

Liability Insurance and Accident Prevention: the Evolution of an Idea

Kenneth S. Abraham

Follow this and additional works at: <http://digitalcommons.law.umaryland.edu/mlr>



Part of the [Torts Commons](#)

Recommended Citation

Kenneth S. Abraham, *Liability Insurance and Accident Prevention: the Evolution of an Idea*, 64 Md. L. Rev. 573 (2005)
Available at: <http://digitalcommons.law.umaryland.edu/mlr/vol64/iss1/20>

This Conference is brought to you for free and open access by the Academic Journals at DigitalCommons@UM Carey Law. It has been accepted for inclusion in Maryland Law Review by an authorized administrator of DigitalCommons@UM Carey Law. For more information, please contact smccarty@law.umaryland.edu.

LIABILITY INSURANCE AND ACCIDENT PREVENTION: THE EVOLUTION OF AN IDEA

KENNETH S. ABRAHAM*

The tort system has an ambivalent attitude toward liability insurance. On the one hand, an insured defendant is more likely to be able to satisfy the full amount of a judgment against it than an uninsured defendant. Liability insurance is therefore favored, because it facilitates the compensation of successful plaintiffs. On the other hand, liability insurance may generate moral hazard, since other things being equal, insured parties are likely to be less concerned about the threat of liability than uninsured parties. Liability insurance may thereby undermine accident prevention. For more than a century now this ambivalence has manifested itself in a variety of ways, in both judicial decisions and in debates about tort reform.

This Article is about the way in which ideas about the relation between liability insurance and accident prevention have evolved from the middle of the nineteenth century to the present. These ideas are part of a larger story about the symbiotic relationship between tort liability and insurance during this entire period. Much more is involved in this story than liability insurance and accident prevention alone. Other forms of insurance, and other goals, also figure prominently. And the story involves more than ideas. The way in which tort liability and various forms of insurance have influenced each other in practice is at least as significant as the way that ideas about this relationship have evolved. Nonetheless, ideas have consequences, and ideas about this relationship—including Guido Calabresi's important ideas about it—have affected the development of the law for nearly two centuries now.

This Article is being presented during a portion of the Conference¹ devoted to Calabresi's impact on the law and scholarship of mass torts. Although the influence of ideas about the relation be-

* Robert E. Scott Distinguished Professor of Law and Class of 1966 Research Professor, University of Virginia School of Law. I am grateful to my colleagues Vincent Blasi and G. Edward White for their comments on an earlier version of this Article. Portions of the Article are part of a book I am writing about the influence of tort liability on the development of insurance, and the influence of insurance on the development of tort liability, over the last 150 years.

1. Calabresi's *The Costs of Accidents: A Generation of Impact on Law and Scholarship*, University of Maryland School of Law (April 23-24, 2004).

tween liability insurance and accident prevention on mass tort liability has been attenuated, toward the end of the Article I will briefly try to show that there has in fact been such an influence and that Calabresi's writing figures importantly in that influence.

When *The Costs of Accidents*² was published, mass tort litigation was virtually nonexistent, and the very idea of a mass tort was only beginning to emerge.³ For example, the first appellate decision to recognize a cause of action for asbestos-related personal injury was issued in 1973,⁴ three years after Calabresi's book was published. The other mass tort actions that we have now come to recognize as paradigms in the field came later that decade. The first Dalkon Shield⁵ and DES actions⁶ were filed in the mid-1970s, and the first Agent Orange actions were filed in 1978.⁷ So it is no surprise that Calabresi did not expressly address mass tort issues in his book. Indeed, the types of tort cases that were in the forefront at that time, and that the book can be understood to be addressing most concretely, involved automobile litigation and sporadic forms of products liability.

But of course *The Costs of Accidents* is about far more than auto accidents and product-related injuries. It is a view of tort liability for accidental injury as a whole, and of the other forms of injury prevention and compensation whose existence and character influence the ways we should think about the proper scope and functions of tort. In that sense, the book was as much about mass torts as it was about other, more traditional forms of liability for accidental injury.

In view of what has transpired in tort law and tort litigation during the last thirty years, it is evident in retrospect that *The Costs of Accidents* was published at the beginning of a new era in the history of tort law—an era in which mass tort litigation figures prominently. The book constructed an intellectual and conceptual platform from which thinking about tort liability and new forms of tort litigation could develop. In doing so, the book brought together and advanced our

2. GUIDO CALABRESI, *THE COSTS OF ACCIDENTS: A LEGAL AND ECONOMIC ANALYSIS* (1970) [hereinafter *THE COSTS OF ACCIDENTS*].

3. See, e.g., Paul D. Rheingold, *The MER/29 Story: An Instance of Successful Mass Disaster Litigation*, 56 CAL. L. REV. 116, 128 (1968) (noting the "novelty" of mass tort litigation).

4. *Borel v. Fibreboard Paper Prods. Corp.*, 493 F.2d 1076 (5th Cir. 1973).

5. See *In re A.H. Robins Co., Inc. "Dalkon Shield" IUD Prods. Liab. Litig.*, 406 F. Supp. 540 (J.P.M.L. 1975) (transferring 57 actions originating in 23 different districts alleging damages resulting from the use of intrauterine contraceptive devices manufactured by defendants to a centrally located district for pretrial procedures).

6. See generally Naomi Sheiner, *DES and a Proposed Theory of Enterprise Liability*, 46 FORDHAM L. REV. 963 (1978).

7. PETER H. SCHUCK, *AGENT ORANGE ON TRIAL: MASS TOXIC DISASTERS IN THE COURTS* 3 (1986).

thinking about two very different themes in the history of tort law and insurance: accident prevention and loss spreading. Once these themes were brought together, not only academically but also in practice, tort law thinking could never be the same again.

To understand where Calabresi's thinking fits in the history of ideas about the relation between liability insurance and accident prevention, I begin by examining how the courts thought about insurance and accident prevention in the period before liability insurance was introduced in this country, late in the nineteenth century. I then review the evolution of these ideas in the major debates about tort reform and insurance that occurred over the next century and a half. What this review reveals is not a slow and steady evolution of thought. It is instead a story of basic insights about the relation between liability insurance and accident prevention that were recognized relatively early, but that went essentially unappreciated and undeveloped over a period of many decades, largely because there was such a heavy concern with the compensation of accident victims among those who thought and wrote about tort liability during this period.

