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Chairs, Stairs, and Automobiles: The Cultural Construction of Injuries and the Failed Promise of Law

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CHAPTER FIVE

CHAIRS, STAIRS, AND AUTOMOBILES

The Cultural Construction of Injuries and the Failed Promise of Law

David M. Engel

INTRODUCTION

Tens of millions of Americans experience physical injuries each year. Approximately one in eight Americans requires medical treatment after being seriously injured, and nearly 130,000 suffer injury-related fatalities (National Safety Council 2014: 2). These figures, although alarming, are almost certainly underestimates. As we shall see, injuries are difficult to define and a great many of them go uncounted. It cannot be doubted, however, that the risks and costs associated with injuries pose a serious social problem. In fact, it would be more accurate to say that the problem of injuries in society is actually a cluster of interconnected problems, among them the following: How should injuries be prevented and the risk of injury in society reduced? How should injurers be deterred from exposing society to unnecessary risk of harm? How should injurers be held accountable or even punished when they inflict harm on others? How should injury victims be compensated? How should they be rehabilitated and reintegrated into society after they recover from the harm they have suffered? How should the public be made aware of injury risks in order to guard against them?

Every society in the world faces these questions and provides its own set of answers, which usually include some combination of government regulation, private or public insurance, informal social or market-based sanctions, tort law, and criminal law. Because of differences in culture, history, and legal traditions, different societies bundle these approaches in different ways. Some place greater emphasis on

government regulation and social welfare, while others rely more on market solutions and private insurance. America is distinctive in its frequently stated preference for market-based approaches and – paradoxically – its robust tort law jurisprudence. In fact, American tort scholars sometimes convey the impression that tort law in itself has the capacity to address our injury problem by providing the necessary deterrence, compensation, moral accountability, punishment, and loss distribution. It is ironic that this grandiose vision of tort law coexists with a uniquely American suspicion of intervention by “big government” in so-called private disputes and transactions.

But does American tort law actually function as a one-stop solution for the multiple problems of injury? Does it really resolve society’s need for safety, for control and punishment of misconduct, and for the need to compensate and rehabilitate injury victims? Setting aside the speculations of tort law theorists about what the law should do, if we want to learn what it actually does it is instructive to consider a rapidly growing research literature about the behavior of individuals who suffer injury. Surprisingly, the answer is that they very seldom invoke tort law or benefit from its indirect or “shadow” effects. Although conventional wisdom would have us believe that Americans are extraordinarily litigious and that most injury victims rush – or hobble – to a lawyer’s office in order to file a lawsuit as quickly as possible, it turns out that injured Americans rarely do so. After suffering an injury, even a serious one, the vast majority of Americans don’t sue, don’t consult a lawyer, and don’t make any claim against another party. Sociolegal researchers use the term “lumping” to describe this kind of inaction; and by lumping they mean that the injured party contends with the costs and consequences of the injury without any significant attempt to hold the injurer responsible.

Researchers have found that roughly nine out of ten injury victims in America engage in lumping, not claiming.¹ Only 3–4 percent hire a lawyer; and only 2–3 percent end up suing, even when their injuries are likely to have been caused by negligence (Hensler et al. 1991, Saks 1992, Baker 2005, Engel 2016). Although cross-cultural comparisons are notoriously problematic, the best evidence suggests that injured Americans are no more litigious than their counterparts in

¹ In this chapter, I define “claiming” as an effort to obtain compensation from the injurer or her insurance company and not from a third party, such as a victim’s compensation fund, government benefits, the workers’ compensation system, or one’s own health and medical insurance.

other countries, despite our unusually robust tort law “on the books.”² In short, there is little evidence to support the widely shared view that Americans are notable for their litigiousness. The absence of legal claims is indeed the most distinctive aspect of American legal culture.

There is something mysterious about this massive tendency to lump our injuries. The overwhelming preference for lumping has never been fully explained or theorized. Why do so few injury victims assert claims, and where do all the other injury cases go? In this chapter, I suggest that the explanation for the predominance of lumping in American injury cases lies in the social construction of injury itself and in the cultural norms and concepts that shape the identities and actions of injurers, injury victims, and their social and physical surroundings. I will describe six ways in which the cultural construction of injury operates to suppress claiming and encourage lumping:

1. *Pain perception*. The experience of pain – and whether it is thought to exist at all – varies across social and cultural settings.
2. *Beneficial pain*. Painful experiences can be interpreted as eufunctional, not harmful. When that is the case, such experiences, even if unbearably agonizing or traumatic, are not considered injuries, and lumping naturally follows.
3. *Natural injuries*. Even if a painful experience is deemed an injury, it may be viewed as the inevitable result of interacting with features of the physical or social environment that are natural, and not the product of human choice or wrongdoing.

