law,"⁸⁰ have meant that little-at-fault, deep pocket, defendants are being required to pay for injuries more frequently than before.⁸¹

Assuming there is no possible retreat from the legal developments just described, replacing the principle of joint and several liability with the rule that a defendant is only liable for damages equal to its share of the fault at least moves some little-at-fault defendants back towards where they would have been in the 1950s.⁸² Putting an end to joint and several liability, however, would probably lead to undesirable overkill, even from the Working Group's perspective. Suppose two independent and equally negligent motorists simultaneously crash into each other and in the process an innocent pedestrian on a nearby sidewalk is hurt. Should that pedestrian only recover half of his or her damages if one of the drivers is uninsured? Or suppose a doctor treating the victim of a negligent motorist commits malpractice.

75. See REPORT, *supra* note 19, at 64-65.

76. See W. KEETON, D. DOBBS, R. KEETON, & D. OWEN, PROSSER AND KEETON ON TORTS 328-29 (5th ed. 1984).

77. See, e.g., *id.* at 336-45.

78. There is also the risk of undersettlement, but I will not focus on that here.

79. See generally V. SCHWARTZ, COMPARATIVE NEGLIGENCE (2d ed. 1986).

80. Expanding duties of care have occurred, for example, in the areas of land owner and occupier liability, liability for emotional harm, and liability for injuries to or injuries by persons with whom the defendant has a preexisting relationship. See generally M. FRANKLIN & R. RABIN, CASES AND MATERIALS ON TORT LAW AND ALTERNATIVES Ch. III (4th ed. 1987).

81. The "deep pocket" complaint is illustrated by a collision between two careless pilots with inadequate liability insurance, when the crash is then also partly blamed on the government air controllers on the ground that failed to see the pilots heading for each other. As a result, the government might be found to be, say 10% at fault, and wind up paying for most of the damages recovered by the pilots and their families.

82. Oddly, the REPORT fails to discuss what it would like the rule to be if joint and several liability were ended. Although liability in proportion to the individual defendant's fault is probably what the REPORT's authors had in mind, which is made clear in the UPDATE, *supra* note 19, at 76-78, this is not the only solution. For example, the Uniform Comparative Fault Act has proposed a compromise solution that would allocate the risk of insolvency on parties, *including the victim*, in proportion to their fault. See UNIF. COMPARATIVE FAULT ACT, § 2(d), 12 U.L.A. 33 (1981 Supp.).

The usual rule is that both the motorist and the doctor are the proximate cause of the harm caused by the malpractice.⁸³ Should the patient only recover a portion of those damages if the motorist is uninsured? Or suppose a landlord's negligence with respect to building security allows a rapist to attack and injure a tenant.⁸⁴ Should the tenant only recover a presumably small portion of her damages, assuming the rapist is not found or cannot pay? These examples are a far cry from those cases usually considered when the elimination of joint and several liability is proposed—such as the de minimus at-fault, deep pocket city which ends up paying for the negligence of an insolvent, drunk driver on the ground that the highway was improperly maintained. Yet a simple elimination of joint and several liability, and its replacement with liability based upon the proportion that the individual defendant's fault bears to the total fault would seemingly relieve not just the city, but also the solvent landlord, doctor, and motorist in the examples given above. I would be surprised, however, if even the Working Group would endorse those results.

My previous comments do not mean either that I think that tort law was in all respects worse in the 1950s than in the 1980s or that I oppose all of the Administration's proposals. Indeed, I warmly endorse several of them as part of my compromise package. The point, however, is that the Working Group and I have quite different ideas about the goals of tort reform.

They very much seem to want to turn back the clock to when tort law was not very expensive, yet still could be pointed to as a hallowed American process for identifying and punishing clearly bad conduct.⁸⁵ I, by contrast, want to move towards the elimination of tort law and towards its replacement with mechanisms that treat the compensation of victims entirely separately from the deterrence and punishment of wrongdoers. To achieve this objective, one thing I favor is making tort law rules of damages for the seriously injured look more like those contained in various sensible modern compensation systems. It happens that this leads me also to propose curtailing some victim rights; but unlike the Working Group, my package of recommendations also calls for a significant expansion of victim benefits.

B. *The American Bar Association—Band-Aid for Hungry Lawyers?*

The American Bar Association has seen trouble brewing on the torts front for some time. In 1979, a Special Committee created by the Board of Governors was charged with the broad duty to examine "the present day validity of the tort liability system in dealing with claims for physical injury."⁸⁶ Chaired by former Attorney General Griffin Bell, this Committee issued an enormous report in November 1984

83. See RESTATEMENT (SECOND) OF TORTS § 457 (1965).

84. See, e.g., *Kwaitkowski v. Superior Trading Co.*, 123 Cal. App. 3d 324, 176 Cal. Rptr. 494 (1981); *O'Hara v. Western Seven Trees Corp.*, 75 Cal. App. 3d 798, 142 Cal. Rptr. 487 (1977).

85. This is reminiscent of the Administration's general nostalgia about the American family of the 1950s, or at least its mythological characteristics. See, e.g., WHITE HOUSE WORKING GROUP ON THE FAMILY, *THE FAMILY: PRESERVING AMERICA'S FUTURE* (1986).

86. See the Committee's Preface to *TOWARDS A JURISPRUDENCE OF INJURY: THE CONTINUING CREATION OF A SYSTEM OF SUBSTANTIVE JUSTICE IN AMERICAN TORT LAW* (Report to the American Bar Ass'n of The Special Committee on the Tort Liability System (1984) [hereinafter *TOWARDS A JURISPRUDENCE OF INJURY*]).

that is largely the work product of the Committee's Reporter, Professor Marshall Shapo, a strong supporter of the role of tort law in America today.

The Committee's charge included giving consideration to "appropriate modification or alternatives to the current system aimed at curing identifiable defects *while preserving the recognized strengths*."⁸⁷ Given this mandate, coupled with Professor Shapo's past published enthusiasm for tort law,⁸⁸ and the ABA's history of avoiding radical reforms, one should not have expected a report calling for dramatic change. Nor did we get one. *Towards a Jurisprudence of Injury: The Continuing Creation of a System of Substantive Justice in American Tort Law*, the Committee's report, is, most importantly, a work that extols the virtues of tort law, emphasizing not only its role concerning accidental bodily injuries, but also regarding invasions of privacy, intentional emotional harms, and pollution damage. The Committee concluded, "We have found the tort system to be vital and responsive as a working process, based in legal concepts, for dealing with injuries alleged to be wrongs [T]he adversary process gives point and content to a body of law that produces a consistently high quality of substantive justice."⁸⁹

Its recommendations for change were mild indeed. Although the Committee examined proposals for changing rules regarding pain and suffering, punitive damages, collateral sources, joint and several liability and the like, it ultimately either rejected such changes or proposed further study of these issues.⁹⁰ Its affirmative recommendations were essentially procedural and not very threatening. For example, the Committee favored increased settlement incentives, experimentation with alternative dispute resolution mechanisms, better data collection, reduction in waste and delay, and discouragement of frivolous litigation.⁹¹

Although the Committee endorsed the existing workers' compensation system and "cautiously" supported modest auto no-fault schemes of the sort now in place in a few states,⁹² it firmly opposed what it called the "importation of full-scale legislative compensation schemes for all tort-like injuries."⁹³ The use of the word "importation," while clearly referring to other countries such as New Zealand, also captures the lawyers' xenophobia, if you pardon the pun, towards legislative encroachment on the common law turf. In short, the essential message of *Towards a Jurisprudence of Injury* is that existing tort law is a tremendous American achievement that ought to be largely left alone. To the extent that modest problems may exist, the Committee's view is that they can largely be taken care of by judges and lawyers of good will working together on behalf of the common good.

The Bell Committee's reaction is a perfectly understandable example of professional solidarity in support of a system in which the profession has made an

87. *Id.* (emphasis added).

88. See generally M. SHAPO, PRODUCTS LIABILITY: CASES AND MATERIALS (1980); M. SHAPO, CASES AND MATERIALS: TORT AND COMPENSATION LAW (1976); SHAPO, *A Representational Theory of Consumer Protection*, 60 VA. L. REV. 1109 (1974).

89. TOWARDS A JURISPRUDENCE OF INJURY, *supra* note 86, at 13-1.

90. *Id.* at 13-14 to 13-19.

91. *Id.* at 13-1 to 13-12.

92. *Id.* at 14-10, and Chs. 10-11.