The story begins at a point when the idea of insuring against civil liability was highly suspect; liability insurance was considered almost immoral.⁸ By the late nineteenth century, however, there had been a decided shift in attitude as the courts began to regard the purchase of liability insurance as a form of responsible behavior, ensuring that legal obligations could be performed.⁹ The courts at this point recognized that liability insurance was not necessarily inconsistent with accident prevention, because of its capacity to vary premiums with the risk posed by the insured's activities. But this potential received little attention in the early-twentieth-century debates about the failure of the tort system adequately to compensate injured workers and auto accident victims. Rather, it was in these debates that ideas about liability insurance as a form of loss spreading, and possibly as a stop on the road to social insurance against accidental injury, began to emerge. The mid-century enterprise liability theorists then developed these loss-spreading ideas. Only when subsequent scholars and policymakers ceased arguing about tort liability and its reform almost exclusively in social welfare terms, however, and began to think of tort as the more complex and mixed system that it actually is, was it possible for insights about the relation between liability insurance and accident

8. See Kenneth S. Abraham, *The Rise and Fall of Commercial Liability Insurance*, 87 VA. L. REV. 85, 86 & n.6 (2001) (describing disfavor of liability insurance because of the belief that it would encourage reckless behavior).

9. *E.g.*, *Phoenix Ins. Co. v. Erie & W. Transp. Co.*, 117 U.S. 312, 324 (1886).

prevention to play a more significant role than they had until that time.

I. THE INTRODUCTION AND LEGITIMATION OF LIABILITY INSURANCE

For many decades, we have tended to think of tort liability and liability insurance as going hand-in-hand. By 1944, this view was so ingrained that it was possible for Justice Roger Traynor to argue that one of the principal justifications for the imposition of tort liability on business enterprises was that these enterprises could purchase insurance against liability and thereby broadly spread injury costs.¹⁰ Traynor's view helped to usher in an enterprise liability movement that was extremely influential during the ensuing decades. Among other things, it was heavily responsible for the modern law of products liability.

The connection between tort liability and insurance, however, had not always been considered as natural or automatic as it seemed to be by the time Traynor crafted his concurrence in *Escola*. Tort liability had existed in various forms long before the advent of liability insurance. Before liability insurance even existed, when negligence law began to emerge in its modern form early in the nineteenth century, the validity of forms of coverage that seemed to insure against the consequences of negligence had to be addressed.

A. *Intellectual Antecedents: The Barratry Defense and Liability Waivers*

What we now understand as liability insurance would not be introduced until the 1880s. Rather, the dominant forms of coverage during most of the nineteenth century were marine and fire insurance. Both were first-party insurance schemes that covered the policyholder against the loss of his own property. Whether and to what extent the insurance policies providing this coverage should be interpreted to cover losses resulting from the policyholder's misfeasance, however, had been a matter of dispute for some time. The doctrinal vehicle through which this issue was considered was the barratry defense of the policyholder's negligence, or the defense of barratry. Speaking of the defense in marine insurance, the Massachusetts Supreme Judicial Court noted that

It is the duty of the owner [of the vessel] to see that he intrusts the property insured with a man of competent skill, prudence, and discretion. He is responsible for all losses or

10. See *Escola v. Coca Cola Bottling Co.*, 150 P.2d 436, 440-41 (Cal. 1944) (Traynor, J., concurring).

damage to the goods committed to his charge, which arise from his negligence, ignorance, or willful misconduct The principle of an implied warranty on the part of the assured, that every thing shall be done to prevent a loss, pervades the whole subject of marine insurance¹¹

The express question in cases such as this was how coverage language that was sufficiently general to be read as insuring against losses caused by negligence should be interpreted. But the implicit question was whether encouraging, or at least tolerating, insurance against negligent conduct was desirable as a matter of public policy. Phillips's *Treatise on the Law of Insurance*¹² put it this way:

A person cannot protect himself by insurance against the loss occasioned by his own fraudulent acts and misconduct [A]n agreement by one party to indemnify another against losses voluntarily incurred, seems to be so obviously opposed to the general interest of a community, that it could hardly be enforced by any legal tribunal. And there is the same objection, in a smaller degree, against sustaining a contract to indemnify a man against the consequences of his own negligence. By such an agreement one man would consent to put himself wholly in the power of another, and it could operate only to the injury of the parties, and to the community of which they were members.¹³

As the middle of the nineteenth century approached, however, attitudes were evolving. Marine and fire insurers increasingly found that the defense of barratry was denied to them when they sought to avoid coverage obligations on the ground that the policyholder's negligence had caused an otherwise-insured loss.¹⁴ The change seems to have already begun to occur when Kent published the third volume of his *Commentaries*¹⁵ in 1828: "[I]t is a vexed question, rendered more perplexing by well balanced decisions, and in direct opposition to each other, whether a loss by fire proceeding from negligence, be covered by a policy insuring against fire."¹⁶

11. *Cleveland v. Union Ins. Co.*, 8 Mass. (7 Tyng) 308, 321-22 (1811); see also *Grim v. Phoenix Ins. Co.*, 13 Johns. 451 (N.Y. Sup. Ct. 1816) (holding that fire damage caused by negligence was not covered under marine insurance); MORTON J. HORWITZ, *THE TRANSFORMATION OF AMERICAN LAW, 1780-1860*, at 202 (1977) (noting that before 1830, parties were not insured for losses resulting from their own negligence).

12. WILLARD PHILLIPS, *TREATISE ON THE LAW OF INSURANCE* (1823).

13. *Id.* at 158; see also HORWITZ, *supra* note 11, at 202 (quoting PHILLIPS, *supra* note 12).

14. *E.g.*, *Columbia Ins. Co. v. Lawtence*, 35 U.S. 507, 518 (1836).

15. 3 JAMES KENT, *COMMENTARIES ON AMERICAN LAW* (1828).

16. *Id.* at 253-54.

The decline of the barratry defense was not accompanied by any explicit recognition that there had been a shift in policy regarding the risk that such insurance might create “to the injury of the parties, and to the community of which they were members” that Phillips had described. Rather, insurance policies whose literal terms covered losses caused by negligence were now understood simply to cover what they said they did.

