

How Serious is Sugarman's "Serious Tort Law Reform"?

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A reply to Professor Sugarman.

THE PROPOSAL

In outline, Professor Sugarman's proposals for serious tort reform are quite simple. He would abolish tort recoveries for short-term losses, that is, those which are incurred in the first six months. Tort remedies would be retained to cover longer-term losses, permanent injuries, pain and suffering and possibly punitive damages, but with changes designed to lower costs and increase equity. Tort recoveries would no longer duplicate benefits available from other sources; also, awards for pain and suffering and punitive damages would be constrained. However, successful tort plaintiffs would become entitled to compensation from defendants for their reasonable attorney's fees and would not have their awards reduced if they were at fault.

Short-Term Losses

Consider first the short term losses. Under Professor Sugarman's plan, all these income losses, regardless of cause, would be removed from the tort system (only persons suffering a serious disfigurement or impairment would have access to the tort system for the payment of general damages). Such losses would be covered by employer-provided sick leave for the first six days of income loss, some version of state-mandated temporary disability insurance to cover income loss after the expiration of sick leave, and continued coverage of income

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loss after the expiration of sick leave for the next 25 weeks. Medical costs would be covered by employer-provided health coverage and nonearners would look to Medicaid and Medicare.

These provisions would cover income loss for those employed. Since those not employed have no income loss, Professor Sugarman reasons that they should receive no compensation. This approach ignores entirely the person who is injured just before he or she embarks on a job. The high school graduate injured in an automobile crash the night of the prom would receive no income replacement since he had no income to replace, even though, had he not been injured, he would have begun his work career on Monday morning. It ignores those persons who are unemployed but still in the labor market, for example, workers who are between jobs. The prior employer might be obligated to cover the employee for a finite period of time, but should the employer be obligated to cover the laid-off or discharged employee until he finds a new job? Such a provision would hardly appear to be equitable, and yet literally thousands of employees are between jobs at any given moment of time.

Small employers, defined as those with fewer than five employees,¹ would be exempt from being required to provide sick leave for the first week. These sweeping reforms pose problems for the significant number of persons who work in these small firms, as well as for the self-employed who presumably would not be required to insure themselves for sick leave pay.

Is it nitpicking to point out these instances where the proposed scheme is missing coverage, or fails to take into account a particular contingency? Are these matters which can be repaired by fine-tuning once the system is in place? I think not. These are the kinds of cases that test the system, and nowhere in Professor Sugarman's lengthy article does the author address the problems posed by these lacunae.

Reforming the Tort System and the Welfare System: Global Remedies are Easy, Only the Details are Difficult

The whole matter of tort reform can be compared to the question of welfare reform. Professor Sugarman has drawn a lengthy bill of indictment against the current system, and although his indictment is not data driven, it rests on some widely shared opinions about how the system works (or does not work), or at least some consensus as to its evils. In similar fashion, it is relatively easy to set forth what is wrong with the current system of providing welfare payments, particularly under the Aid to Families of Dependent Children (AFDC) program.² While most observers would agree with the list of short-

1. Sugarman, *Serious Tort Law Reform*, 24 SAN DIEGO L. REV. 795 (1987).

2. See, for example, the cases cited in PRESIDENT'S COMM'N FOR A NAT'L

comings, it is difficult to get a majority to agree on what should replace this welfare program. The proposal to have some form of Negative Income Tax (NIT)³ appeals both to conservatives and liberals. The difficulties appear only as one begins to specify a tax rate break-even point (the point at which no monies would be paid), as well as the maximum amount to be paid any one family. The problems increase as one gets down to specific cases and worries about divorced families, alcoholic parents and other realities of the modern world. And the problems really become intractable as one makes decisions about the existing programs which should be displaced by the new NIT. In principle, the NIT is appealing but the practical difficulties of implementation loom large and must be solved before one can hope to formulate the political consensus necessary to change the system.

When originally proposed by Milton Friedman, the idea was that the NIT would have the virtue of eliminating the transfer payment programs which were thought to have all sorts of perverse incentives.⁴ Literally, that meant doing away with all transfer type programs from unemployment insurance to social security old age pensions.⁵ When McGovern ran for President, the NIT was to be an integral plank in his platform.⁶ When the reality hit that implementing the NIT meant scuttling unemployment insurance and social security, the politic answer was that both the NIT and the older programs should survive. Such a decision knocks out the cost-saving argument for wanting the NIT in the first place. Professor Sugarman makes no such mistake. He has the courage of his conviction.