93. *Id.* at 14-10.

important psychological investment wholly apart from any question of financial livelihood that would be hard to give up. After all, I assume that a rather small proportion of the ABA membership critically relies on torts cases, let alone accidental personal injury cases, for a living. Symbolically, on the other hand, what tort law represents—precise, individualized justice meted out through the full scale adversary system—is an idea that an overwhelming percentage of lawyers has probably long ago embraced and internalized as a way of importantly justifying to themselves their professional role in our society.

In the spring of 1985, a large ABA-sponsored conference on the Bell Committee report was held in Lexington, Kentucky. I think it fair to say that the most outspoken critics of the tort system at that meeting were the law professors. Nonetheless, many judges, defense lawyers, and insurance company house counsel expressed far greater dissatisfaction with tort law than the Bell Committee had.

Indeed, a report from the Defense Trial Lawyers' Task Force on Litigation Cost Containment, calling for more substantial changes, was by then already in the works.⁹⁴ Published in September 1985, this report announced the formation of the National Coalition on Litigation Cost Containment ("NCLCC"). The NCLCC, whose stated goal is to work to enact reforms of the sort proposed by the Task Force, was initially sponsored by four national organizations of the defense bar.⁹⁵

Moreover, by the time of the Lexington meeting, the Insurance Information Institute, a nonprofit action and information center, had begun to promote a series of reforms that in important respects foreshadowed the recommendations of the Reagan Administration's Working Group. Its booklet titled *The Civil Justice Crisis*, published in September 1984—almost simultaneously with the Bell Committee's report—painted a sharply different picture of tort law in action in the 1980s, leading it, in turn, to favor far more ambitious changes.⁹⁶ Rounding out the trio of interest groups on the defendant side, a business, trade, and professional coalition was also formed, the American Tort Reform Association ("ATRA"). It now appears to be the most important state-level lobbying force for changing tort law.⁹⁷

94. See THE DEFENSE TRIAL LAWYERS' TASK FORCE ON LITIGATION COST CONTAINMENT, STATEMENT AND REPORT (1985). Many of the Task Force's proposals parallel those of the Working Group that have already been discussed. For example, the Task Force favored limiting or eliminating punitive damages, limiting or eliminating joint and several liability, eliminating the collateral source rule, and controlling contingent fee arrangements between plaintiffs and their lawyers. The Task Force also favored various changes in the administration of civil justice, including limiting discovery abuse, promoting more active case management by trial judges, and encouraging the use of alternative dispute resolution techniques.

95. They are the Association of Insurance Attorneys, the Defense Research Institute, the Federation of Insurance Counsel, and the International Association of Insurance Counsel. The NCLCC is chaired by San Francisco attorney Grant P. DuBois.

96. See INSURANCE INFORMATION INSTITUTE, THE CIVIL JUSTICE CRISIS (1984), emphasizing public opinion poll surveys that suggest widespread public unhappiness with the civil justice system, and proposing reforms that are broadly similar to those supported by the Working Group and the NCLCC.

97. See Strasser, *supra* note 2, at 1. ATRA was formally established in January 1986. Former Congressman James K. Coyne heads ATRA. ATRA is networked to state groups of varying sizes and strengths. In California, for example, the Association for California Tort Reform ("ACTR") is the main group whose supporters broadly reflect the same constituents who are behind ATRA. Like ATRA, ACTR's pro-defendant reform position is in sharp contrast to the Bell Committee. See *Tort Reform in California-A White Paper* (processed, on file with the author).

Faced with such pressure from business interests, insurers, and the defense bar, it is not surprising that the ABA would appoint yet another committee. The Action Commission to Improve the Tort Liability System was announced in November 1985, with Professor Robert McKay as its chair and Professor Robert Rabin as its reporter. The Commission's membership included several nationally prominent figures connected with tort law, many of whom had participated in the Lexington meeting.⁹⁸

Although the Commission was broadly charged with examining all aspects of the tort liability system, it did not take advantage of that broad mandate. Nor, on the other hand, did it restrict itself to turning the findings of the Bell Committee and the deliberations of the Lexington meeting into specific recommendations to be considered by the Board of Governors and the House of Delegates. Rather, as judged by the recommendations contained in its February 1987 report, the Action Commission seems largely to have allowed the Working Group's proposals to set its agenda. That is, just as the Administration took a stand on pain and suffering damages, punitive damages, joint and several liability, attorneys' fees, the collateral sources rule, and improved dispute resolution processes, so did the Commission. Indeed, its positions on these matters comprise the bulk of its report. On the whole, however, the Commission's stands are far less sweeping.

Whereas the Working Group called for a \$100,000 limit on the sum of pain and suffering damages and punitive damages, the Commission opposed legislative limits. Rather, it called for a more active role by trial judges in restricting excessive awards in individual cases.⁹⁹ The Commission envisioned that a more active judicial role would be facilitated by the regular official publication of information on the pattern and trends of past awards and the issuance of guidelines to aid judges. In other respects concerning the award of punitive damages, however, the Commission went further than the Working Group. It not only spelled out reasonably tough standards for an award of punitive damages, but also called for new procedural controls designed to protect defendants from prejudice. Furthermore, it urged sensible restrictions on such awards in mass torts cases, and proposed that instead of paying all of any such awards to the victim and his or her lawyer, a proportion should be used for public purposes.¹⁰⁰

Where the Working Group called for the reversal of the collateral sources rule, the Commission opposed such change at the present time.¹⁰¹ The Working Group called for the end of joint and several liability, while the Commission favored only the reduction of a defendant's responsibility for the victim's non-economic loss when the injurer's responsibility for the loss was substantially disproportionate to the entire loss.¹⁰² For example, when one defendant is 25% responsible and another 75%

98. The product of this group's work is contained in REPORT OF THE ACTION COMMISSION TO IMPROVE THE TORT LIABILITY SYSTEM (1987) [hereinafter ACTION COMMISSION REPORT]. See Appendix E of the report for information about its members.

99. *Id.* at 10-15.

100. *Id.* at 15-20, 44. For the Working Group's latest proposal for control of punitive damages, see UPDATE, *supra* note 19, at 81-82.

101. *Id.* at Appendix B.

102. *Id.* at 20-25.

responsible, the former would only have to pay for 25% of the victim's pain and suffering damages.

Although the Working Group called for substantial constraints that would plainly affect the contingent fees that plaintiffs' lawyers charged, the Commission proposed far milder limits: (a) fee arrangements should be written, (b) clients should be clearly told that they may have some choice about fee arrangements, (c) fee percentages should be applied to net, rather than gross, awards—that is, after litigation expenses have been paid, and (d) courts should disallow fees that are “plainly excessive.”¹⁰³ Whether these provisions would importantly change current practices is quite unclear.¹⁰⁴

To some, the Commission recommendations may well sound like sensible politics or even rare boldness, given the even milder recommendations of the Bell Committee.¹⁰⁵ Yet to me, like the Bell Committee's package, this latest ABA package sounds like a band-aid that will assure the generous feeding of both plaintiff and defendant lawyers.

The Commission's report raises the question of “whether fairness and efficiency suggest the need for replacement rather than incremental efforts to improve the existing system of tort liability,” noting that “much of the recent academic criticism of tort law attacks the major foundations upon which the system is built.”¹⁰⁶ It then tries to justify why it failed to consider “a comprehensive analysis of the case for universal social insurance or broad-ranging no-fault schemes replacing the tort system” even though some members of the Commission favored such solutions.¹⁰⁷ First, this was too big a job in view of the Commission's limited time frame. Second, in view of the deliberately selected diversity of its membership, the Commission believed it could never achieve a consensus favoring a “substantial dismantling of the tort system.”¹⁰⁸ Hence, the Commission adopted an incremental approach to reform, assuming consensus would be more likely, because even those members favoring dramatic change would prefer some change to merely retaining the status quo.

The Commission's justifications for the narrowness of its reach do not convince me. Substantial first steps in the direction of “replacement” (proposed by me and others) are already well enough worked out for the Commission to have taken a stand on them, even within its time frame. Further, the consensus strategy failed anyway, as four of the fourteen members dissented.¹⁰⁹

103. *Id.* at 25–30.

104. A number of additional recommendations of the Commission call for further studies and the gathering of further information (for example, with respect to improving the liability insurance system and the handling of mass tort cases, *id.* at 7–10 and 40–44). Those two commissions have now been appointed. Robert Hanley, a Denver lawyer, chairs the Mass Torts Commission, and James Hewitt, from Lincoln, Nebraska, chairs the Commission to Improve the Liability Insurance Industry as It Affects the Tort System.