² Research on injury victims in England and Wales has revealed a claiming rate of 10.5 percent, which is roughly equivalent to the rate cited by studies in the United States (Genn 1999). Surprisingly, Japanese people tend to have much higher claiming rates than Americans in injury cases, yet their lawyer consultation rates are a little less than ours and their litigation rates are substantially lower (Murayama 2007). All of these differences are difficult to interpret because of definitional variations among researchers. Other cross-national studies proceed from a different baseline – the existence of a grievance rather than the experience of an injury – so the calculation of claiming and litigation rates is skewed. Nonetheless, such studies tend to portray Americans’ responses as not strikingly more adversarial than those of citizens elsewhere. For example, Americans’ claiming rate and litigation rate per tort grievance are roughly the same as those of Australians (FitzGerald 1983). Our claiming rate per injury grievance is higher than that of Canadians, but our lawyer consultation rate is lower than theirs, and our litigation rate for civil cases in general appears to be approximately the same (Kritzer et al. 1991).

4. *Invisible choices.* Although it is sometimes apparent that an injury was caused by conscious choice – the deliberate weighing of risks and benefits by injurers – the decision-making process may be hidden from view and the victims may not understand how and why they have been exposed to harm. The resulting injuries in such cases take on a false appearance of unavoidability – and they are most likely to be lumped.
5. *Self-blame.* Those who suffer illness or injury very often blame themselves, a widespread tendency that is reinforced by society's propensity to blame the victim. Self-blame and blaming the victim tend to reduce the likelihood of claiming.
6. *The cultural environment.* Cultural norms generally extol personal responsibility and condemn the pursuit of compensation. Such norms tend to shape the interpretations and choices of those who suffer harm. They also influence the views of family members, friends, and colleagues, who reinforce the decision to avoid claiming.

PAINFULNESS IS NOT A GIVEN

Although one might think that pain is one of the few universal constants, and only its interpretation varies across cultures, that is not entirely true. Wounds or fractures that are extremely painful to an office worker or a classroom teacher may seem less intense to a professional athlete, for whom they are a normal and expected hazard of everyday activities (Howe 2001). Hockey or football players often deny that they are in pain – to themselves as well as to others. Farmers who suffer injuries that a white collar worker would consider excruciating may simply consider them part of their daily life and not necessarily debilitating (Engel 1984). A study of servicemen during the Second World War found that they required lower levels of pain medication when they were wounded if they associated their pain with an honorable discharge (Jackson 2011: 52, citing research by Beecher 1946). There is good reason to view pain as a cultural construct that may vary from one social context or historical era to another (Gergen 2009: 126).

To the extent that an individual does not experience an event as painful – even though others might – the likelihood of an injury claim is greatly reduced. This simple fact helps to explain lumping in at least some cases of what would generally be considered injuries.

PAIN MAY BE BENEFICIAL NOT HARMFUL

Not all painful events are injuries. Pain can be interpreted in different ways, and sometimes it actually appears to confer a benefit – even when the results leave lasting marks on the body. A classic example is foot binding in China, a pre-revolutionary practice that was excruciatingly painful and made it difficult to walk without the assistance of servants (Levy 1966, Blake 1994). Chang (2003: 4) describes her grandmother's painful experience during a period when foot binding was a common practice among upper class Chinese women:

Her mother [i.e., Chang's great-grandmother], who herself had bound feet, first wound a piece of white cloth about twenty feet long round her feet, bending all the toes except the big toe inward and under the sole. Then she placed a large stone on top to crush the arch. My grandmother screamed in agony and begged her to stop. Her mother had to stick a cloth into her mouth to gag her. My grandmother passed out repeatedly from the pain.

Without question, Chang's grandmother suffered pain. Yet it is unlikely that any of the participants would have characterized foot binding as the infliction of an injury. Rather, it was an enhancement of the girl's beauty and a symbolic token of nobility. When pain is accepted as beneficial, it does not become the basis for an injury claim.