AGENDA IN THE EIGHTIES, REPORT OF THE PANEL ON GOVERNMENT AND THE ADVANCEMENT OF SOCIAL JUSTICE, HEALTH, WELFARE, EDUCATION AND CIVIL RIGHTS (1980). The Panel cites the case of a widowed mother of several children, one of whom is disabled. "In a typical jurisdiction, she will have to go to at least 4 different offices, fill out at least 5 different forms and answer some 300 separate questions. . . . Fourteen hundred pieces of information may be needed just to determine accurately the level of the woman's income." *Id.* at 73. Yet, although there is no lack of shortcomings to the present system that the Panel can cite, it is less than confident when it comes to setting forth any grand solution.

3. The proposal is set forth in summary form in M. FRIEDMAN, *CAPITALISM AND FREEDOM* 190-95 (1962).

4. Friedman goes on to make some simple calculations to show that the negative income tax at the rates he proposes would be less expensive than the social welfare expenditures that he would scrap. *Id.*

5. *Id.* Even Friedman did not go all the way and propose eliminating *all* transfer programs. In making his calculations, he eliminated the veterans' programs for reasons which are not difficult to rationalize. The problem in the real world is that each person has a different reason for exempting one program or the other.

6. N.Y. Times, July 8, 1972, at 10, col. 1; Aug. 30, 1972, at 1, col. 8.

tions. It is not a matter of taking collateral sources into account when tort recoveries are calculated. Professor Sugarman would abolish some of the collateral source programs, or at least parts of them.

Incremental reforms are possible and take place every day in the welfare system and in the tort system. During the 1970s, every state except West Virginia enacted some change in the area of medical malpractice lawsuits.⁷ In welfare, the Supplementary Security Income (SSI) program⁸ approximates a modified negative income tax, although no one dares to call it such. Massachusetts and New Jersey are also experimenting with some sort of work program,⁹ which also borrows from the NIT concept, though in a partial and disguised form. The advantage of the slow, partial approach is that problems can be solved as they appear. I do admit that the debate on the NIT, which did not culminate in any dramatic national legislation, inspired the desire to do something and even shaped the type of changes which have come about. In that sense, Professor Sugarman's article is thoughtful and, if meant to stir the debate pot, fine. However, if his article is meant to be a blueprint for the future, there are problems.

Scuttling Workers' Compensation

Professor Sugarman's income replacement scheme covers accidental injuries of all types regardless of fault: work, home, road accidents, medical malpractice. Given that income replacement would be forthcoming from the temporary disability insurance, he would simply do away with any medical or other short-term income replacement from workers' compensation.

This seemingly simple change seems motivated by a commonly-held assumption that the workers' compensation system is inefficient and a bit anachronistic. However, Professor Sugarman does not propose to abolish workers' compensation any more than he seeks to do away entirely with the tort system. He proposes to take short-term losses out of the tort system. He would do away with what the workers' compensation system calls temporary total disabilities, but only for the first twenty-six weeks. Persons injured on the job would remain eligible for workers' compensation benefits if they remained disabled or impaired after twenty-six weeks.

7. An illuminating table showing the status of tort reform provisions in each state is contained in INS. INFORMATION INSTITUTE, 1986-87 PROPERTY CASUALTY FACT BOOK 60 (1987). The table shows for each state the varied reform provisions including such items as regulation of attorney fees, provisions codifying the doctrine of *res ipsa loquitur* in medical liability cases by delineating the circumstances in which it may be applied, limiting the amount of liability, changing the collateral source rules, and so on.

8. 42 U.S.C. § 1381-83 (1982).

9. R. SMITH, WORK-RELATED PROGRAMS FOR WELFARE RECIPIENTS 24-29 (Congressional Budget Office 1987).

Is Workers' Compensation Left With An Impossible Job?