105. As the Preface to the Action Commission Report makes clear, between 1981 and 1986, the ABA's stance towards congressional and state tort reform efforts had been one of strong opposition. *Id.* at ix.

106. *Id.* at 5.

107. *Id.*

108. *Id.*

109. *Id.*

Even though the Commission's proposals are far less dramatic than are those of the Administration's Working Group, the major ones can clearly be read to be pro-defendant. Whether they are anti-consumer, or against the public interest, of course, is altogether another question. But one would be hard pressed to find very much in the package that could be called pro-victim. Therefore, it is hardly surprising that those who dissented were a judge strongly associated with the plaintiffs' bar before going on the bench, a professor who has long served as the academic voice of the main plaintiffs' bar organization (the Association of Trial Lawyers of America, widely known as "ATLA"), a lawyer serving on ATLA's Board of Governors, and a public interest lawyer (from the NAACP Legal Defense and Education Fund).¹¹⁰ Speaking for the dissenters, Judge Jim R. Carrigan lamented the Commission's unwillingness to lay a fair share of the blame for the torts crisis on the insurance industry, as well as its one-sided elimination of victim rights.¹¹¹

It is important to appreciate that the Commission report appears at a time when a considerable number of state legislatures have already enacted tort reform legislation, many of them going further in the pro-defendant direction than the Commission would like. In view of this, one could see the Commission's proposals as a strategic retreat. By conceding that certain limited reforms are appropriate in the areas marked for change by the Administration and defense interests, the Bar may be able to dissipate the head of steam building behind more radical measures. The Commission's position, in this view, is a compromise between the old regime and the Working Group's set of reforms. In February 1987, amid feeling that the bar had to support some constructive tort reform proposals, the ABA's House of Delegates approved virtually all of the Commission recommendations.¹¹²

The Bar's position has a certain attractiveness as a compromise. Yet the contrasting compromise I offer here, even if it means considerably less work for lawyers, is far more socially desirable. In order to permit an appraisal of how much room remains for compromise of any sort, the next section will briefly review the reforms that have already been enacted.

C. State Legislatures—Putting Out Fires?

During 1986 and early 1987, a large number of states adopted measures in response to the torts crisis. From the national perspective, however, the pattern one sees is complex, with legislatures opting for quite different remedies. Therefore, although seeds have been sown that could grow into far-reaching reform, most states are presently in the putting-out-fires mode.

110. Jim R. Carrigan, Thomas Lambert, Leonard Decof, and Elaine Jones, respectively. For the text of the dissents, see *id.* at Appendix F.

111. *Id.* at F-1.

112. See American Bar Association Mid-Year Meeting, 55 U.S.L.W. 2450 (Feb. 24, 1987); Coyle, *ABA Takes a Stand on Tort Reform—Finally*, Nat'l L.J., Mar. 2, 1987, at 8, col. 1. Only that portion of the Action Commission's recommendation calling for paying over for public purposes part of all punitive damages recoveries was rebuffed, the House of Delegates having concluded that further study was necessary before it could be determined whether such a scheme would work well in practice.

The Working Group's agenda, nonetheless, has so far defined most areas of state activity. A number of states, for example, have put ceilings on non-economic losses. Yet, the most important thing to note about the limits is that they are far more generous than the \$100,000 ceiling favored by the Administration. Florida, an important torts jurisdiction, imposed a \$450,000 cap;¹¹³ and New Hampshire's ceiling is \$875,000.¹¹⁴ Moreover, in a number of states the limits have exceptions that promise to make the restrictions meaningless. For example, although Minnesota caps "intangible loss" at \$400,000, that does not cover "pain, disability or disfigurement."¹¹⁵

Research by Professor Patricia Danzon on statutes enacted during the 1970s that significantly limited the amount of damages payable for pain and suffering in medical malpractice cases (such as California's \$250,000 cap) suggests that such limits can indeed have an impact on the total amount paid out in medical injury cases.¹¹⁶ Yet because of their high limits and "loopholes," it is quite unclear whether these recent across-the-board limits on non-economic loss will be equally effective.

Although it might therefore be charged that many states have made largely symbolic gestures with respect to non-economic loss that will affect virtually no one, it should also be appreciated that, in very sharp contrast, the Reagan Administration's proposed \$100,000 cap would mean that the victim in most serious injury cases would actually net nothing for pain and suffering. This is because the \$100,000 (and often more) would be eaten up in legal fees and other costs, even under the Working Group's proposals for curtailing the level of contingent fees. Later I show how it is possible to achieve a more sensible resolution to these problems by combining a meaningful cap on non-economic loss with a separate arrangement for paying the victim's lawyer. Aside from the formal imposition of limits, it remains to be seen whether the atmosphere of the torts crisis itself will cause trial judges increasingly to use their own discretion to reduce jury verdicts they find excessive, a result the ABA Commission favors.

As advocated by the Administration, but not the ABA Commission, a number of states have moved towards reversing the collateral source rule. When actually enacting a statute, however, legislators usually realize that there are a number of important details to worry about. Should all other sources count to reduce the defendant's obligation, or should there be a listing of exclusions (like life insurance) or inclusions (like public benefits and employee group benefits)? Should defendants

113. FLA. STAT. ANN. § 768.80 (West Supp. 1987). The Florida Supreme Court has held that this cap is inconsistent with the Florida Constitution. *Smith v. Department of Ins.*, 55 U.S.L.W. 2608 (Fla. Sup. Ct. May 12, 1987).

114. N.H. REV. STAT. ANN. § 508:4-d (Supp. 1987). By contrast, Maryland has capped non-economic losses at \$350,000. MARYLAND CH. 639, § 11-108 (1986). Washington has adopted a novel limit on non-economic damages which is determined by multiplying the life expectancy of the victim by 43% of Washington's average annual wage; the idea is to allow a higher cap for younger people who have longer to suffer from their injuries. See Washington Tort Reform Act of 1986, ch. 305, § 301, 1986 Wash. Laws. See generally Donaldson, Hensen, & Jordan, *Jurisdictional Survey of Tort Provisions of Washington's 1986 Tort Reform Act*, 22 GONZ. L. REV. 47 (1986/87).

115. MINN. STAT. ANN. § 549.23 (WEST SUPP. 1987). See also ALASKA STAT. § 09.17.010 (1986), which imposes a \$500,000 cap that does not apply to "disfigurement or severe physical impairment." For comments on the Minnesota provision, see Note, *Introduction to Minnesota's Tort Reform Act*, 13 WM. MITCHELL L. REV. 277, 300 (1987).

116. Danzon, *The Frequency and Severity of Medical Malpractice Claims: New Evidence*, 49 LAW & TEMP. PROBS. 57, 76 (1986).

be obligated to repay victim insurance premium costs, if any? What if the collateral source contains provisions for subrogation rights against the defendant? As a result of these questions, there is considerable variation among the statutes that the states have enacted.¹¹⁷

Professor Danzon's findings in the medical malpractice field¹¹⁸ suggest that as long as tort defendants do not pay for things otherwise covered by the victim's social insurance benefits, sick leave benefits, and health insurance benefits, these new statutes may reduce considerably the amount of tort damages paid out.

Although California imposed a fairly restrictive sliding scale limit on contingent fees in medical malpractice cases during the 1970s, there has been little willingness by states, as yet, to adopt this approach for all personal injury cases.¹¹⁹ Most state reforms in this area have tended to reflect the ABA Commission's view—giving judges power to review fees for reasonableness and providing for attorneys' fees sanctions as a way of seeking to deter frivolous complaints (or defenses).¹²⁰ Given Danzon's findings in the medical malpractice area,¹²¹ it is rather doubtful whether either sort of change concerning fee arrangements will have a significant impact on the aggregate amount of tort awards. Apparently, such limits are more likely to affect how the victim and his or her lawyer share the awards than the amount the defendant pays.

State action concerning the principle of joint and several liability has divided along the lines represented by the differing views of the Working Group and the ABA Commission. Thus, whereas some states have abolished the rule outright,¹²² a number of others have only limited its application with respect to non-economic losses and rather-less-at-fault defendants.¹²³ It is dubious that these efforts to protect "deep pockets" from what is perceived to be unfair picking will have any noticeable impact either on the ability of certain notorious deep pockets (e.g., municipal governments) to obtain insurance, or on the level of premiums they pay. What does seem quite clear, however, is that victims whose injury unluckily involves an insolvent defendant as well as a deep pocket are going to be left in a worse position.