A modern example is male circumcision. The American medical establishment endorsed male circumcision for more than a century, starting in the late 1800s, based on the view that it prevented disease and deformity (Waldeck 2003). And, of course, the Jewish and Islamic traditions have for centuries portrayed circumcision as conferring an important religious benefit. But today some critics consider male circumcision a form of child abuse and even a human rights violation. The procedure is so painful for adults that it requires general anesthesia, yet it is typically performed on infants without this precaution, despite the fact that, according to scientists, infants are fully capable of sensing pain (*ibid.*: 477).

It cannot be doubted that circumcision causes male babies to feel pain, but, as was the case with foot binding in China, defenders of the practice argue that the pain actually confers a benefit. In the words of one model:

There is a misconception that pain is a bad thing to be avoided at all cost. Pain is part of life as a human being. We could not survive without

pain ... We could not grow and learn as individuals without pain. You cannot give your child a life without pain. The consequence of doing that would be disastrous (Davis 2001: 527, quoting Berlin 1989).

In the year 2005, more than 1.2 million circumcisions were performed on 56 percent of newborn male babies in the United States (the number fluctuates with changes in the position of the American Academy of Pediatrics). For the most part, these children are not seen as injury victims, but as the recipients of a religious or medical benefit. This perspective may change, as did the view of foot binding in China. More people may come around to the critics' view that this particular experience is not only painful but also injurious. If that should occur, then what was once viewed as a health precaution or a religious rite would come to be viewed instead as an injury.

So long as beneficial pain is not perceived as injurious, lumping is such an obvious response that few would even consider the individual to have foregone the opportunity to lodge a claim. Claiming in response to beneficial pain appears absurd, unthinkable. It is only when societal perceptions change and the beneficial character of the painful practice is questioned that it can become evident – to some, at least – that an injury has occurred. Only at that juncture does the possibility of a claim arise, though the likelihood may remain very small. Before that moment, however, when the pain is not seen as harmful, lumping is the only imaginable response.

NATURAL INJURIES

Even when individuals feel they have been injured, their suffering may seem natural and not the basis for lodging a claim. The naturalization of injuries occurs in at least two different ways. First, damage to the body may be explained as a normal consequence of the life cycle rather than a harm that could be avoided by taking precautions. Chairs are a case in point. Consider the case of an imaginary middle-aged office worker who suffers from back pain or spinal deformity. This individual cannot recall any traumatic incident that caused these symptoms, just the development of physical discomfort and disability over a period of years. Her condition seems a normal part of the aging process to her and to her coworkers, who may experience similar symptoms. They do not consider it an injury and surely not a reason to seek a remedy from anyone else. Lumping would nearly always be the expected response.

It may be surprising, then, to learn that these very ailments can be caused by a familiar feature of our physical environment – the chair. The presence of chairs in our lives does not appear to be the result of human choices among competing options or a preference for risky technologies over safer ones. They are simply what most of us do with our bodies when we are not moving around or lying down. They seem almost like natural objects, the equivalent of rocks and trees in our homes, work places, and public areas.

Yet a growing body of research now suggests that chairs not only cause back pain and spinal deformity but also diabetes and cardiovascular disease (Cranz 1998, Buckley et al. 2013). Those who study “sedentary science” contend that there is nothing natural about chairs or the harms they cause. In some cultures, people do not use chairs at all; they simply squat, stand, or sit on the ground or floor – and in those cultures, people have healthier spines. If more office workers used stand-up desks rather than conventional desks and chairs, or even if they took frequent breaks from their sitting positions, they would enjoy better health, live longer, and suffer fewer musculoskeletal problems (Buckley et al. 2013).

Might chair-related injuries be the basis for claims against others? It is certainly possible to interpret the absence of claims as a form of lumping. Even though it is difficult to imagine America as a totally chairless society, variations in chair design can cause more or fewer physical symptoms. If the most advanced ergonomic practices were adopted, we could significantly reduce the number of injuries and illnesses associated with chairs (Cranz 1998: 101–2). The ideal chair would have lower seats, front rails that curve downward, seat depths and widths of only seventeen inches, less padding, and a space between the seat and the back of the chair. Adopting these changes in the design of most chairs, Cranz argues, would yield “an enormous benefit for public health” (ibid.: 105).