Only about 10 percent of all temporary total disability cases in workers' compensation last for more than twenty-six weeks.¹⁰ Outside of the medical only cases, temporary total disability cases are the most frequent cases encountered in the workers' compensation system, but by no means are they the most expensive. That distinction falls to the permanent partial disability cases.¹¹ Approximately 10 to 12 percent of the compensation benefit dollar goes to pay temporary total disability benefits, whereas from one-third to one-half of the benefits are used to pay permanent partial disability cases.¹² The other big category of benefits is medical care costs. In California, for example, 1.6 percent of the benefits dollar went to pay for fatalities, 1.5 percent for permanent total cases, 48.8 percent for permanent partial injuries, 5.3 percent for temporary total and the balance, 42.8 percent, for medical.¹³ Presumably, under Professor Sugarman's proposed reforms, workers' compensation would still be left with all permanent partial injuries, fatalities and permanent total cases, and some unknown proportion of the medical costs.

10. Fratello, *Workmen's Compensation Injury Table and Standard Wage Distribution Table*, in PROCEEDINGS OF THE CASUALTY ACTUARIAL SOCIETY XLII 140, exhibit E-6 (undated). In Fratello's distribution of 1,578,846 days of disability, only 149,669 days of disability last more than 182 days or 26 weeks.

11. The distribution of incurred benefits by injury type for almost all states is reported by the National Council on Compensation Insurance. See NAT'L COUNCIL ON COMPENSATION INS., 1987 ANNUAL STATISTICAL BULLETIN 324-25, exhibit XI (1987).

12. Permanent partial disability cases are, by far, the most expensive of the benefit categories. Various states choose to compensate this type of disability in one of three ways — by actual wage loss, by measuring the degree of impairment, or by estimating the loss in what is called "wage-earning capacity." The laws of most states contain a schedule, a price list, as it were, of the parts of the body. The loss of an arm, finger, or toe is listed, typically, as so many weeks of compensation. California is an exception in that it has no schedule in its statute but uses an extensive and comprehensive schedule to rate all permanent partial disabilities.

Professor Sugarman states that these schedules provide for payments, "for what amounts to pain and suffering." Sugarman, *supra* note 1, at 828. I seriously doubt that the analogy is an apt one. Although none of the original workers' compensation laws contained schedules, they were soon put into them within two or three years after original enactment. The case can be made that these schedules were an administrative attempt to introduce certainty and to estimate in some general way what the wage loss would have been for the average worker. The California schedule, probably borrowed from the Russian schedules of the early 1900s, makes this explicit in that the ratings are adjusted for the worker's occupation and age. See generally, M. BERKOWITZ & J. BURTON, PERMANENT DISABILITY BENEFITS IN WORKERS' COMPENSATION (1987).

13. These data are from NAT'L COUNCIL ON COMPENSATION INS., 1987 ANNUAL STATISTICAL BULLETIN 324-25, exhibit XI (1987). Each jurisdiction in workers' compensation is different and these distributions will differ, but the California experience is not radically different from the others.

Could a system of workers' compensation adapt to these new rules under which its responsibility would not kick in until the worker has been off work for some twenty-six weeks? I doubt that such a system would be viable. A hallmark of workers' compensation is the absolute necessity of distinguishing between work and nonwork injuries.¹⁴ When a worker suffers an accident at work, the employer is obligated to file a form, usually called the "First Report of Accident."¹⁵ Would such a form still be required under the proposed reforms? It is difficult enough to get employers to file such forms promptly under the current system. The employer would take this form less seriously if no action was to be taken determining the liability, the amount of medical care costs, and temporary total benefits unless and until the employee was out of work for at least twenty-six weeks. At the end of twenty-six weeks it would be difficult to make a judgment about whether the accidental injury did or did not "arise out of or in the course of employment." The proposed reforms would be placing an impossible administrative burden on workers' compensation, even as they sought to relieve the program of responsibility for the payment of one type of benefits.

The Workers' Compensation Program — Is It Worth Saving?

The survival of workers' compensation as a separate viable program is not at the top of the agenda of most academic scholars interested in accident issues. Yet, I would urge those who would throw this particular baby out with the bath water to at least pause and recognize the nature and the dimensions of workers' compensation, and something of its rather amazing ability to withstand past attempts to dislodge it from its position as the premier program in the area of work injuries.

The program exists in each state of the Union and in the District of Columbia, with separate jurisdictions covering federal employees and longshore and harbor workers. For the most part, employers are compelled by law to assure their financial responsibility for making the mandated payments. In most states they may self-insure if they

14. This distinction is, at once, the system's prime strength and its prime weakness. The strength of the distinction is what gives the system its justification for being. It provides the rationalization for instant coverage of the worker on the job before that person has demonstrated his or her attachment to the labor force, as in unemployment insurance; it is also the rationale for placing the responsibility for the accident on the employer, regardless of fault.