On the few occasions when the validity of devices that looked like liability insurance were called into question, however, concern with the consequences of permitting such insurance was still voiced. For example, throughout the nineteenth century there was uncertainty about the extent to which common carriers would be permitted to contract out of their common-law duties of care to passengers and the owners of goods that they transported.¹⁷ This uncertainty reflected the tensions between freedom of contract, which grew in importance within the legal hierarchy of values as the century proceeded, and the desirability of ensuring protection for the customers of the common carrier. As late as 1873, the United States Supreme Court agonized about the issue in the following way:

The question is, whether such modification of responsibility by notice or special contract may not be carried beyond legitimate bounds, and introduce evils against which it was the direct policy of the law to guard; whether, for example, a modification which gives license and immunity to negligence and carelessness on the part of a public carrier or his servants, is not so evidently repugnant to that policy as to be altogether null and void; or, at least null and void under certain circumstances.¹⁸

The Court’s reference to common carriers’ “modification” of their “responsibility” to the public reflected its concern with what today we would call “moral hazard”—the decreased tendency on the part of those who are insured to exercise care to avoid loss. Underlining the point, the Court went on to quote a New York decision expressing concern about the effects of that state’s rule permitting abrogation of a common carrier’s duty of high care to its passengers:

“The fruits of this rule,” says Judge Davis, “are already being gathered in increasing accidents, through the decreasing care and vigilance on the part of these corporations; and they will continue to be reaped until a just sense of public

17. See HORWITZ, *supra* note 11, at 204-05.

18. N.Y. Cent. R.R. Co. v. Lockwood, 84 U.S. 357, 360 (1873).

policy shall lead to legislative restriction upon the power to make this kind of contracts."¹⁹

This concern was evidenced not only in connection with the liability of common carriers to passengers and shippers, but also regarding what amounted to liability insurance hidden in the interstices of first-party policies themselves. For example, first-party marine insurance against the loss of ships and cargo at sea sometimes covered liability for the "running down" of one ship by another.²⁰ But this form of coverage was also subject to the barratry defense of the policyholder's negligence, except under unusual circumstances.²¹ An English court early in the nineteenth century had indicated that "[i]t would be an illegal insurance to insure against what might be the consequences of the wrongful acts of the assured," but created an exception where the policyholders were also insurers and were therefore "as much interested to extend the principle of loss, as to restrain it."²² As time went on, however, this kind of rhetoric became less common, and the overall willingness of the courts to countenance legal arrangements that in one way or another transferred liability risk from one party to another seemed to increase.²³

Horwitz attributes the increased acceptance of insurance as the nineteenth century proceeded to the rise of an actuarial consciousness during this period,²⁴ and it may well be that at this time there was a transformation in the understanding of both insurance and the events that insurance covers. On the one hand, the older view was that insurance was just one of many forms of indemnity in which risk was merely transferred from one party to another. With the transfer of risk came the undesirable removal of responsibility from the party who was transferring it. On the other hand, once insurance began to be seen as a risk pooling mechanism in which the insurer is the vehicle by which the law of averages can be enlisted to protect both insurer and insured, the insurance transaction became more easily viewed as a means of economic planning and stabilization than as a device for avoiding common-law responsibilities.

19. *Id.* at 368 (quoting *Stinson v. N.Y. Cent. R.R. Co.*, 32 N.Y. 333, 337 (1865)).

20. Mary Coate McNeely, *Illegality as a Factor in Liability Insurance*, 41 COLUM. L. REV. 26, 27 & n.7 (1941).

21. *See id.* at 32 n.27 (collecting cases in which English courts decided whether the policyholder could recover when the master or crew were negligent).

22. *Delanoy v. Robson*, 5 Taunt. 605, 128 Eng. Rep. 827 (1814).

23. HORWITZ, *supra* note 11, at 203-10.

24. *Id.* at 226-37.

In my view, however, the courts had not yet come completely around to this actuarial way of understanding insurance as the twentieth century approached. Rather, although their conception of insurance was evolving, they continued to be ambivalent about the connection between insurance (and devices like it, such as indemnity agreements and liability waivers) and accident prevention. And as we will see, when the courts came squarely to address the validity of liability insurance, their thinking did not seem to be informed by an actuarial point of view.

B. *The Rise of Liability Insurance*

The problematic relation between insurance and “responsibility” found expression in a number of important late-nineteenth-century decisions upholding the validity of liability insurance against the contention that permitting insurance for negligence would encourage negligent conduct. In these decisions, the way the responsibility theme was expressed and applied began to be transformed.

It was no accident that the courts were not called upon to address the validity of liability insurance until nearly the dawn of the twentieth century. Liability insurance was first marketed in the United States in the 1880s, having been imported from Great Britain, where it was also a very recent invention.²⁵ The first form of liability insurance coverage was “employers’ liability insurance,” designed to protect employers against liability to their employees in the era before the enactment of workers’ compensation.²⁶ In short order a “public liability” feature was added to such policies, a feature that became central after workers’ compensation was enacted.²⁷ These policies eventually evolved into today’s commercial liability insurance.²⁸

The first cases challenging the validity of liability insurance each involved common carriers. That common carriers would be parties makes sense for two reasons. First, common carriers such as railroads and steamships were disproportionately likely to be involved in tort suits, and therefore likely to be among the first defendants who would seek to take advantage of their newly purchased liability insurance policies. Second, because common carriers had a high duty of care, it was in connection with the purchase of liability insurance by this particular kind of enterprise that the diminution-of-responsibility argument against the validity of liability insurance had the greatest chance

25. Abraham, *supra* note 8, at 87-88.

26. *Id.* at 87.

27. *Id.* at 88.

28. *Id.* at 88-89.

of succeeding. If enterprises whose conduct was as affected by the public interest as common carriers could validly purchase insurance that risked diminishing their incentive to comply with their common-law duty, then other enterprises whose conduct was less affected by the public interest would surely be permitted to purchase liability insurance. The opposition to liability insurance was thus likely to make its strongest argument in cases involving common carriers.