From this perspective, then, the ailments of our hypothetical office worker are actually injuries caused by manufacturers and designers who failed to take proper precautions. The problem, however, is that people who suffer the consequences of improper chair design seldom conceptualize their physical problems as avoidable injuries that have been inflicted on them by others. Indeed, the vast majority do not perceive that they have been injured at all. Lumping occurs as a matter of course, not as a conscious decision by the victim. Litigation in such circumstances is unthinkable. The perception of chair-related illnesses

and injuries as “natural” is likely to persist as long as chair sitting for extended periods of time remains culturally normative. Scientists like James Levine (2014) are currently campaigning for a change in our perceptions about sitting, standing, working, and exercising, and in the United Kingdom a movement called “Get Britain Standing” has been launched (www.getbritainstanding.org). If such efforts succeed, a cognitive shift may occur and an enormous number of health problems in our society may come to be viewed as injuries that could result in legal claims. Until that shift takes place, however, lumping will remain the only conceivable response.

A second reason for the naturalization of injuries is that they result from risks that are viewed as a normal part of life, such as the risk of falling down the stairs. Stair injuries are different from chair injuries, where, as we have seen, the victim does not even associate her physical condition with exposure to a risky object. People who fall while ascending or descending the stairs know they have been injured, and they certainly associate their accident with the stairs they were using. What they may not know, however, is that falling on stairs need not be viewed as normal. Unnecessarily dangerous design rather than their own clumsiness or inattention may very well have caused their mishap.

Between one and two million Americans are injured on stairs each year, and thousands are killed, many of them older people (Pauls 1991: 128, Cohen 2000). The cost to the public is more than \$10 billion dollars annually (Cohen 2000). But stairs are a ubiquitous part of our physical environment, and the risks associated with them are usually seen as unavoidable. To the extent that anyone is blamed for injuries on stairs, the problem is typically attributed to the inattentiveness or physical shortcomings of the victim.

In fact, however, ergonomics engineers have demonstrated that such injuries can be significantly reduced by better stair design: broader treads, shorter risers, and the elimination of variability in stair dimensions within a given staircase. That is, some researchers now maintain that stair injuries are not a “natural” or inevitable result of humans’ interaction with their physical environment, but are caused by faulty design (Cohen et al. 2009). Viewed from this emerging perspective, many of these injuries could be considered actionable harms. They could give rise to claims rather than simply being lumped by the victim.

But people who fall on stairs seldom view their mishaps as potential claims. They interpret their injuries according to a normalized view of their physical surroundings. Stairs are simply there, and it is normal

for some people to fall when they use them. Stairs do not hurt people; people on stairs hurt themselves. As long as few of us know about the unnecessary risks posed by certain stair designs, lodging a claim is unlikely to cross the minds of most injury victims, and we would expect lumping to occur in nearly every case.

In sum, the naturalization of injury results in the lumping of enormous numbers of potential claims each year. Naturalization occurs either because certain harms are considered a part of the body's inevitable decline and degeneration or because they are viewed as the result of normal interactions with our physical environment. In both circumstances, a shift in perception could result in a radical change in public understanding. What are currently viewed as natural injuries could come to be viewed as avoidable harms caused by blameworthy decisions to expose us to unnecessary risks. Until such a shift occurs, however, we may assume that nearly all "naturalized" injuries will result in lumping rather than claiming.

INVISIBLE CHOICES

Even when harms are created by conscious decisions – the deliberate weighing of risks and benefits by injurers – these deeply embedded and often profit-motivated choices may not be fully understood or even apparent to the victims or to society in general. This is an additional reason that injuries caused by unnecessarily risky design choices come to be naturalized and result in lumping. Unreasonable or self-serving processes of risk allocation may simply be invisible to those who are harmed as a result. Injury victims end up lumping because they view their injuries as inherent in the product or activity and not as the consequence of faulty risk-benefit analysis or other undesirable design choices.

Sarah Lochlann Jain has provided an excellent account of these invisible choices in the field of product liability. In her book, she describes the social distribution of injury that is encoded in product design: "Design decisions ineluctably code danger and injury at the outset of the production process ... [and] raise the question of how human wounding counts, who 'owns' health, and how it is to count as a social good" (Jain 2006: 56).