The obvious weakness is the sheer difficulty of having to draw the line between work and nonwork injuries, especially in cases of occupational illnesses and cumulative trauma cases where it is difficult to fix the time of the "accident."

15. In some jurisdictions, this report becomes either the basis for accident and safety statistics in the state, the first document of what will be a compensation file, or both.

can provide evidence of their financial responsibility. In fourteen states, they may choose to insure in a state fund, while in another seven states they are compelled to insure in the exclusive state fund in the jurisdiction. In most states the employer insures liability with a private insurance carrier who administers the program.¹⁶

The workers' compensation program is huge in terms of benefit programs. Private carriers wrote over \$17 billion in premiums and paid out more than that amount in losses and expenses in 1985.¹⁷ In 1984, the last year for which comprehensive data are available, benefits paid amounted to \$19.5 billion. Of that amount, \$10.6 billion were paid out by carriers, \$5.3 billion by state funds and \$3.6 billion by employers who self-insured.

Most of the benefit dollars, some \$13.2 billion, went for cash benefits while the balance, \$6.3 billion, went for medical and hospital payments. The costs of workers' compensation amounted to 1.66 percent of employer payroll, down from the high point of 1.86 percent in 1980.¹⁸

Perhaps the costs of the program are not of prime importance, but the amounts involved show that this program is not trivial. Indeed, it is an established, some would say entrenched, program that will not be easy to dislodge. If it is legitimate to criticize Professor Sugarman's proposal on the grounds that it is politically infeasible, then removing temporary disability benefits from workers' compensation poses one formidable obstacle.

16. The provisions of the state laws can be found in U.S. DEP'T OF LABOR, EMPLOYMENT STANDARDS ADMIN., OFFICE OF STATE LIAISON AND LEGISLATIVE ANALYSIS, DIV. OF STATE WORKERS' COMPENSATION PROGRAMS, STATE WORKERS' COMPENSATION LAWS (Jan. 1987). This publication is issued approximately every six months. Another source of current information on the provisions of the laws in the several states is CHAMBER OF COMMERCE, WASHINGTON, D.C., ANALYSIS OF WORKERS' COMPENSATION LAWS, which is revised annually.

17. INS. INFORMATION INST., 1986-87 PROPERTY/CASUALTY FACT BOOK 30 (1987). There are many different ways in which to portray the size of the program. The most comprehensive look at overall costs is to be found in the periodic articles in the SOCIAL SECURITY BULLETIN. See, e.g., Price, *Workers' Compensation: Coverage, Benefits, and Costs, 1982*, 47 SOC. SECURITY BULL. 7-13 (1984). See also Price, *Social Security Programs in the United States, 1987, Workers' Compensation*, 50 SOC. SECURITY BULL. 31-39 (1987) [hereinafter Price, *Social Security Programs*]. The latter article includes information about workers' compensation programs in each of the states, the three federal programs and the Federal Coal Mine Health and Safety Act, commonly known as the "Black Lung" program.

18. These totals include payments under the Black Lung program. In 1982, payments under this program amounted to \$16.1 billion according to Price, *Social Security Programs*, *supra* note 17, at 8.

The Survival of Workers' Compensation

Workers' compensation has survived for more than three-quarters of a century. Here is a Progressive Era program which certainly never lived up to its promise of providing a swift, certain remedy in place of the uncertain vagaries of the tort system.¹⁹ In spite of these failed promises, the program has led a charmed life and each time it looked as if the program might be abandoned, it emerged as strong as ever. The history of workers' compensation is at least, in passing, strange when it is considered that the program began in an era when the power of government to intervene and mandate conditions at the work place was most limited. "The notion that the government could go beyond mediation or do more than establish minimum standards, that it could itself supply social welfare services took many years to arise."²⁰ The workers' compensation program successfully weathered the challenge posed by the newer social security legislation. With the advent of federal disability insurance under social security, workers' compensation no longer had the field to itself, and although it ceded some of its responsibilities, it emerged with clear title to the area of industrial injuries.