The first notable attack came indirectly. In *Phoenix Insurance Co. v. Erie & Western Transportation Co.*, a marine insurer had paid the shipper of goods for a loss, and brought a subrogation action against the carrier of the goods.²⁹ The carrier's defense was that because the contract of carriage gave the carrier the benefit of the shipper's insurance, the insurer had no right of subrogation,³⁰ presumably under the rule that an insurer cannot have subrogation against its own insured.³¹

The insurer seems to have contended, among other things, that providing the carrier with the benefit of the shipper's insurance was invalid, because it amounted to insuring the carrier against liability for its own negligence. The case eventually made its way to the U.S. Supreme Court, which brushed this contention aside, citing as authority the earlier decisions abolishing the barratry defense of the policyholder's negligence in cases in which the carrier had purchased its own fire or marine insurance.³² But of course the tension between responsibility for negligently causing accidents and insuring against that liability did not automatically disappear, and the Court seemed to feel compelled to reconcile that tension. It attempted to do so in a memorable phrase that would heavily influence courts subsequently addressing the issue: "By obtaining insurance," the Court said, the insured "does not diminish his own responsibility to the owners of the goods, but rather increases his means of meeting that responsibility."³³

All *Phoenix* did literally, however, was hold that the barratry defense of the policyholder's negligence was abolished under marine insurance policies, not only when the claim was made by the named insured, but also when a party given the benefit of that insurance by contract was sued by the insurer in its capacity as subrogee of the named insured.³⁴ *Phoenix* itself did not involve liability insurance, and

29. 117 U.S. 312, 312 (1886).

30. *Id.*

31. KENNETH S. ABRAHAM, *INSURANCE LAW & REGULATION* 192 (3d ed. 2000).

32. *Phoenix*, 117 U.S. at 324-25.

33. *Id.* at 324.

34. *Id.* at 323-24.

the dispute in *Phoenix* concerned what amounted to indirect insurance against liability for damage to property, not against liability for personal injury.

It was not long, however, before what we might call the "*Phoenix* doctrine" was applied expressly and directly to insurance against liability for personal injury. In 1896, the Court of Appeals of Maryland squarely rejected an attack on the validity of common carrier's liability insurance, relying on the now well-established applicability of fire and marine insurance to losses resulting from the policyholder's negligence and citing the *Phoenix* doctrine as authority for its decision.³⁵ The court dismissed the contention that the policy was invalid because its "inevitable tendency or effect" would be "to induce less vigilance or to promote greater carelessness" on the part of the policyholder.³⁶ Liability insurance, the court said, does not in any way relax the carrier's duty of care and vigilance to the public.³⁷ This is because insurance is "at best limited and partial" and because the policyholder will

endeavor to reduce the sum total of his insurance to a minimum figure, and thereby diminish the amount of the annual premium . . . as well as the rate charged him for it, [which] will always depend in a large measure, if not entirely, upon the prudence, care, and skill with which his affairs are managed and conducted. Such a carrier has, consequently, exactly the same motive or incentive to protect the public and the individual from injury that he would have if he should become his own insurer³⁸

A year later the Supreme Court of New Jersey reached the same result, employing similar reasoning and also quoting *Phoenix*.³⁹

Thus, the introduction and judicial acceptance of liability insurance did not signal the demise of the responsibility theme. The *Phoenix* doctrine openly acknowledged the importance of responsibility. *Phoenix* and its progeny simply rejected the contention that there was anything inconsistent about being discouraged from engaging in negligent conduct by the threat of liability for the consequences of that conduct, while simultaneously insuring against such liability.

In *Phoenix* itself this notion was virtually an ipse dixit without much reasoning to support it. Merely saying that being insured

35. *Boston & A.R. Co. v. Mercantile Trust & Deposit Co.*, 34 A. 778, 786-87 (Md. 1896).

36. *Id.* at 786.

37. *Id.* at 787.

38. *Id.* at 786, 787.

39. *Trenton Passenger R.R. Co. v. Guarantors' Liab. Indem. Co.*, 37 A. 609, 611 (N.J. 1897).

against liability for negligence does not diminish the incentive to be careful does not make it so. But the Maryland Court of Appeals' effort to reconcile the tension between responsibility and insurance by invoking the notion that varying premiums with the amount of "prudence, care, and skill" exercised by the policyholder would maintain all necessary incentives constituted a more substantive argument and tended also to be quoted in subsequent decisions.⁴⁰

The new doctrine validating liability insurance was accepted virtually without objection, both at the time and as time went on. The only vigorous judicial criticism I have located came a decade later, when the Supreme Court of Missouri expressly took issue with the *Phoenix* doctrine and declined to apply it in *Breeden v. Frankfort Marine, Accident & Plate Glass Insurance Co.*⁴¹ The court simply could not accept what it took to be the core of the doctrine, that liability insurance does not undermine accident prevention:

With all due respect for the opinion of that great court, yet we challenge the soundness of the logic of certain portions of the argument advanced and the correctness of the conclusions reached therein regarding this question. In our judgment, when a carrier knows that a third person is required to furnish the means from his own pocket with which to pay for the injuries done by his negligence to the passenger, then that consideration has a direct and potent influence in encouraging negligence on the part of the carrier.⁴²

The court then added:

If [liability insurance] does not encourage negligence and stimulate carelessness in the discharge of the carrier's duties to the passenger, then I must confess that I am ignorant of human nature, the general mode of transacting business, the motives and considerations which prompt the human family to action, and the powerful influence that self-interest plays in the affairs of man.⁴³

40. *Boston & A.R. Co.*, 34 A. at 787.

41. 119 S.W. 576 (Mo. 1909).

42. *Id.* at 581.

43. *Id.* at 585. True to its principles, the court listed a parade of horrors that would follow if it adhered to the *Phoenix* doctrine:

If this so-called species of insurance is valid, then by the same course of reasoning a physician or surgeon may insure against his acts of malpractice, or other negligent acts in the sick room, and act with perfect impunity. And, based upon the same authorities relied upon by counsel for respondent in this case, the Supreme Court of Pennsylvania, in a recent case, has just held that the owner of an automobile may insure against all damages he may be compelled to pay to any third person in consequence of his negligence in operating the same. . . . Already we

But the *Breeden* decision was the dying gasp of an older point of view. That view saw the common carrier's responsibility as lying in its duty to exercise care to avoid causing personal injury. In contrast, the newer point of view saw responsibility differently. When the *Phoenix* Court said that, by purchasing liability insurance, the policyholder "does not diminish his own responsibility . . . but rather increases his means of meeting that responsibility,"⁴⁴ it did not conceive of responsibility as the obligation to avoid negligence. If insurance increases the policyholder's means of meeting his responsibility, then the responsibility in question cannot be the obligation not to cause injury, or the obligation not to be negligent. Whatever one thinks about whether being insured has a negative impact on safety, almost certainly the Court was not saying that insurance has a positive impact: Insurance does not increase the policyholder's means of preventing accidents.