Automobiles provide many illustrations of the "ineluctable" coding of danger and injury. One classic example is air bags, which automobile manufacturers resisted providing long after it was known that they

would prevent many injuries and fatalities. Over time, the manufacturers' cost-benefit justification for withholding this safety feature became more and more visible, until the point was reached when a societal consensus characterized cars without air bags as "defective." The shift in perception from nondefective to defective occurred not because of a major technological advancement, but because the public came to understand that it was no longer "natural" for drivers and passengers to be thrown against the steering wheel, dashboard, or windshield in an accident. Manufacturers' decisions to introduce automobile safety features often lag behind what is technologically possible and reveal a more fundamental set of assumptions about how much injury it is appropriate (or efficient) for them to impose on society.

A more recent example of a shift in the coding of danger and injury involves rear view cameras on automobiles. According to recent estimates by federal regulators, 267 deaths and approximately 15,000 injuries are caused each year by vehicles backing up. The victims are mostly young children, in contrast to stair injuries, where the victims are mostly elderly (Office of Regulatory Analysis and Evaluation, National Center for Statistics and Analysis, National Highway Traffic Safety Administration 2014). One study found that 80 percent of individuals struck in driveways by cars backing up were younger than five years old and the victims' average age was only two years (Hurwitz et al. 2010).

Surely all would agree that these tragic incidents should be counted as injuries, but are they "actionable" injuries that could plausibly become claims? Not if it is assumed that cars are a ubiquitous part of our physical environment and they "naturally" come with a blind spot, making risk to small children unavoidable. According to this line of thinking, injuries from backing up, though regrettable, are a normal concomitant of the automobile combined with inattentive caretakers. Responsible parents keep their kids away from driveways where they might be injured in this way; and good kids listen to their parents. The absence of claims does not seem to be the product of lumping. It is just common sense.

It does not appear that a major technological breakthrough was required to install rear view cameras in cars. Their absence simply reflected a set of assumptions about who should be responsible for such risks, and whose costs and whose benefits should be given the most weight. These choices about risk were, however, invisible to most of us until the issue began to receive publicity and eventually the attention of Congress. A consensus now appears to be growing that a vehicle

without a rear view camera is defective – that this type of injury should not be encoded in the vehicle design, to use Jain’s terminology, and there should be a change in the allocation of risk and responsibility among auto manufacturers, drivers, and children. Not surprisingly, a new regulation has now been promulgated making rear view cameras mandatory in all new cars and light trucks starting in May 2018.

When shifts of this kind take place over time, injuries are increasingly perceived as “actionable” that were previously seen as unfortunate yet natural features of our automotive age. Unless and until such a perceptual shift occurs, however, these injuries and others like them are almost certain to be lumped. Claiming seems both absurd and inappropriate, an attempt to cash in on a child’s misfortune and to shirk one’s personal responsibility. As Jain points out, virtually every product might, if closely examined, reveal the silent encoding of risk that it contains. When injuries result from these invisible choices, lumping rather than claiming is all but assured, except in extremely rare circumstances.

SELF-BLAME

Astonishingly, a great many injury victims blame themselves for their suffering, even when it seems obvious that their accident resulted from another person’s wrongdoing. And, to some extent, society supports this perverse tendency to blame the victim. In theory, self-blame should not foreclose the possibility of claiming, but in practice it is a powerful factor leading countless injury victims to lump their harm.

Contemporary tort law allows injury victims to recover compensation if their harm results *both* from the wrongful act of another *and* from their own contributory negligence. Under modern “comparative fault” regimes, when both the injurer and the victim breach a duty of care, the injured person can receive a damage award reduced by the proportion of the harm attributable to her own carelessness. She is not precluded from recovery altogether. When it comes to injuries in real life, however, neither injury victims nor the general public seem to accept the legal principle of comparative fault. Many victims and third-party observers simply assume that, when the victim has done something wrong, she has completely absolved the injurer of any responsibility.

Even in our supposedly litigious society, self-blame is a common reaction to injury. Jean Jackson notes that one of the most deep-seated associations with pain and suffering is the idea that the injured person

must have somehow deserved his or her fate: "The Latin root for 'pain,' after all, means punishment. In a just and orderly world, our reasoning goes, innocent people would not be suffering like this, so something must be *wrong*" (Jackson 2011: 378). The association of pain with punishment tends to be shared by the victim as well as the society that witnesses her suffering.