Perhaps most important, the state programs have responded to challenges by exhibiting a surprising dynamism. After the recommendations of the National Commission on State Workmen's Compensation Laws in 1972, an unprecedented wave of reforms emerged whereby coverage and benefits increased dramatically.²¹ Since that initial wave of reforms, a second wave has dealt with administrative changes and provisions for compulsory rehabilitation. The program has exhibited a surprising resiliency and, in spite of the formidable challenges of product liability suits and occupational disease litigation, it shows no signs of fading away.

One must conclude that the program, in its imperfect way, serves a purpose, as well as satisfies the voting constituencies of the several states. The problems the workers' compensation program deals with — the fixing of amounts to be paid in permanent partial disability

19. For a fuller explanation of the surprising stability of the workers' compensation system, see Berkowitz & Berkowitz, *Challenges to Workers' Compensation: An Historical Analysis*, in *WORKERS' COMPENSATION BENEFITS, ADEQUACY, EQUITY & EFFICIENCY* 158 (J. Worrall & D. Appel ed. 1985); and Berkowitz & Berkowitz, *The Survival of Workers' Compensation*, 58 *SOC. SERVICE REV.* 259 (1984).

20. See Berkowitz & Berkowitz, *Challenges to Workers' Compensation: An Historical Analysis*, *supra* note 19, at 164.

21. These changes in the law were tracked by the United States Department of Labor and published periodically. See, e.g., U.S. DEP'T OF LABOR, *EMPLOYMENT STANDARDS ADMIN., OFFICE OF STATE LIAISON AND LEGISLATIVE ANALYSIS, DIV. OF STATE WORKERS' COMPENSATION PROGRAMS, STATE WORKERS' COMPENSATION LAWS IN EFFECT ON OCTOBER, 1982 COMPARED WITH THE 19 ESSENTIAL RECOMMENDATIONS OF THE NATIONAL COMMISSION ON STATE WORKMEN'S COMPENSATION LAWS* (1982).

cases — are inherently difficult. There is no one absolutely correct way of administering these benefits and the various states have chosen quite different ways to solve these problems. Despite the program's lack of uniformity across states, its survival would argue that it meets the needs of those most affected by it.

I recognize the logic of Professor Sugarman's position and the inherently satisfying use of the existing Temporary Disability Insurance (TDI) and employer-provided benefit schemes to cover short-term losses without involving the expensive and cumbersome tort system. But there are difficulties on the edges and at the corners, as it were, where particular persons are not covered. If Professor Sugarman's logic means emasculating the current workers' compensation system, it is doubtful if his scheme is doable, and equally doubtful if it is desirable.

THE INDICTMENT

At the outset, let me say that I have no reason to believe that Professor Sugarman's indictment of the tort system is misleading or mistaken. The questions I raise are different. I ask, how does he know? Where is his evidence? I would also raise the issue of whether things are getting better or worse. What are the trends in the field? Have matters now reached such a state that we are justified in asking society to overturn established programs, to compel all employers to provide insurance coverage they have not voluntarily chosen to offer, and possibly to create a whole new set of inequities to substitute for the old?

Professor Sugarman argues that the current tort system ought to be judged on a utilitarian basis, "by comparing [its] costs with [its] benefits."²² This is a test with which I, an economist, feel most comfortable. What I would expect, then, is for the author to begin to tackle the tough issues of calculating the costs and the benefits, reducing these to some common metric so that they can be compared. Except for some comment in his footnotes, Professor Sugarman does not provide sufficient explanation and detail, particularly in a situation such as this one, in which the benefit-cost calculus is so crucial to the control of the article. Instead, he presents a series of value judgments relating to the *wasteful and unnecessary* tests that physicians are compelled to perform, and the *excessive* defensive litigation strategies to defeat claims that are *well justified* under current rules.

22. Sugarman, *supra* note 1 at 795.

These are normative judgments resting on no evidence whatsoever. But even if these judgments are obvious and well recognized facts, if they are to be placed into a cost-benefit calculus, it is necessary to go further and try to estimate their effects, especially since we are told that the system is *intolerably expensive* and that we are not getting our money's worth.

Putting costs and benefits aside, the indictment runs along the lines that the tort system is a lottery in which the participants are hardly voluntary players, that too small a portion of the insurance premium dollar finds its way into the pockets of the victims, that too much of the funds received duplicate benefits received from other sources, that some persons are ignorant about the source of the damage to them, while others have no plausible defendant to sue.