Although no state seems to have adopted the Working Group's idea that a single dollar ceiling should limit both pain and suffering damages and punitive damages, some states have sought to curtail the amount of punitive damages by restricting them, in most cases, to the amount of compensatory damages awarded.¹²⁴ Variations

117. See, e.g., ALASKA STAT. § 09.17.070 (1986); FLA. STAT. ANN. § 768.76 (West Supp. 1987); ILL. ANN. STAT. ch. 110, § 2-1205 (Smith-Hurd Supp. 1986); MINN. STAT. ANN. § 548.36 (West Supp. 1987).

118. See Danzon, *supra* note 116, at 72, 77.

119. Connecticut is the only state I have found. CONN. GEN. STAT. ANN. § 52-251c (West Supp. 1987).

120. For court reviews, see, e.g., HAW. REV. STAT. § 607-14.5 (1985); N.H. REV. STAT. ANN. § 507.15 (Supp. 1987); WASH. REV. CODE ANN. § 4.24.005 (Supp. 1987). For sanctions for frivolous litigation, see, e.g., MICH. COMP. LAWS ANN. §§ 600.2421-2421c (West 1986) and OKLA. STAT. tit. 23, § 103 (West 1987).

121. See Danzon, *supra* note 116, at 78.

122. See, e.g., UTAH CODE ANN. § 78-27-38 (Supp. 1986); WYO. STAT. § 1-1-109 (1977).

123. For non-economic damages, see, e.g., California Proposition 51, Civil Code § 1431.2 (West Supp. 1987). For low fault defendants, see, e.g., ALASKA STAT. § 09.17.080 (1986). For a combination, see, e.g., HAW. REV. STAT. §§ 663-1 to 663-1.8 (1985).

124. See, e.g., FLA. STAT. ANN. § 768.73 (West Supp. 1987); OKLA. STAT. tit. 23, § 9 (West 1987). Although New

on a number of the ABA Commission proposals have also been adopted, such as imposing a high standard of fault or a high standard of proof before punitive damages are awarded, and establishing mechanisms under which a share of any punitive damages award is paid over to a special state fund to be used for public purposes.¹²⁵

Even if punitive damages were to be completely abolished, it is unlikely that it would have an obvious and substantial impact on the financial costs of the tort system. Recent studies have shown that a very small percentage of cases attract punitive damages.¹²⁶ Indeed, the biggest impact of the recent liberalization in the award of such damages may well be in promoting the settlement of cases for more generous amounts of compensatory damages. If that leverage were removed, compensatory awards might be lowered; but measuring changes in negotiated settlements and determining whether they are attributable to changes in the law of punitive damages would be extremely difficult work.

Still, defendants might derive some security from these new laws on punitive damages in that they are far less likely to be hit with multi-million dollar exemplary damage awards for what they believe are either minor mistakes or even faultless behavior in which the jury has, in effect, decided that they are to be punished for failing to know the unknowable. While that security may mean little in advance of being sued, it could well mean a lot once the parties are locked in litigation combat.

Many states have imposed new regulations on the liability insurance industry. It is just possible that this seemingly unanticipated legislative response will lead the industry to conclude that its complaints about the civil justice system are backfiring and that it is getting more trouble than relief. For example, it has been suggested that in the recent round of Florida reforms, some of the insurers now think that they have paid too high a price for tort limitations in the form of new controls on the way they do business and rollbacks in the premiums they charge.¹²⁷ If that belief were to become widespread, the liability insurers could decide to give up on tort reform, hoping that the whole matter will die down.

Three additional factors about state statutory changes are noteworthy. First, even if half the states have enacted some tort changes in the past year or so, few of the big population states have made changes of a considerable scale. Second, in all this tort legislation (as opposed, for example, to insurance legislation) it is difficult to find any serious pro-victim changes. Third, few states have addressed defendant and Reagan Administration complaints about strict liability and their pleas for clear fault-finding before liability is imposed. Perhaps this is explained by the view that, on the one hand, ending de facto strict liability in what are nominally negligence cases really

Hampshire has enacted a statute abolishing punitive damages, it is not clear that such damages were actually available previously. N.H. REV. STAT. ANN. § 507.16 (Supp. 1987).

125. See, e.g., ALASKA STAT. § 09.17.020 (1986) (clear and convincing evidence); FLA. STAT. ANN. § 768.73 (West Supp. 1987) (portion to be paid to Public Medical Assistance Trust Fund or General Revenue Fund).

126. See M. PETERSON, S. SARMA, & M. SHANLEY, PUNITIVE DAMAGES: EMPIRICAL FINDINGS (1987). The authors find, however, that the frequency and incidence of total dollars awarded as punitive damages are on the upswing.

127. Telephone conversation with Bernard Oxman, University of Miami Law Professor. See also Hunter & Angoff, *Tort-Reform Legislation Ought to Reduce Premiums*; Priest, *Tort-Reform Legislation Is Only a Start*, Wall St. J., Feb. 11, 1987, at 26.

requires action by judges, not legislatures, and that, on the other, Washington has been the locus for battles over strict liability in the products area.

Although the recent, often hastily passed tort legislation has been largely driven by a need to be seen as responsive to the insurance crunch, the expertise and expectations generated in the rush to put out fires leaves some room in the upcoming year for more serious consideration of reforms of the type I have proposed. There is, for example, the chance that the many torts study commissions that have been created will find it attractive to offer something that is both bold and not one-sided.

D. Congress—*Big Windup, No Pitch?*

For a number of years Congress has been considering product liability reform, and on a number of occasions something fairly dramatic has almost passed. This ongoing attention to the problem dates from the product liability insurance crisis of the 1970s. At that time, a Federal Interagency Task Force formed to study the problem made a series of recommendations for change.¹²⁸ Emerging from that effort was the Model Uniform Product Liability Act that reduced general recommendations to specific statutory form.¹²⁹ Aimed at states, Congress could also adopt its provisions.¹³⁰

Congressional bills about product liability have taken various forms in the years since the Task Force's report.¹³¹ Generally, these bills have reflected four quite different approaches. None of these approaches has yet been enacted. Indeed, the business and insurance interests that had been urging federal changes now might well settle for state law reforms with the result that there will not be any further serious push for a federal products liability law after all. Nonetheless, these four approaches provide an interesting contrast with the legislative proposals I have so far discussed.

1. Uniform National Standards

Defendants and insurers have consistently complained that although many products are distributed nationwide, enterprises are subjected to a bewildering variety of local rules. Although many have thought this to be a powerful reason for federal action in this area, it is by no means clear what is wrong with the lack of uniform national legal standards. One possible outcome of uneven tort law is that

128. REPORT OF THE INTERAGENCY TASK FORCE ON PRODUCT LIABILITY (1977).

129. The Act was published at 44 Fed. Reg. 62,714 (1979).

130. Victor Schwartz, a key man in the Task Force's efforts and in the drafting of the Model Act, has become an important lobbyist for congressional action. A former law professor, the author of a leading treatise on comparative negligence, and a coauthor of the Prosser-Wade casebook on torts, Schwartz has, from his new base as a Washington lawyer, continued to publish widely on the need for tort reform. See, e.g., Schwartz, *Tort Law Reform: Strict Liability and the Collateral Source Rule Do Not Mix*, 39 VAND. L. REV. 569 (1986); Schwartz & Mahshigian, *Failure to Identify the Defendant in Tort Law: Towards a Legislative Solution*, 73 CALIF. L. REV. 941 (1985).

131. See generally Twerski, *A Moderate and Restrained Federal Product Liability Bill: Targeting the Crisis Areas for Resolution*, 18 J.L. REFORM 575 (1985).

companies find that some states demand more safety than do others. Because of uniform production and marketing requirements, these states may in turn set the standard for the nation. Although creating safer products is hardly objectionable, if the consequence were that products became more expensive, less convenient to use, less attractive than consumers in states with more lenient standards wanted, or that certain products became unavailable everywhere, that would be a basis for saying that consumer interests in less demanding states were being ill-served. One problem with this line of argument, however, is that the advocates for change have not been consumer groups from states with less demanding tort laws.

Moreover, the call for uniform national standards, like most calls for equality, leaves open the possibility for equality at radically different levels. Yet it is perfectly clear that those asking Congress to enact uniform national standards would not want to nationalize the laws of the states of New Jersey or California, which are widely seen as having the most pro-plaintiff products liability laws.¹³² Rather, advocates for substantive law change by Congress mainly want to be free from the rulings of the highest courts of states like New Jersey and California and apparently believe that their chances of obtaining such relief are greater in Congress than with the legislatures of those states.