Insurance does, however, increase the policyholder's means of paying for the costs of accidents. If this is the increased means of meeting responsibility to which the *Phoenix* doctrine was referring, then the very idea of responsibility has begun to evolve, from responsibility to avoid negligently injuring others, toward responsibility to compensate for injury when it occurs. Liability insurance is transformed in this evolution into a vehicle for ensuring compensation to the injured. And once liability insurance also is understood as not being wholly incompatible with accident prevention, then the seeds of the modern functioning of liability insurance have been planted.

Nevertheless, it is important to underscore not only what the new thinking about liability insurance was at this point, but also what it was not. By the dawn of the twentieth century, the courts were rejecting the concern that liability insurance would so undermine safety incentives that this new form of insurance was against public policy. And they had come to see the benefit of liability insurance as a means of ensuring that the policyholder would be able to compensate those it tortiously injured—as a means of meeting that responsibility rather than shirking it. The courts rejecting attacks on liability insurance consistently emphasized the fact that those purchasing liability insur-

see mere children, almost daily, driving automobiles, with their attending dangers, along our streets at a high rate of speed, from 20 to 35 miles an hour. Would any sensible man suppose for a moment that parents would tolerate that recklessness for a moment if they were not indemnified against all damages which might flow from such conduct? Certainly not.

Id. at 584-85.

44. *Phoenix Ins. Co. v. Erie & Western Transp. Co.*, 117 U.S. 312, 324 (1886).

ance were not relieving themselves of any obligation to those they injured. The Court of Appeals of Maryland noted, for example, that "[n]otwithstanding such insurance, the carrier remains liable to the owner or shipper of the goods, and by insuring them he merely contracts, as in every other instance of a reinsurance, with some one else for reimbursement for such loss."⁴⁵

But there is nothing in these opinions to suggest that the courts were thinking in anything other than two-party terms. The common carrier had a responsibility to compensate those injured by its negligence, and liability insurance helped to assure that such compensation would be available. There was no reference, however, to the way in which the purchase would be financed, to the fact that other similarly situated common carriers would also be purchasing insurance, or to the possibility that shipping costs would rise and that customers as a group might therefore be footing some of the bill for the carrier's liability insurance. In short, the courts were not yet speaking about the loss-spreading effects of liability insurance. In their reasoning there were no other policyholders in the background or risk-sharing benefits being taken into account. For these courts, liability insurance was for all intents and purposes just like an ordinary indemnity that transfers financial responsibility from one freestanding party to another. It would take another step in the evolution of thinking about liability insurance before loss-spreading considerations of this sort would be brought into play.

II. THE WORKERS' COMPENSATION DEBATE

The courts were not the only forum in which the relation between injury prevention and insurance was being worked through during this period. In the decade after the *Phoenix* doctrine found acceptance in the state courts, a national debate about the proper method of handling workplace injuries culminated in the enactment of workers' compensation acts around the country.⁴⁶ The rhetoric and reasoning in this debate and in the discussions of workers' compensation following its enactment reveal how an incipient conception of the role of loss spreading first began to figure in the arguments about the new system.

45. *Boston & A.R. Co.*, 34 A. at 786; see also *Trenton Passenger R.R. Co. v. Guarantors' Liab. Indem. Co.*, 37 A. 609, 611 (N.J. 1897) ("The insured is held to the performance of his duty of vigilance both by his liability notwithstanding the indemnity, and by the fact that the vigilant carrier would obtain better terms in making the contracts of insurance.").

46. At the time, of course, these acts were referred to as "workmen's" compensation, but I will employ the modern usage that refers to workers without regard to their gender.

The labor movement entered the early years of the debate over workers' compensation convinced that a tort remedy for employer negligence, reformed to eliminate or mitigate the "unholy trinity" of employer defenses (the fellow servant rule, assumption of risk, and contributory negligence) would serve workers' interests best.⁴⁷ Witt argues that concern over the potential loss of traditional employee control of the workplace influenced this reluctance of labor to support workers' compensation, which had been enacted in Great Britain in 1897 and in Germany before that.⁴⁸ Whatever the explanation, labor support for workers' compensation fully materialized in 1909, when Samuel Gompers of the American Federation of Labor came out in favor of workers' compensation.⁴⁹

The predominant rationale deployed in favor of workers' compensation was that with the employer's control over the workplace came responsibility for any injury that occurred there.⁵⁰ There was little dispute, of course, that the employer was responsible for injuries caused by its negligence (perhaps subject to defenses); the crux of the debate about the wisdom, and indeed the constitutionality, of workers' compensation was whether the law should impose responsibility on employers for injuries that were not caused by negligence.⁵¹

The argument made against imposing liability without fault was that, because there was nothing the employer should have done (and in some cases, could have done) to prevent an injury not caused by its negligence, imposing liability without fault amounted to a taking of his property without due process of law.⁵² Thus, the argument went, workers' compensation "does nothing to conserve the health, safety, or morals of employ[ee]s" and therefore exceeds the police power of the state.⁵³ An employer held liable without fault is merely forced to insure against liability, either directly, or by raising the price of its

47. PRICE V. FISHBACK & SHAWN EVERETT KANTOR, A PRELUDE TO THE WELFARE STATE: THE ORIGINS OF WORKERS' COMPENSATION 93-94 (2000); John Fabian Witt, Note, *The Transformation of Work and the Law of Workplace Accidents, 1842-1910*, 107 YALE L.J. 1467, 1497 (1998).

48. See Witt, *supra* note 47, at 1497; see also JOHN FABIAN WITT, THE ACCIDENTAL REPUBLIC 89 (2004) (describing the tension between workers' desire to control the workplace and the need to characterize the workplace as manager-controlled in order not to undermine employers' liability reforms).