The latter point is interesting in its implication that someone should be responsible for all injuries. Single car accidents, falls from one's roof while cleaning the gutters, home and recreational accidents are cited as examples where the injuries are essentially self-inflicted, "[y]et, these victims, like other victims, need compensation."²³ It is not only that they need compensation, but the amounts to be received evidently should be the same as if someone were at fault or if the accident arose out of and in the course of employment. Professor Sugarman, in his understandable zeal to provide basic protection for income loss and medical costs for those who suffer any and all sicknesses and accidents, regardless of cause (everyone should have the basic protection afforded a University of California law professor), is forced to discount heavily any safety or deterrence objectives which the tort law may have.

He discards proposals which cut back victims' rights on the grounds that they do nothing for uncompensated persons and also on the grounds of practicality. "Combining the political power of the plaintiff's bar and . . . arguments about the one-sidedness of the proposed changes means that perhaps only a few states will make substantial reforms."²⁴ It seems to me that Professor Sugarman realistically appraises the political difficulties in making fundamental reforms, but ignores the same practical difficulties in the reforms he eventually proposes, especially as they involve changing the workers' compensation program, extending the TDI program and mandating employer sick leave and health insurance.²⁵ These are hardly trivial

23. *Id.* at 800.

24. *Id.* at 802-03.

25. I do not discuss the complicated issue of requiring all employers to provide health insurance for employees simply because it is such a complicated issue. Certainly, it is not the kind of issue which can be treated as simply as Professor Sugarman does. At the moment, the issue is receiving increased attention because of its implications for cost shifting. The insurance industry does not quite know how to react to legislative proposals to mandate such coverage. They would be delighted to have the business but recognize

changes.

Political Adjustment Mechanisms and Allocation Decisions

Quite apart from these practical difficulties, Professor Sugarman minimizes the incremental reforms which have been made in the tort system by the legislatures responding to problems as they arise. If physicians cannot buy malpractice insurance at prices they believe to be within reason, something happens. Impossible situations do have a way of resolving themselves. Legislatures have been active in the area of making changes in the tort system and, it is hoped, some of them may even do some good and help improve matters.²⁶ If certain activities no longer can take place because of prohibitive insurance rates, that may not be altogether bad. One of the fundamental purposes of allocating costs to activities which produce these extra costs is to alert society to the true amount of resources used in producing the activity so that rational decisions can be made about the amounts to be produced.

It is this internalizing of externalities which the tort system is called upon to perform. Professor Sugarman downplays, even denigrates, the role of the system in the area of safety and deterrence. Postponing that discussion for the moment, the related but separate issue would remain important if tort recoveries had no deterrent value. If a byproduct of the logging industry is a certain number of accidents, then the cost of these accidents should enter into the price of lumber. Rational allocation decisions should incorporate this information in and deciding whether to build with wood or steel. Pooling such costs over all employers blunts the pricing mechanism so as to make it almost useless for allocation purposes.

Safety and Deterrence

In order to sustain his proposals for reform, Sugarman must take the position that the present tort system is almost useless when it comes to encouraging safe behavior and deterring activities which cause harm. I would not take such a position. I wish that I could

that once coverage becomes mandated, issues of control and regulation cannot be far behind. For some of the complexities surrounding the general issue, see Wilensky, *Variable Strategies for Dealing With the Uninsured*, HEALTH AFFAIRS 33-46 (Spring 1987).

26. As Worrall notes in another context, "The political market is the mechanism through which groups attempt to shift the cost burden of disability." Worrall, *Nominal Costs, Nominal Prices, and Nominal Profits*, in ISSUES IN WORKERS' COMPENSATION (J. Chelius ed. 1986).

present incontrovertible evidence of the deterrent power of retaining workers' compensation and the tort system, but I cannot. But my review of the evidence on these matters convinces me that the system does some good and it is my value judgment that the benefits outweigh the costs.

These are old issues and arguments. In reforming their accident compensation systems, both New Zealand and Great Britain decided against a system which would retain the sophisticated insurance pricing system whereby premiums are adjusted to employer experience with accidents. In New Zealand, there is at least some evidence that the introduction of the new scheme resulted in a substantial increase in reported accidents.²⁷ In England, the Pearson Commission, considering the matter of adjusting levies to the accident experience of employers, noted that a majority of the members were attracted to the idea as a theory, but thought it would have only a limited effect on accident prevention. It concluded, with one dissent, that the industrial injury scheme be financed through the existing system of National Insurance contributions and supplements from general revenues.