Although it may seem irrational and counter-productive for victims to view their injury as a form of punishment, this tendency has been widely documented. Considerable evidence points to the prevalence of victim-blaming – the assumption that victims should have taken greater care, that they somehow deserve the harm that befell them, and that the injury itself was fated to happen or may even have been a form of cosmic retribution. The religious roots of such assumptions are unmistakable (Wright 1983: 64, Schulz and Decker 1985: 1166, Bendelow and Williams 1995: 92, Cook 2004: 462).

The psychology of self-blame is far more powerful than the rule of law, which would allow some compensation for the injury victim who did indeed do something wrong. The perception that injury victims are responsible for their own suffering expands beyond reason to preclude any possibility that the injurer should be called to account. Self-blame explains a great deal of the lumping that occurs in our society.

LIVING IN A CULTURE THAT DISAPPROVES CLAIMING

Cultural norms are more likely to be influenced by "haves" than "have-nots" (Galanter 1974). This simple fact helps to explain why injury victims formulate their responses in a cultural environment hostile to the very idea of asserting rights against injurers. Personal injury claims, unlike most legal actions, are usually brought by have-nots against haves. Less wealthy and legally inexperienced individuals are the ones most likely to suffer injuries and, if they do choose to sue, they are most likely to litigate against "deep pocket" defendants. It shouldn't be surprising that persons and corporations with greater wealth and social status would adopt anti-claiming perspectives, since they are the most likely targets of tort claims. Nor is it surprising, given their greater social clout, that their anti-claiming perspectives have become highly influential. What they consider an appropriate response to injury pervades much of American society and stigmatizes injury claims and claimants.

In their study of tort law and the media, Haltom and McCann (2004) reveal one way in which this process of cultural production works. The mass media, even when reporting basic facts, draw selectively on contrasting versions of "common sense" about injuries and litigation in American society. Haltom and McCann found that newspapers have a strong tendency to report about injuries in terms of the ideology of "personal responsibility" rather than the equally legitimate ideology of risk reduction and corporate responsibility. "Personal responsibility" has, of course, become a catchphrase of those who oppose claiming and litigation by injury victims. In this context, it means that lumping is the most culturally legitimate course of action.

Haltom and McCann persuasively demonstrate that the dominant media perspective grew directly from a strategy coordinated by such organizations as the Manhattan Institute, the American Tort Reform Association (ATRA), the Association of Public-Safety Communications Officials (APCO), and locally based Citizens against Lawsuit Abuse (CALA) groups. Funding for these organizations came from insurance companies, large corporations, and "wealthy individual patrons and foundations that traditionally have supported conservative, pro-business causes, including the John Olin Foundation, the Sarah Scaife Foundation, and the Starr Foundation" (Haltom and McCann 2004: 46). A massive advertising campaign in the 1980s and 1990s disseminated the anti-claiming viewpoint in clear and simple terms. This campaign was so successful that a majority of Americans still believe its erroneous assertions about hyper-litigious Americans to be based in fact.

The so-called "tort reform" movement became highly politicized. Its positions were adopted, primarily but not exclusively, by political conservatives and figured prominently in political campaigns. At the same time, voices on the other side of the policy debate were weak or ineffectual in their impact on popular culture. Referring to the pro-plaintiff American Trial Lawyers Association, Haltom and McCann entitle one of their chapters, "ATLA Shrugged." The mass media playing field came to be dominated by ideas and images associated with a highly critical view of personal injury claimants, and the contrary view began to seem indefensible.

The politics of tort reform have had a powerful impact on the new common sense about claiming and lumping in our society. Tort reformers have been far more savvy and effective in their media strategies than those who speak for injury victims. Their success goes a long way

to explain why our social and cultural environment is so supportive of lumping and so skeptical about claiming.

Once cultural frameworks of this kind become well entrenched, they affect Americans' thoughts and choices even at the nonconscious level. Although the dominant perspective on injuries reflects the interests of those against whom claims might be asserted, it paradoxically influences the cognition of those who are injured as well. Even when it might be in the victims' interest to bring a claim, they often adopt the tort reformers' "personal responsibility" ideology, and they support the belief that our society suffers from too many claims. In short, injury victims tend to share the position that upstanding citizens, those who are not greedy or selfish, should simply lump their losses or settle for minimal compensation (Greenhouse et al. 1994). And they respond to their mishaps by joining the vast majority who refrain from lodging a claim against their injurers.