Specifically, most bills seeking to set uniform national standards want to eliminate strict liability in all but the run-of-the-mill manufacturing defect cases. These bills insist upon proof of defendant fault in what now are typically called both design defect and warning defect cases. In effect, the defendants are seeking to have Congress insulate them from liability for dangers that were not reasonably knowable or avoidable at the time their product was made.¹³³

Traditionally, tolerating state differences in tort law has not only been a matter of loyalty to our federal system generally, but it has also reflected the notion that the negligence concept itself depends upon community standards. Yet, some claim that certain states are now using their tort law as a vehicle for turning the drug manufacturers, automakers, and others who do business in that state into the insurers of injured victims, at least where there is some connection to their products. Perhaps it is appropriate to ask Congress to decide whether individual states ought to be able to force such enterprises to take on that role. Whether Congress should pre-empt the states in this way is, of course, quite a different matter.

2. Damage Control

A second sort of national strategy that has surfaced starts from an entirely different premise. It seeks primarily to control the amount of tort damages that are payable in product cases, leaving it to the states to continue to decide when liability is appropriate. This approach, simply put, urges congressional enactment in cases of

132. The Working Group, for example, especially criticized certain decisions of those two states.

133. This is essentially the approach of the Model Act and of S. 2631, 97th Cong., 2d Sess., 128 CONG. REC. S. 6878 (daily ed. June 8, 1982), and its near twin S. 44, 98th Cong., 1st Sess., 129 CONG. REC. S. 90 (daily ed. Jan. 26, 1983), which together have gained considerable legislative attention. The 1985 version was numbered S. 100, 99th Cong., 1st Sess. (1985). See Vol. XLI CONG. Q. ALMANAC 278 (1985).

product injuries of the Administration's Working Group recommendations on issues like pain and suffering damages, the collateral sources rule, punitive damages, joint and several liability, and attorneys' fees.¹³⁴

3. Elective No-Fault

A third congressional approach—elective no-fault—owes its inspiration to the work of Professor Jeffrey O'Connell.¹³⁵ The basic idea is to create a two-tier system for product injuries. Those victims handled by one tier would obtain prompt payment for their out-of-pocket losses on a no-fault basis. Those handled on the other tier would receive full scale tort law recovery, but would face full scale traditional tort burdens, most likely including proof of defendant fault. Such plans aspire to move to the no-fault tier both a significant share of cases that now eventually lead to tort recovery, and a significant number of cases that now generate no recovery at all.

If one tries to adapt auto no-fault and workers' compensation schemes to product injuries as a class, it quickly becomes apparent that there is no convenient and acceptable boundary line that would define when no-fault compensation is due that is analogous to the "auto accident" or the "workplace injury." "But for" causation simply will not do. If that were used, knife makers (and their consumers) and whiskey makers (and their consumers) would have to pay for injuries to those who were injured through deliberate, reckless, and negligent use of these products, even if there were no defect in the product itself. Most people would find this result unfair. What is troubling is not the sense that such victims should be denied compensation, even for self-caused injuries from such products. Rather, the objection is that the maker and other buyers of the product would be singled out to pay. Moreover, in a cause-based system it would very often be uncertain which product to charge; if I am slicing a lime to put in my gin and tonic and cut my finger, do I claim from the knife maker, the lime grower, or the gin distiller?

O'Connell has recommended "elective" no-fault to resolve the problem of deciding when no-fault is appropriately applied to product injuries. In such a system, the parties themselves would define the triggering compensatory event. Of course, since the parties cannot really be expected to negotiate individually before the event over what events will generate no-fault benefits, the power to elect must generally be lodged with either victims or injurers.

As Professor O'Connell recognizes, problems are created whether it is the plaintiff or the defendant who determines on which tier a case is to fall. The defendant would have an incentive to opt for lower no-fault recovery only in those cases where it would otherwise be found liable in tort. That is true whether the enterprise is

134. In 1986, this package was introduced by Senator Kasten as an amendment to his Senate Bill 100. See *Senate Panel to Tackle Three Insurance Plans*, CONG. Q., May 31, 1986, at 1219-20. It is, of course, possible to combine both national substantive standards with national limitations on damages, as did Kasten's proposal.

135. See generally J. O'CONNELL, *THE LAWSUIT LOTTERY: ONLY THE LAWYERS WIN* (1979); J. O'CONNELL, *ENDING INSULT TO INJURY: NO-FAULT INSURANCE FOR PRODUCTS AND SERVICES* (1975). For his most recent salvo against the tort system, see J. O'CONNELL & C.B. KELLY, *THE BLAME GAME: INJURIES, INSURANCE, & INJUSTICE* (1987).

permitted to elect for individual cases after the accident or for classes of cases beforehand. Under these circumstances, what would have been sold as a scheme to give benefits, albeit lower benefits, to more victims would mainly be a rollback of victim rights.

On the other hand, if victims have the option of electing no-fault recovery, one must be concerned that those who will do so are only those who would not otherwise recover in tort. While this may be good from the narrow perspective of expanding victim benefits, it no longer looks like a compromise reform that would be attractive to defendants.¹³⁶

Still, over the years, O'Connell has invented various clever variations on his main theme that cope reasonably well with these incentive problems and promise to put on the no-fault tier not only a considerable number of cases that would have led to full tort recovery if litigated, but also at least a fair number that would not have led to recovery if litigated.¹³⁷ And O'Connell's thinking has found its way into congressional bills.¹³⁸

Even if an elective no-fault scheme would work as well as O'Connell hopes, it still would not serve accident victim compensation needs in a comprehensive manner. Masses of disabled people, surely as equally deserving as many who would be served by O'Connell's plan, will not be covered. Thus, for me, elective no-fault can only be supported as a step on the way to some other arrangement.

Moreover, interestingly enough, it turns out that in some important situations the problem of deciding which product injuries are appropriate for no-fault treatment is not so difficult after all. One nice illustration of this point involves the reasonably well understood, rather serious, occasional side-effects of the antipertussis vaccine routinely administered to virtually all American children.

It is now well established that a rather small but uncertain proportion of children who receive immunization injections against pertussis suffer serious injuries from the vaccine. This immunization is nearly universally required before children can attend school. Some have argued that it makes sense today for an individual family to seek to avoid having its child immunized on narrow cost-benefit grounds.¹³⁹ But, from the overall public perspective, the public health community still strongly believes that, notwithstanding the occasional unfortunate consequences, mass immunization should continue in order to keep at bay a disease that killed thousands of children annually in the 1930s and nearly no one today.¹⁴⁰

136. A scheme with victim election also raises the difficult problem of deciding to whom to make the election available; plainly, the wider the circle beyond those who would otherwise recover in tort, the less attractive the plan to defendants.

137. See, e.g., O'Connell, A "Neo No-Fault" Contract in Lieu of Tort, *supra* note 15; O'Connell, *Offers that Can't Be Refused: Foreclosure of Personal Injury Claims by Defendants' Prompt Tender of Claimants' Net Economic Losses*, 77 Nw. U.L. REV. 589 (1982); O'Connell, *Harnessing the Liability Lottery: Elective First-Party No-Fault Insurance Financed by Third-Party Tort Claims*, 1978 WASH. U.L.Q. 693.

138. Most prominent is Senator Danforth's original Senate Bill 1999, developed by the Senate Commerce Committee staff and described in a floor statement by Danforth 131 CONG. REC. S. 18,321-22 (daily ed. Dec. 20, 1985).

139. See generally David, *DTP: Drug Manufacturers' Liability in Vaccine-Related Injuries*, 9 J. PROD. LIAB. 361 (1986); Sturges, *Vaccine-Related Injuries: Alternatives to the Tort Compensation System*, 30 ST. LOUIS U.L.J. 919 (1986).

140. See generally REPORT OF THE WORKING GROUP ON VACCINE SUPPLY AND LIABILITY, *supra* note 23.

What to do about the victims of this public health campaign is another matter. By the fall of 1986, tort suits for enormous sums had been filed on behalf of many of them.¹⁴¹ In the closing weeks of the 99th Congress, an O'Connell-like plan to deal with such victims was enacted. The National Childhood Vaccine Injury Act¹⁴² is designed to provide victims of the pertussis vaccine, as well as some other designated vaccines, no-fault damages for their injuries, merely upon a showing that they had been vaccinated and soon thereafter suffered one of the statutorily recognized side-effects. No demonstration is required of the defectiveness of the vaccine, regardless of state law.¹⁴³ Relief from this burden is an important benefit in states that would, at least in principle, relieve a manufacturer of liability if it had reasonably warned doctors of risks that the vaccine maker had reason to know about—unless the plaintiff could show that the manufacturer had been negligent in failing to discover or market a safer vaccine.¹⁴⁴ While some victims might be able to prove the latter to the satisfaction of a jury, it would probably be an extremely heavy, if not insurmountable burden for most.¹⁴⁵ Moreover, under the Vaccine Injury Act, unlike in the usual O'Connell no-fault proposal, victims are to be entitled not only to their otherwise uncovered medical expenses, incidental expenses, and lost earnings (here set appropriately for children in terms of the state average wage), but also to pain and suffering damages of up to \$250,000. Of course, if a seriously harmed child were ever to get to the jury on the question of damages, far more than \$250,000 might be awarded.