The lone dissent was from Professor Prest and he expressed his feelings in terms of apt analogy:

As a general principle, it must make sense to relate the charges necessary to finance injury compensation to the risk potential of different activities. No one would dream of arguing that the price per pound of very decayed cod should be the same as that of very fresh salmon; or at least no one who argued for such an arrangement would volunteer to clear up the consequences.²⁸

Prest pointed out that the consequences of not relating charges to the probabilities of generating industrial accidents amounted to cross-subsidization between safer and riskier industries, resulting in the lack of incentives to install safety devices and the like. He notes that Beveridge in his famous report on social insurance endorsed the same general principle.²⁹

England has always differed from the United States in allowing tort recoveries for work injuries where negligence can be shown, even as it administered a separate social insurance system for work injuries. Interestingly enough, the Pearson Commission recommended retention of the tort system. They noted the controversy surrounding

27. See M. BERKOWITZ, *THE ECONOMICS OF WORK ACCIDENTS IN NEW ZEALAND* (1979). Since the publication of this study, New Zealand has moved to a type of differential levy on employers by awarding merit rebates on the premiums paid.

28. I REPORT OF THE ROYAL COMMISSION ON CIVIL LIABILITY AND COMPENSATION FOR PERSONAL INJURY ¶ 200 (1975) (Lord Pearson, Chairman) [hereinafter REPORT OF THE ROYAL COMMISSION].

29. *Id.*; see SIR WILLIAM BEVERIDGE, *SOCIAL INSURANCE AND ALLIED SERVICES* ¶ 89 (1942).

the issue of the effects of tort recoveries on accident prevention and safety.³⁰ The Pearson Commission noted that there was an opposite point of view:

Some of our witnesses felt strongly that retention of the tort system, far from being a hindrance to safety at work, was necessary to maintain standards of accident prevention. They pointed to stringent surveys by insurance companies, and the effect on employers of the risk that unsafe practices would be exposed in court.³¹

MIXING AND MATCHING THE SYSTEMS

The number of combinations and permutations is interesting. It is possible to have only the tort system, as we did in the field of work injuries prior to 1911, and as we still do in other areas; to have only workers' compensation, as we do for work injuries; to have both, as England did for a period, and possibly still does if the current system for compensating work injuries can be considered a workers' compensation system. It is also possible to have neither, or a little of both, as Professor Sugarman proposes. I am arguing that his proposal blunts the safety incentives in both systems, although I recognize that he can argue that he is retaining the best of both worlds.

There is some evidence that there are differences in the safety incentives in the tort system and in workers' compensation. Professor Sugarman essentially agrees with the early twentieth century critics of the tort system as it applied in the industrial environment.³² They saw it as a system where a low percentage of workers were able to collect damages, but those who did collect typically received larger awards than the benefits available with relative certainty under workers' compensation. The switch from court judgments to workers' compensation was essentially a switch from a low probability-high compensation system to a high probability-low compensation system.

Ashford and Johnson compared the expected values (probability times amount of compensation) of both systems.³³ This "expected value" is a measure of the injury costs assigned to the employer (one minus the expected value is the cost assignment to the employee).

30. REPORT OF THE ROYAL COMMISSION, *supra* note 28, ¶ 200; *see* LORD ROBENS, SAFETY AND HEALTH AT WORK (1972). The Robens committee had also expressed concern over the effects of such litigation on safety.

31. REPORT OF THE ROYAL COMMISSION, *supra* note 28, ¶ 193.

32. *See* Sugarman, *supra* note 1.

33. Ashford & Johnson, *Negligence vs. No-Fault Liability: A Theoretical and Empirical Analysis of the Workers' Compensation Example*, 12 SETON HALL L. J. 725 (1982).