49. See FISHBACK & KANTOR, *supra* note 47, at 101; WITT, *supra* note 48, at 147.

50. See Witt, *supra* note 47, at 1490.

51. WITT, *supra* note 48, at 134.

52. *Id.*

53. *Ives v. S. Buffalo Ry. Co.*, 94 N.E. 431, 442 (N.Y. 1911). For discussion of *Ives* and its background, see WITT, *supra* note 48, at 152-86.

goods or services,⁵⁴ but is not required to do anything to make employees safer.

The ultimately successful policy and legal response given by proponents of the legislation was that workers' compensation would in fact contribute to the health and safety of employees and was therefore both a constitutional and sensible exercise of the police power. The core of the proponents' argument was that neither tort liability on the part of employers nor insurance privately purchased by employees—nor a combination of the two—provided adequate compensation for workplace injuries. Workers' compensation, in contrast, had a better chance of doing so. Ensuring that there was a means of compensating injured employees who would otherwise be left destitute was sufficient contribution to their health and safety to fall within the police power of the state. Interestingly, there was much more emphasis on this prong of the justification for workers' compensation than on the notion that moving to what would later be called enterprise-based strict liability on the part of the employer might actually promote accident reduction. In short, workers' compensation was justified by its proponents largely on compensation grounds. It was in this sense a first step in developing a system of social welfare.⁵⁵

Two foundational documents in this debate illustrate the character of the arguments that flew back and forth. Crystal Eastman's classic study of industrial accident compensation in Pittsburgh was an indictment of the deficiencies of the tort system.⁵⁶ It demonstrated that there was a dramatic gap between the losses suffered by workers and the amounts they recovered in tort, when they recovered at all, and recommended the adoption of workers' compensation as a substitute for tort. Eastman found that, of the 258 cases involving the workplace deaths of married men in Pittsburgh during a twelve-month period in 1906-1907, 164 plaintiffs recovered \$500 or less, 59 of whom recovered nothing.⁵⁷ Of the 48 who were known to have recovered more, only 8 received more than \$2,000.⁵⁸ Thus, at most only 30 percent recovered more than \$500 for the death of a breadwinner.⁵⁹

The very fact that Eastman's study focused on the deaths of married workers shows how much the overall concern was for compensa-

54. *Cf. Ives*, 94 N.E. at 439 (recognizing this ability of employers to pass on the burden of liability to an insurer or consumers as a positive aspect of workers' compensation before holding that the plan was unconstitutional).

55. See FISHBACK & KANTOR, *supra* note 47, at 1-6.

56. CRYSTAL EASTMAN, *WORK-ACCIDENTS AND THE LAW* (1910).

57. *Id.* at 121 tbl.16.

58. *Id.*

59. *Id.* at 121-22, 121 tbl.16.

tion that would not leave families destitute, rather than accident prevention. Otherwise, the deaths of single men (and women) would surely have been given equal attention. This emphasis was a reflection of what, in the study as a whole, was a worker-protection theme that was tinged with paternalism. The employer was seen to have a responsibility for compensating worker injuries both because injured workers and their families were in need and because the employer was in a position of control that rendered him responsible for what occurred in the workplace.⁶⁰

Eastman's study focused almost exclusively on the causes of industrial accidents and the workers' need for compensation. Although the study contained discussions of accident prevention, for the most part they merely identified the generic categories of employer negligence whose elimination would reduce accident rates: "lack of provision for safety in the original construction of the working place, . . . defects in plant or equipment [that] could have been prevented by a more frequent and careful inspection," etc.⁶¹ The only arguable examples of safety improvement that did not involve eliminating employer negligence were restrictions on the employment of children and long hours of work.⁶² At only a few points in the book was there any intimation that imposing liability on the employer for all accidents, whether or not they resulted from negligence, would enhance accident prevention.⁶³

Nor was there much reference at all to the potential availability or impact of insurance against the new form of workers' compensation liability that Eastman recommended. The assumption throughout was simply that the employer should bear the costs of accidents. The concern was whether, and if so by how much, these costs would increase if the tort system were displaced by workers' compensation. There was substantially less consideration of whether the shift of liability to em-

60. Witt describes this as concern with the "family wage." See WITT, *supra* note 48, at 119-20.

61. EASTMAN, *supra* note 56, at 105.

62. See *id.* at 105-07.

63. For example, Eastman notes:

And yet, in the face of the unremitting pressure for output, the motive for prevention can never be compelling until to each injury and death is affixed a uniform and unescapable penalty. If accidents became a heavy and determinable cost to the business not dependent upon the cleverness of lawyers, the leanings of judges, or the sympathies of juries, but directly proportioned to the number of deaths and the number and seriousness of injuries among the men on the payroll, then the prevention of them would become of direct economic interest to the employer.

Id. at 114.

ployers would reduce accidents and therefore reduce accident costs. The dominant theme was that the employer would fulfill its responsibility, not necessarily by preventing accidents, but rather by ensuring compensation to the employee for injuries suffered in the accidents that do occur.

There was also virtually no consideration given in Eastman's work to the ultimate distribution of costs that would result from the adoption of workers' compensation. She seemed to recognize that in the long run the costs of workers' compensation would not necessarily be paid by the employer. In enumerating the requirements that she believed a workers' compensation law must satisfy, for example, Eastman said that "it must shift a considerable share of the burden of each accident from the family immediately affected to the business, and thus to the whole body of consumers."⁶⁴ But this assumption that accident costs would be spread to consumers was never analyzed, and the benefits of the broad spreading of costs that would result were not identified as one of the arguments in favor of moving to the new system she proposed.

Eastman's work helped to set the stage for the enactment of workers' compensation. But the seminal document in the field was the Wainwright Commission Report,⁶⁵ which made the findings that supported the earliest noteworthy workers' compensation statute, enacted in the State of New York in 1910.⁶⁶ The Commission, on which Eastman served, held eleven days of hearings around the state in late 1909 and early 1910.⁶⁷ It heard testimony from 106 witnesses and produced a 470-page transcript of this testimony.⁶⁸

The central concern of this testimony was again the inadequacies of the tort system and the possible attractiveness of workers' compensation as an alternative. Just as in Eastman's book, the witnesses focused more on the need for effective compensation of accident victims than on the potential injury-reduction effect of a move to workers' compensation. The worker-protection theme again was

64. *Id.* at 220.