Although this scheme is designed to be elective for victims, it does not seem to be so because of the typical O'Connell concerns, however. Once the triggering event has been identified, as it has been here, why not impose this no-fault solution on victims and vaccine makers alike? Rather, it appears that the elective feature here was meant to appease the trial bar. In fact, however, few victims, if any, would likely choose to litigate given the provisions of the Act. First, in order to bring a case under the tort system, the claimant must forfeit whatever no-fault benefits would otherwise be available. Moreover, under the Act, those who choose the tort route are to be subjected to legal hurdles that would surely make such a path highly treacherous, in effect requiring proof of manufacturer fault regardless of what state law might provide.¹⁴⁶ Therefore, unless some very strong evidence of manufacturer wrongdoing

141. See Tarr, *DTP Vaccine Injuries: Who Should Pay?*, Nat'l L.J., Apr. 1, 1985, 1, col. 1; Toner for Toner v. Lederle Laboratories, 779 F.2d 1429 (9th Cir. 1986); Toner for Toner v. Lederle Laboratories, 732 P.2d 297, 112 Idaho 328 (1987) (on questions certified to the Idaho Supreme Court).

142. This Act was part of an Omnibus Health Bill, S. 1744, signed by President Reagan on November 14, 1986. See CONG. Q., May 15, 1986, at 2920. For the original report of the Act, see HOUSE COMM. ON ENERGY AND COMMERCE, NATIONAL CHILDHOOD VACCINE INJURY ACT OF 1986, H.R. REP. NO. 908, 99th Cong., 2d Sess. (1986).

143. See HOUSE COMM. ON ENERGY AND COMMERCE, NATIONAL CHILDHOOD VACCINE INJURY ACT OF 1986, H.R. REP. NO. 908, 99th Cong., 2d Sess. §§ 2113-14 (1986).

144. See generally David, *supra* note 139; Sturges, *supra* note 139.

145. Even when strict liability would apply, many DTP plaintiffs would have problems. Whether the harm was caused by the vaccine or something else is one problem. Another is showing which vaccine manufacturer made the vaccine that they received. See Tarr, *supra* note 141.

146. HOUSE COMM. ON ENERGY AND COMMERCE, NATIONAL CHILDHOOD VACCINE INJURY ACT OF 1986, H.R. REP. NO. 908, 99th Cong., 2d Sess. § 2122 (1986).

comes to light, the Vaccine Injury Act really presents the victims with an offer they cannot refuse.

Although this Act was passed by Congress and signed by the President, it may in fact come to nothing, since there is no funding mechanism in place for the no-fault benefits.¹⁴⁷ The original idea was to have the plan funded by an excise tax of \$1.54 on each vaccine dose. Since the vaccine manufacturers have boosted their price per dose by far more than this sum in response to tort liability fears, and since there have been serious fears of vaccine unavailability from time to time during the past couple of years, one might have imagined that this no-fault solution, together with its funding mechanism, would be fairly attractive all around.¹⁴⁸ Yet in the face of strong White House opposition to the tax mechanism, the Act was passed with the funding arrangement for the benefits still to be worked out. Whether that will happen is now quite uncertain.¹⁴⁹

There is, of course, a great deal to be said in favor of providing generous no-fault benefits to children who have been injured while performing what may be termed a public service. Therefore, I find it difficult to object to the Vaccine Act as a short run solution. Yet from a broader perspective, this example well illustrates my general objection to the "tailored compensation plans" that O'Connell-like schemes represent.¹⁵⁰ There are, after all, enormous numbers of children who are born with birth defects or contract serious childhood diseases who, in my view, are as deserving

147. See Statement by the President, Office of the Press Secretary, Nov. 14, 1986 on the occasion of President Reagan's signing of S. 1744.

148. See HOUSE COMM. ON ENERGY AND COMMERCE, NATIONAL CHILDHOOD VACCINE INJURY ACT OF 1986, H.R. REP. NO. 908, 99th Cong., 2d Sess. Title II § 211 (1986) (Addition to the Internal Revenue Code), and the REPORT OF THE WORKING GROUP ON VACCINE SUPPLY AND LIABILITY, *supra* note 23, at 132, 149.

149. President Reagan has objected to funding the compensation arrangement in any respect by the "federal taxpayer"—even though the basic funding for the plan was meant to come from a class of taxpayers restricted to buyers of the vaccine. The President also objected to housing the administration of the plan in the federal courts and to the remaining opportunity under the plan for similarly situated plaintiffs who pursue tort remedies to receive quite different judgments. See Statement by the President, *supra* note 147. The last objection, of course, can equally be made of the tort system generally, both today and as it would be reformed by the adoption of the recommendations of the President's Working Group. Only replacing tort with sensible modern compensation mechanisms, something the Administration has so far generally opposed, would deal with this objection to horizontal inequality among victims. See also *Before the Select Revenue Measures Subcommittee, House Comm. on Ways and Means, 100th Cong., 2d Sess. (1987)* (Statement of Dennis E. Ross, Tax Legislative Counsel, Department of the Treasury); and *Issues Arising in the Determination of an Appropriate Funding Source for the National Vaccine Injury Compensation Program* in which Mr. Ross restates the Administration's support for the idea of a vaccine compensation plan, but spells out a somewhat different set of objections to the plan that was enacted and to the original, but not enacted, tax arrangements that were to fund the plan. For one thing, Ross makes clear that the Administration is less concerned about unequal treatment of victims who elect to use the tort system (as suggested by the President) and more, in order to assure vaccine supply, about relieving vaccine manufacturers of the risk of large and unpredictable liability awards. In addition to reiterating the President's objection to housing the plan in the federal courts, Ross states that the Administration objects to provisions of the plan that entitle claimants to the payment of their attorneys' fees. These various objections, of course, go to features of the plan that are already enacted. As for the yet-to-be enacted funding mechanism, Ross makes clear that one fear the Administration has is that this program could set an unwelcome precedent that "could encourage the creation of similar Federal programs for persons injured by other goods and services." *Id.* at 9. Moreover, in view of experience with the Black Lung program, Ross explains that the Administration is understandably concerned that the proposed excise tax may generate inadequate funds to pay for the plan's beneficiaries. One way to avoid open ended and unpredictable liabilities, according to Ross, is to have the plan pay out lump sum benefits (as does tort law traditionally) rather than ongoing, as incurred, benefits as now contemplated by the plan and as is typical of social insurance arrangements generally. In his remarks, Ross states that the Administration plans to propose its own no-fault scheme for vaccine victims that would make significant changes in what has been enacted to date.

150. See generally Sugarman, *Doing Away With Tort Law*, *supra* note 10, at 622-41.

as vaccine-damaged children. But there is little prospect of reaching their compensation needs through plans that depend upon identifying enterprises that have somehow caused their condition. To be sure, some of these "defective" children will be compensated through successful suits brought on their behalf against their mother's obstetricians, whether truly at fault or not. That, of course, is part of what is driving many doctors from the baby-delivery business. But many disabled children will simply have no access to either tort recovery or a special compensation fund. What is required instead are new ways of thinking about the disabled in general.

4. Settlement Incentives

In 1986, yet another wrinkle on O'Connell's elective no-fault approach to product injuries surfaced in Congress.¹⁵¹ The approach is sufficiently different, however, that I have put it in a fourth category. This strategy involves creating incentives that are meant to achieve settlements of torts claims on terms roughly equal to those O'Connell favors in his no-fault proposals.

The idea is to specify certain offers that plaintiffs and defendants can make to each other which, if not accepted, will lead to penalties if the party refusing settlement continues to litigate, especially if the result of that litigation is less favorable than the settlement offer. For example, if a defendant refuses a product injury claimant's offer to accept payment for only net economic loss, the claimant might then be entitled to payment of his or her attorneys' fees on top of whatever full tort recovery is obtained at trial. Alternatively, if the defendant offers to pay net economic loss and the claimant refuses, the plaintiff might then be restricted in the amount of pain and suffering he or she can obtain through litigation, or might be penalized by having to pay defense attorneys' fees if less than the settlement offer is obtained at trial.¹⁵²

There are certainly good things that can be said in favor of creating financial incentives that promote reasonable settlements. But it seems very odd to have Congress select for national treatment an area of litigation administration that is usually considered especially within the province of states and their courts. Such proposals certainly seem a far cry from the uniform national substantive law standards idea that was at the heart of the early congressional deliberations in this field.