Furthermore, because the anti-claiming ideology of "personal responsibility" has become so pervasive in American culture, it is likely that influential third parties will reinforce the victims' inclination to lump. Most people consult with friends and family before making major life decisions, and even those who decide alone are swayed by the anticipated approval or disapproval of those with whom they interact. It is highly probable that these third parties will, in any given injury case, reflect the majority view – that claiming in personal injury cases is socially unacceptable. Moreover, those who are close to the victim may want to shield him or her from the social opprobrium a claim might evoke, as well as the stress, anxiety, and uncertainty associated with the legal process.

Thus, the individual who lives in a culture that generally disapproves of personal injury claims is much less likely to claim than to lump. In countless ways, cultural images that discourage claiming can influence the thoughts and actions of injury victims. These cultural factors provide powerful explanations for the predominance of lumping in American society.

CONCLUSION

I began by asking why lumping and not claiming is the predominant response to injury in American society. Why is it, in other words, that the vast majority of injury victims respond to the harm they have suffered by absorbing the costs and consequences without making any sort of claim against the injurer? As we have

seen, lumping is even more widespread than we thought. That is because so many injuries go uncounted, and in such cases no claim is typically made or even imagined. The concept of injury itself is a moving target, socially constructed in ways that make lumping all but inevitable.

Commentators have tended to assume that the decision to claim, as opposed to lumping, is made consciously by individuals who weigh the costs and benefits of seeking a remedy from their injurer. The prevalence of lumping, in other words, is usually thought to result from deliberate choices made by fully aware individuals. But this understanding of perception and decision-making by injury victims now seems inadequate. Furthermore, conventional models have failed to problematize the concept of injury itself and have seldom considered how it is that so many painful and debilitating life experiences come to be viewed as no one's fault, as natural, and even as beneficial.

Injury is a social and cultural construct, not a fact of nature, and a closer examination of the ways in which we construct injuries helps to explain the prevalence of lumping rather than claiming. I began by discussing "beneficial pain," incidents that some might in theory view as injuries but, because of historical, religious, medical, and other framings, Americans instead tend to view as eufunctional and not harmful. Despite the criticism of recent activists, few people, even today, would consider the millions of infants who undergo male circumcision to have suffered injuries. Although this sort of painful experience may someday be viewed as an injury – perhaps even an actionable injury – as of today most people tend to perceive the practice as no more than a normal medical procedure or religious ritual. If we don't see the injury, we don't even notice that lumping has occurred.

Other painful experiences are indeed considered injuries, but are nevertheless lumped because they appear to the victim – and to nearly everyone else – as natural occurrences. These injuries are explained as the normal and inevitable result of human interaction with the physical environment – with the chairs, stairs, and automobiles that are a daily part of our lives. But, as we have seen, many of these seemingly "natural" injuries could indeed have been made less serious or averted altogether. From a different and more critical perspective, therefore, it becomes clear that the risk of harm in many instances is not really inherent in our physical surroundings. Often designers and manufacturers actually recognize and weigh the risks.

Their intentional decisions to embed those risks in their products or services, however, remain invisible. The resulting injuries appear to be natural or unavoidable, when in fact the means to prevent them may be close at hand. And finally, even when injury victims do conclude that they have been wronged by another person or corporation, they are deterred from taking action by the psychology of self-blame and by a widely-shared hostility to claiming in their social and cultural surroundings.

It follows, then, that lumping is the default response by most injured Americans, and tort law is therefore playing an even more marginal role than we might have thought. This chapter has suggested six reasons why lumping predominates in injury cases. If valid, this analysis casts serious doubt on tort law's capacity to provide compensation, deterrence, loss distribution, and moral justice to injury victims – either directly or through its shadow effects. If, among the millions of Americans who suffer injuries each year, few claims are ever asserted against the injurers, tort law's promise has failed – not only through the efforts of conservative tort reformers, but through broader processes of social construction. The belief that American tort law can reduce injuries and provide justice may be nothing more than a comforting myth.

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