65. REPORT TO THE LEGISLATURE OF THE STATE OF NEW YORK BY THE COMMISSION APPOINTED UNDER CHAPTER 518 OF THE LAWS OF 1909 TO INQUIRE INTO THE QUESTION OF EMPLOYERS' LIABILITY AND OTHER MATTERS (1910) [hereinafter WAINWRIGHT COMMISSION REPORT].

66. An Act to Amend the Labor Law, in Relation to Workmen's Compensation in Certain Dangerous Employments, ch. 674, 1910 N.Y. LAWS 1945.

67. WAINWRIGHT COMMISSION REPORT, *supra* note 65, at 4-5.

68. MINUTES OF EVIDENCE ACCOMPANYING THE FIRST REPORT TO THE LEGISLATURE OF THE STATE OF NEW YORK BY THE COMMISSION APPOINTED UNDER CHAPTER 518 OF THE LAWS OF 1909 TO INQUIRE INTO THE QUESTION OF EMPLOYERS' LIABILITY AND OTHER MATTERS (1910).

dominant. What little reference to insurance against workers' compensation liability one finds in the testimony reflects differences of opinion about whether premium rates would rise or fall under such an approach.⁶⁹ The uncertainty about this issue resulted from the fact that, although the number of injuries for which compensation was payable would increase under workers' compensation, the average amount that would actually be paid per injury might either increase or decrease.⁷⁰

In addition, how successful liability insurance could actually be in encouraging loss prevention was unclear at this time, despite the analysis that had persuaded the Maryland Court of Appeals a decade earlier.⁷¹ Even before the enactment of workers' compensation, the companies writing employers' liability insurance had understood that varying premiums in accordance with factors that policyholders could control might affect safety levels. As early as the turn of the century, for example, the Travelers Insurance Company was inspecting the premises of its policyholders and giving them reductions in premiums for complying with safety standards.⁷² But Travelers' own company history recounts the difficulties it encountered in getting policyholders to make safety changes. This history quoted one of the early inspectors as saying: "We enjoyed little cooperation and much downright antagonism. The boss had no interest in the elimination of danger, and the workers themselves had become so used to conditions that they resisted change"⁷³

The focus of the Wainwright Commission Report itself largely reflected the character of the testimony before the Commission, and the data on accidents and compensation that the Commission independently gathered.⁷⁴ There was much emphasis in the Report on the inadequacies of the compensation received by workers under the tort system, on the absence of significant sources of insurance to which employees had access to on their own, on the waste and delay entailed in the system, and on the antagonism between employers and employ-

69. *Id.* at 39, 47, 75.

70. Although workers' compensation benefits would be paid on a much less generous basis than was in principle available in tort, "full" tort damages were often not recovered in tort. As a consequence, it was uncertain whether actual payouts in workers' compensation would be larger or smaller than in tort.

71. See *Boston & A.R. Co. v. Mercantile Trust & Deposit Co.*, 34 A. 778, 787 (Md. 1896); *supra* text accompanying note 40.

72. TRAVELERS INSURANCE COMPANIES, *THE TRAVELERS 100 YEARS* 55 (1964).

73. *Id.* (internal quotation marks omitted).

74. WAINWRIGHT COMMISSION REPORT, *supra* note 65.

ees that the system produced.⁷⁵ The new system the Commission proposed in the Report would remove these deficiencies by making the cost of industrial accidents a cost of doing business that would be passed on to the consuming public.⁷⁶ Although there was a passing reference to the potential of the new system to reduce the incidence of accidents,⁷⁷ the Report noted at the outset that the Commission had not yet been able to address the causes and prevention of accidents, promising to address these issues in a subsequent report.⁷⁸

A few passages in the Report, however, also reflected its authors' awareness that the costs of accidents were likely to be spread broadly if the new system were enacted. At the outset, the Report indicated that "just as employers now fix their selling price with reference to the costs of replacing and repairing machinery, so we would have them make an element of the price of the product the cost of relieving injured workers of hazardous industry."⁷⁹ Despite its recognition of this potential loss-spreading effect, the Report made no further reference to loss spreading until a short passage near the end on the cost of the proposed system, in which the Report argued that:

If the bridge builder in the State of New York must pay more to his employees in the shape of damages or compensation for injuries, that additional cost will be reflected in the total cost of building the bridges, just as would a rise in wages or a rise in the cost of materials; but when the law is known the bridge-builder and the house-builder will make his contracts accordingly and his prices accordingly, and no man will be deprived of property or unduly mulcted[.] The community at large will then support the injured workman by compensation through the employer in the first instance, rather than through increased taxes for charity.⁸⁰

But when it came time to provide the summary of the Report's conclusions that was later so famously quoted in *Ives*, the points that were highlighted involved the flaws in the existing system, not the benefits of the proposed new one:

The summary of our investigation on employers' liability then is:

75. *Id.* at 19-36.

76. *Id.* at 7.

77. *Id.* at 5-7.

78. *Id.* at 2.

79. *Id.* at 7.

80. *Id.* at 67.

First, that the present system in New York rests on a basis that is economically unwise and unfair, and that in operation it is wasteful, uncertain, and productive of antagonism between workmen and employers.

Second, that it is satisfactory to none and tolerable only to those employers and workmen who practically disregard their legal rights and obligations and fairly share the burden of accidents in industries.

Third, that the evils of the system are most marked in hazardous employments, where the trade risk is high and serious accidents frequent.