Promoting settlement is even further afield from a related concern that is clearly a matter of congressional responsibility. Rather than worrying so much about defining what duties manufacturers ought to have towards people hurt by their products, Congress should pay more attention to the inadequacies in the way the Social Security and Medicare systems now treat the seriously disabled as a whole.¹⁵³

151. For discussions tracking the politics of these proposals, contained in a bill by Senator Danforth, S. 1999, 100th Cong., 1st Sess. (1986), and a comprehensive amendment proposed by Senator Gorton, see CONG. Q. May 31, 1986, at 1219-22; June 7, 1986, at 1268; June 14, 1986, at 1362; June 28, 1986, at 1511-12; and Aug. 23, 1986.

152. The detailed provisions of the Danforth bill and Gorton amendment are somewhat more complicated than this.

153. For example, the disabled now often have to wait too long before becoming eligible for Medicare, and Medicare does not provide for many extra-cost needs that the long-term disabled have. Social Security's income benefits are often woefully inadequate for disabled workers and their families, especially when the worker was paid low-income wages prior to becoming disabled. See generally Sugarman, *Serious Tort Law Reform*, *supra* note 10.

If those plans assured coverage of the compensation needs of that group, both state court judges and legislatures could be counted on to see tort law in quite a different light. Not having much hope that the federal government will soon act on this responsibility,¹⁵⁴ however, my recommendations for change described in the next section are aimed at the states.

IV. A BETTER IDEA

At present, a number of non-tort compensation schemes deal with the needs of the disabled, including Social Security disability insurance, automobile no-fault plans, workers' compensation, private accident and disability insurance, employment-based sick leave and disability pension programs, Medicare, and employment-based health plans. They have, on the whole, a number of common characteristics, four of which I wish to emphasize here.

First, victims are usually able to obtain their benefits at relatively little administrative cost to them. Second, the victim's own conduct, apart from the rare situation of deliberate self-injury, is usually irrelevant both to his or her eligibility for benefits and to the amount awarded. Third, benefits provided by any one plan are usually sensibly integrated with those provided by other plans; normally, social insurance and routine employment-based benefits are treated as a core with respect to which other benefits relate. Fourth, to the extent that cash benefits are paid for non-economic losses (i.e., impairments), as in workers' compensation and certain kinds of accident insurance, they are limited in amount and restricted to those victims suffering the more serious and permanent injuries.

My tort reform proposals rest on the principle that the law of damages should generally reflect these same four features. Therefore, with regard to the seriously injured, the Working Group is correct in urging states to reverse the collateral source rule, to constrain the award of punitive damages, and to limit pain and suffering awards and attorneys' fees in the large cases (even if the details of the Reagan Administration's proposals are not what I would favor). On the other hand, in light of my principle, the Reagan Administration is incorrect in putting great emphasis on the fault concept and seeking to overturn the rule of joint and several liability. To the contrary, where a defendant can fairly be said to be liable for an injury, not only should that defendant run the risk of another defendant's insolvency, but also that

154. The Reagan Administration has been inclined to be rather ungenerous both towards Social Security disability recipients and towards the disabled poor who must turn to the means-tested Supplemental Security Income scheme. Yet, in view of budget deficits, it is quite unclear whether the totally disabled could hope to fare significantly better even under a different Administration.

Although it is also questionable whether the federal government will soon act in the specific area of tort reform, supporters of such action began pushing for change early in the 100th Congress. For example, Representative Roth has introduced H.R. 430 that, among other things, would set national substantive law standards for product liability cases; Representative Dennemayer has introduced H.R. 635 that would, among other things, create a two-tier scheme of the O'Connell sort for product injuries; Senator Pell has introduced S. 426 that would impose limits in personal injuries cases broadly in line with, although somewhat more generous than, those proposed by the Working Group; and Representative Latta has introduced H.R. 798 that would combine a national fault-based standard for product design and warnings cases with damage limits in products cases of the sort the Administration favors. See 617 PROD. LIAB. REP. (CCH) at 7-8 (1987). See also Representative Shumway's H.R. 1936, 622 PROD. LIAB. REP. (CCH) at 10 (1987).

defendant should not be relieved of liability because of the contributing fault of the victim.

More specifically, I will review what was sketched at the outset of this Article to show how my proposals would give tort law those same four features with which I began this section. First, because defendants, rather than plaintiffs, would be obligated to pay for the attorneys' fees of successful claimants, the administrative costs to victims of making claims would be cut drastically. Such fees would normally be restricted to a percentage that declines as the amount recovered increases.¹⁵⁵ Victims would have to pay out of their awards only the other costs of litigation.

Second, victim fault would become irrelevant to recovery because contributory negligence would no longer be any defense at all. Tort law would thus have shifted in a relatively short period from the principle that victim fault is a complete bar, to the rule that it serves to cut down recovery, to the practice of compensating victims without regard to victim fault.¹⁵⁶ Of course, tort liability would still require a showing of defendant fault or the satisfaction of whatever requirements exist in the jurisdiction for imposing strict liability, and defendants would still have to be proven to be the proximate cause of the injury.

Third, through the reversal of the collateral source rule, tort law would become, like other compensation systems, sensibly related to core social insurance and employee benefit programs. Like well-designed private disability insurance and automobile no-fault arrangements, tort damages would serve to supplement, rather than duplicate, benefits those programs already provide to victims.

Fourth, through changes in the rules governing pain and suffering and punitive damages, tort payments for non-economic losses would be limited in amount and focused on the seriously hurt. A threshold requirement that the victim have either been disabled for more than six months or permanently and seriously impaired or disfigured would end the payment of pain and suffering awards to the not-so-seriously injured. The imposition of a maximum award of \$150,000 to those who are eligible for pain and suffering awards would, when the victim no longer has to pay for his or her lawyer's fee out of such award, constrain recovery for general damages to a reasonable sum.¹⁵⁷ After all, \$150,000 can be rather easily invested to produce \$1000 a month for the rest of the victim's life.

This limit is quite unlike the \$100,000 cap proposed by the Working Group, which, because the victim still must pay his or her lawyer's fee, effectively does away

155. Assuming the sliding scale now used for California medical malpractice were adopted, this would provide for payments of 40% on the first \$50,000 of the award, 33% of the next \$50,000, 25% of the next \$100,000, and 10% of any excess. See *supra* note 16. For cases settled reasonably early in the litigation process, perhaps a modified scale such as 33% of the first \$100,000, 20% of the next \$100,000, and 10% thereafter ought to apply. I would favor allowing trial judges to make exceptions to these presumed scales in exceptional cases, where the lawyer's efforts were either unusually great or light.

156. Although it is the minority view, some jurisdictions have adopted this rule with regard to strict products liability claims, generally concluding that the victim's fault is no defense in such cases because strict liability itself is driven by compensation concerns. See SCHWARTZ, *supra* note 79, at 199.

157. Perhaps juries would cut down on pain and suffering awards where victims are at fault. That would not be too objectionable. The main thing to avoid is an automatic cutback, which occurs under comparative negligence, because it threatens to leave the victim vastly under-compensated for real losses. This is a concern that is magnified under my proposals, in which the possible surplus now created by the collateral source rule would also be gone.

with pain and suffering awards for the badly hurt victim. Rather, my limit at least keeps the treatment of seriously injured tort victims broadly comparable to that of workers' compensation claimants, who, in nearly all jurisdictions, are entitled to some cash payment for their impairment beyond actual wage loss suffered.¹⁵⁸ On the other hand, my proposal is in marked contrast to the ceiling on non-economic loss of \$875,000 enacted in New Hampshire. Even with legal fees taken out, that sort of ceiling permits tort law, in effect, to make virtually a millionaire out of someone who had previously earned average wages. Such a result is altogether out of line with how other compensation plans treat people, no matter how disabled.