Ashford and Johnson's calculations indicate that it is very likely that the expected value of injury costs assigned to the employer was higher under the negligence system than under workers' compensation. This finding, when integrated with the finding that the introduction of a workers' compensation system was associated with a higher level of safety, indicated that the employer's relative certainty of being assigned injury costs was more critical than the magnitude of the expected value of these costs. In other words, imposing the injury costs on employers in a reasonably certain manner appears to have been a key factor in raising the level of occupational safety.³⁴

Admittedly, there are many different possible approaches to providing incentives to producing the optimal amount of health and safety in addition to the negligence system or workers' compensation. The market system, with its compensating differentials, creates some incentives. In a perfectly competitive market, workers will be paid a compensating wage differential equal to the expected value of the risk borne by the marginal worker. Economists grow weary attempting to find the existence and size of such differentials and their relation to programs such as workers' compensation.³⁵

Smith has proposed an injury tax under which, in effect, employers would be penalized financially according to the number and type of injury.³⁶ It is also possible to rely on some inspection/penalty approach such as is embodied in the Occupational Safety and Health Act, or simply to depend on the collective bargaining approach in unionized firms.³⁷ These are all arrows in the same quiver. I would argue that any and all of them are necessary. They play an important role in inducing safety and health by the workers' compensation system which is in place and functioning, and by the tort system where that is allowed its sway. To make changes in these systems, which would interfere with their prevention and their allocation functions, seems to me to be moving in the wrong direction. Somewhat the same arguments might be made about rehabilitation, but I confine my arguments only to the prevention and allocation aspects of the problem.

34. A fuller discussion of these matters is to be found in J. BURTON & M. BERKOWITZ, *THE ROLE OF THE WORKERS' COMPENSATION PROGRAM IN PROMOTING OCCUPATIONAL SAFETY AND HEALTH* (1982).

35. There is extensive literature in this area which finds these differentials more readily where there is an elevated risk of death rather than injury. See, e.g., Smith, *Compensating Wage Differentials and Public Policy: A Review*, 32 *INDUS. & LAB. REL. REV.* 339 (1979). See also Dorsey, *Employment Hazards and Fringe Benefits: Further Tests for Compensating Differentials*, in *SAFETY AND THE WORK FORCE* 87 (J. Worrall ed. 1983). An excellent brief summary of the literature is found in Worrall's introductory chapter in the same volume.

36. R. SMITH, *THE OCCUPATIONAL SAFETY AND HEALTH ACT 73-85* (1976).

37. A good evaluation of some of the collective bargaining approaches can be found in T. KOCHAN, *COLLECTIVE BARGAINING AND INDUSTRIAL RELATIONS* (1980).

CONCLUSION

To accept the present tort system as it is may be as foolish as wanting to pull it up by its roots. I would not for one moment deny some of the particulars of the bill of indictment that Professor Sugarman draws, but I am a bit wary of his reliance on anecdotal evidence. The drive toward workers' compensation in the early part of the century was fueled by horror stories of the increase in the number of industrial accidents and the poor chances workers had to recover at law. Yet more recent evidence indicates that the workers' chances were improving and judgments were becoming more generous. At the beginning of the twentieth century, in contrast to an earlier period, juries were showing a marked sympathy towards injured employees and were increasingly willing to find employers responsible.³⁸ In similar fashion, there are changes afoot in the tort area in each of the states. It might be wise to let the current wave of tort reform play itself out before more radical changes are instituted.

Professor Sugarman poses the correct test for changes. He talks of the costs and the benefits; and he argues that the benefits of his proposals far outweigh the costs, although it is not always clear whether he has in mind the costs he associates with the current system, or the costs involved in making the change to the new system. Although I criticize his lack of quantitative evidence as to the costs and benefits, I understand the difficulties. The problem is difficult to conceptualize and model, and the data are most sparse.

I believe that the problems of tort reform and the problems of welfare reform have a good deal in common. In each area, wonderful plans can be drawn, but implementation becomes difficult if not impossible. The seemingly unimportant details, be they small employers, changing family structures, or programs already in place, prevent their execution. But even if these matters could be solved — if all details were ironed out and political paths were smoothed — we are left with the prevention, deterrence and allocation issues.

I would agree that if workers' compensation and tort recoveries have no deterrence or allocation functions to perform, they might as well be discarded. They could be absorbed in one program or the other with some expansion of first party coverage. But I believe that would be moving in the wrong direction. More, not fewer, built-in incentives are needed to move toward safe and healthful conduct on the part of those who provide jobs and services. Professor

38. Posner, *A Theory of Negligence*, 19 J. LEGAL STUD. 44-52 (1972).

Sugarman's article is an incisive examination of the problem which forces us to examine each of the issues, but, in the end, it points us in the wrong direction.