Although punitive damages are, of course, foreign to other compensation schemes, I have not proposed their elimination from tort law because of the special role they can play in assuaging the enormous outrage victims may legitimately feel when they are deliberately injured. But, since I am concerned both about the freewheeling way in which these damages seem to be awarded today (especially against corporations who as legal creations cannot really be punished in the way that jurors seem to want to punish them) and about the risk that they too often might be used by aroused juries to avoid the pain and suffering ceiling I propose, I favor new limits on this type of award. While a number of different strategies for dealing with the problem are promising, the simplest seems to be to take the question entirely away from the jury and give it to the trial judge. This remedy not only puts the matter in the hands of someone who is both less likely to be carried away by passion and accustomed to imposing fines in other areas, but it also would keep otherwise irrelevant, yet inflammatory, evidence away from the jury as it considers the questions of liability and compensatory damages.¹⁵⁹

These changes in the way damages would be awarded to seriously injured tort victims are meant to achieve both a cutback on the total payout of the tort system and a redirection of the payouts that are made. Since the problem of the unpredictably growing number of gigantic awards would be reduced, these reforms should make liability insurance (at least for bodily injury) both less expensive and more reliably available.

Within the system, the main losers would be plaintiff lawyers and victims who under today's rules would have been lucky enough to win the lottery of the giant pain and suffering and punitive damages awards. Other losers would be people who now receive duplicate recovery for their losses. On the other side, people who are badly hurt and whose fault contributes to their injury would gain. Having to live with a serious disability is, I believe, already plenty of punishment for these victims, if any at all is deserved. They should not suffer the further punishment of severely restricted payment for their losses.

With respect to the not-so-seriously injured, new arrangements outside of tort law should be adopted that would assure the prompt payment of the out-of-pocket

158. Incidentally, my reforms ought to make it far less attractive for workers to seek recovery under both workers' compensation and tort law, as increasingly occurs today.

159. For evidence on the role that trial judges already play in reducing (or eliminating) jury awards of punitive damages, see M. PETERSON, S. SARMA, & M. SHANLEY, *supra* note 126, at 26-30.

losses of those who are temporarily disabled for any reason. Given the extensive network of employee benefits and social arrangements that most temporarily disabled Americans already have, there is every reason to believe that the new costs of the first party program I advocate will be less than the savings generated by curtailing payments to this group for pain and suffering and from the administrative savings that would be achieved by taking such claims out of the tort system.¹⁶⁰

Specifically, I propose first that all employees be assured reasonable sick leave benefits of the sort that the majority of workers now have. A typical benefit would be one day a month of sick leave that would accrue if unused. This program is primarily meant to deal with disabilities that cause a week or less of time off work. Second, I propose that all employees have generous temporary disability income insurance, or its equivalent. A typical benefit here would provide, after a one week waiting period, for the replacement of earnings up to twice the state average wage for up to six months, at a replacement rate equivalent to about 85% of the worker's pre-disability after-tax income. Five states already mandate such programs, although with less favorable wage replacement rates and lower ceilings.¹⁶¹ In those states and elsewhere, however, many employers voluntarily provide better benefits of the sort I propose.¹⁶² The existing mandatory programs nonetheless provide a convenient model upon which the more generous scheme I propose can easily be built.

The existing approach to temporary disability insurance should be expanded further to include work as well as non-work disabilities. The five states which presently have such plans cover only non-industrial disabilities, while workers' compensation schemes deal with on-the-job injuries. Covering both sorts of injuries in a single plan has the advantages of (1) reducing the administrative costs that come from running two parallel programs and trying to decide which program applies in borderline cases, (2) assuring socially desirable equal treatment to work and non-work disabilities, and (3) helping to free workers' compensation of responsibility for short term injury cases. In this event, workers' compensation, like tort law, could concentrate its attention on the relatively few serious disability cases. For that to occur, however, both workers' compensation and tort law would also have to be freed from responsibility for the medical expenses of the temporarily disabled.

Reversing the collateral source rule would help relieve tort law of such responsibility because the payment of medical expenses would no longer come from the defendant's insurer whenever the victim had his or her own insurer. Even though most Americans today either have job-based health plan benefits or public Medicare or Medicaid benefits that already make tort law coverage of these expenses superfluous, an important goal is to promote the provision of good health care benefits for those currently without such benefits. This is, of course, desirable for its own sake as well as for the purpose of relieving tort law of this responsibility.

160. See Sugarman, *Serious Tort Law Reform*, *supra* note 10.

161. See *Social Security Programs in the U.S.*, *supra* note 11, at 37-41.

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

My proposal would help promote the desired result by providing an incentive to employers who do not currently have such plans: those that do provide benefits would be relieved of their obligation to provide medical benefits to the temporarily disabled through their workers' compensation program. This does not matter to the worker, since, where good health insurance is provided, the workers' compensation medical benefits are not needed. Yet at the present, when both kinds of benefits are provided, cumbersome reimbursement arrangements between workers' compensation carriers and health insurers are required. This insurance overlap and its accompanying administrative burden would be eliminated under my proposal.

The result would be simple, sensible, and uniform treatment of nearly all people who are temporarily disabled, whether through illness or through accident, and whether from what we now call a tort, from an on-the-job cause, or from an off-the-job cause that is outside of current tort law. These victims would have their lost income replaced through the new mandatory temporary disability insurance and sick leave programs and their medical expenses paid by an ordinary health plan. Very few temporarily disabled individuals would file claims in either the tort system or the workers' compensation system.

Enterprises would find that the basic needs of their temporarily disabled employees are well taken care of, that the liability concerns of the enterprise are much reduced, and probably also that the costs of the new program are no more, and often less, than current arrangements. Other tort defendants like motorists and doctors would enjoy substantial tort relief that promises to translate into significant insurance premium relief.¹⁶³

Perhaps most importantly, these reforms taken together, unlike those recommended by the Working Group and the ABA Commission, do not amount to a rollback of victims' current tort rights. Rather, while helping enterprises, they provide important new benefits for victims as well: the payment of attorneys' fees and the end of reduced recovery for contributory fault in cases of seriously injured tort victims, and a generous and comprehensive compensation program for those who are less seriously injured for whatever reason.

If legislatures were to take advantage of the current torts crisis and enact this package of reforms, two very important steps would be taken toward desirable long-term changes. First, given the experience with automobile no-fault laws, it seems safe to estimate that 80% or more of the personal injury tort claims would disappear.¹⁶⁴ Second, with both tort law and workers' compensation law concentrated on the problems of the seriously disabled, society could better focus on that

163. This assumes that the jurisdiction has not already enacted a substantial automobile no-fault plan (as Michigan and New York have done) and that the jurisdiction has not already adopted with respect to medical malpractice cases the defense-oriented reforms proposed here.

164. I base this estimate on Hammit & Rolph, *Limiting Liability for Automobile Accidents: Are No-Fault Tort Thresholds Effective?*, 7 *LAW & POL'Y* 492, 497 (1985), which found that Michigan's verbal threshold, which is somewhat more generous than that proposed here, excluded 89% of potential bodily injury claimants. I have not projected a 90% cutback, however, because I am assuming that a lower percentage of non-auto claims would be excluded on the ground that relatively fewer of those claims today are of the less serious sort. Of course, this estimated cut-back in tort claims would be less in states with existing auto no-fault plans.

population as a whole. Should tort victims be singled out for more generous benefits than are provided to other seriously disabled people? Should the pain and suffering benefits paid to seriously injured tort victims be extended to others? Should a series of tailored no-fault plans, like the Vaccine Injury Act, be adopted for various groups of the seriously disabled? How can Social Security and Medicare better serve the needs of the seriously disabled?

Bifurcating the tort victim population as I have proposed also means that since the seriously injured could still sue in tort, would-be defendants will continue to face the risks of bad publicity, of an official determination of their wrongdoing, and of having to pay significant damages to badly harmed victims. Thus, to the extent that tort law now serves the social functions of exposing enterprise misconduct, promoting attentiveness to safety, and forcing defendants to fix things that are shown to be wrong with their products or activities,¹⁶⁵ those functions should continue to be served in the situations where they are most important—where victims are seriously injured.

In sum, I offer a bold compromise tort reform proposal designed to better serve the general public interest. Unlike the other reform proposals discussed in this Article, my proposal seeks to achieve a balance between business, consumer, and victim interests that have so far appeared irreconcilable. Yet because my proposal builds upon existing programs, its boldness does not render it infeasible. This proposal is ripe for adoption and the time is ripe for change.¹⁶⁶

165. Although I am rather skeptical about whether tort law actually significantly serves these functions, others believe strongly to the contrary. See Sugarman, *Doing Away With Tort Law*, *supra* note 10, at 559–91.

166. For a thoughtful article by my law school torts professor, which, I am happy to say, endorses most of the program I outline here, see Pedrick, *Perspectives on Personal Injury Law*, 26 WASHBURN L.J. 399 (1987).