Fourth, that, as matter of fact, workmen in the dangerous trades do not, and practically cannot, provide for themselves adequate accident insurance, and therefore, the burden of serious accidents falls on the workmen least able to bear it, and brings many of them and their families to want.⁸¹

Yet in its conclusion the Report once again made a brief argument based in part on loss spreading: "These results can, we think, be best avoided by compelling the employer to share the accident burden in intrinsically dangerous trades, since by fixing the price of his product the shock of the accident may be borne by the community."⁸²

In these brief passages we see the very beginnings of a new rationale for the imposition of liability, and indirectly a new rationale for liability insurance: not simply providing a means by which compensation may be assured, but also a means by which the burden of providing compensation may be distributed broadly. Commentators writing at the time similarly made note of, though they did not strongly emphasize, this loss-spreading rationale. For example, Francis Bohlen, one of the leading tort scholars of the period, pointed out what he seemed to suggest was a distinctly minority view:

There is a further body of public opinion, that of the advanced collectivist who believes that society as a whole should share the shock of industrial accidents rather than that it should be borne by the particular individual whose ill fortune it is to suffer it immediately, and so desires to place the burden primarily upon the employer, who, in theory at least, can add the cost to the price of his product and so distribute

81. *Id.* at 68 (quoted in *Ives v. S. Buffalo Ry. Co.*, 94 N.E. 431, 436 (N.Y. 1911)).

82. *Id.*

the loss among that part of the community at least whose wants call his business into existence.⁸³

At this point, then, the loss-spreading rationale for workers' compensation played a secondary role, not only in the reasoning of the Report of the Wainwright Commission but also in the course of arguments about the constitutionality of workers' compensation. After the New York statute was enacted, it was challenged and declared unconstitutional in the famous *Ives* case.⁸⁴ The New York Constitution was thereafter amended to authorize workers' compensation,⁸⁵ a new (and modified) statute was enacted,⁸⁶ and the constitutionality of that statute ultimately was challenged in the U.S. Supreme Court.⁸⁷ In rejecting that challenge, the Court held that providing a quid pro quo in return for expanding the employer's liability was sufficient to avoid due process and takings concerns.⁸⁸ The Court thus reasoned that it was not unreasonable for the employer to be required to pay workers' compensation benefits in return for being relieved of tort liability for employee injuries.⁸⁹ There was no reference in the opinion to the incentive effects that might be created by the new form of liability or by insurance against that liability. Nor was there any consideration given to the loss-spreading effects that liability might generate, as the Wainwright Commission had predicted, if only briefly. That is, the Court felt no need to buttress its position by refuting the argument that imposing liability without fault could not enhance safety, and did nothing more than shift costs from the employees to the employer.

In summary, although the rudiments of the relationship among liability, insurance, and accident prevention were understood by the time that workers' compensation was enacted, the central documents in the workers' compensation debate that I have examined place this relationship mainly in the background. The assumption throughout was that costs would be passed through from the employer to the consuming public, and although this was regarded as an advantage, its significance was not fully appreciated. Even when there was recognition that varying insurance premiums with the liability experience of an employer might influence its incentive to take additional safety

83. Francis H. Bohlen, *A Problem in the Drafting of Workmen's Compensation Acts*, 25 HARV. L. REV. 328, 330 (1911).

84. *Ives*, 94 N.E. at 448.

85. N.Y. CONST. art. I, § 18.

86. An Act to Re-Enact and Amend the Workmen's Compensation Law, ch. 41, 1914 N.Y. LAWS 216.

87. N.Y. Cent. R.R. Co. v. White, 243 U.S. 188 (1917).

88. *See id.* at 201-02.

89. *Id.* at 203-04.

precautions, there was uncertainty about how likely this was to occur.⁹⁰ The important thing was that the employer would be held financially responsible for employee injuries and that as a consequence employees would receive some compensation.⁹¹ There was also a recognition that these costs would in some measure ultimately be distributed more broadly.⁹² Exactly how, and exactly what impact the system would have on accident prevention, however, were uncertain and of less significance than the fact that compensation would take place.

III. THE AUTO ACCIDENT PROBLEM AND THE COLUMBIA PLAN

The next major event in the history of tort reform was the publication of the Columbia Plan in 1932.⁹³ Proposed by a group of eminent scholars, judges, and lawyers, the Plan envisioned the mandatory purchase of automobile liability insurance by all owners of motor vehicles, together with the adoption of strict liability for auto-related personal injuries, the provision of partial compensation for economic loss but not general damages, and the administrative resolution of disputes.⁹⁴ The Plan was clearly and expressly based on the workers' compensation model; not only did it propose imposing strict liability for auto accidents on those causing the accidents, it also recommended a reduction of compensation to correspond with the expansion of liability and the adoption of a benefit schedule modeled on the workers' compensation schedule.⁹⁵ Like the Wainwright Commission Report, it marshaled an extensive array of statistics in support of the proposition that there was a substantial accident problem result-

90. For example, in its promised Second Report on the causes and prevention of accidents, submitted after enactment of the workers' compensation statute, the Wainwright Commission expressed concern that in a highly competitive insurance market, premiums would not vary sufficiently to create safety incentives. REPORT TO THE LEGISLATURE OF THE STATE OF NEW YORK BY THE COMMISSION APPOINTED UNDER CHAPTER 518 OF THE LAWS OF 1909 TO INQUIRE INTO THE QUESTION OF EMPLOYERS' LIABILITY AND OTHER MATTERS: SECOND REPORT 9 (1911).

91. See EASTMAN, *supra* note 56, at 166 ("A law which leaves the economic burden of work-accidents wholly upon the workers . . . not only does them an injustice, but makes out of a largely necessary loss an absolutely unnecessary amount of privation.").

92. See *id.* (arguing that workers' compensation legislation would effect a "more rational distribution of the loss entailed by [work-accidents]").

93. REPORT BY THE COMMITTEE TO STUDY COMPENSATION FOR AUTOMOBILE ACCIDENTS TO THE COLUMBIA UNIVERSITY COUNCIL FOR RESEARCH IN THE SOCIAL SCIENCES (1932) [hereinafter COLUMBIA PLAN].

94. *Id.* at 132-44; see also Jonathan Simon, *Driving Governmentality: Automobile Accidents, Insurance, and the Challenge to Social Order in the Inter-War Years, 1919-1941*, 4 CONN. INS. L.J. 521, 571-84 (1998) (discussing the Columbia Plan).

95. See COLUMBIA PLAN, *supra* note 93, at 137-42. As the Plan noted, "The Committee has drafted the following schedule of benefits based on the workmen's compensation laws of New York and of Massachusetts." *Id.* at 140.

ing in inadequate compensation of victims.⁹⁶ But the Plan paid little attention to the possible impact of its adoption on accident prevention, in fact concluding that “compulsory insurance has no demonstrable effect on accident frequency” and that “[i]f . . . the fear of personal injury will not restrain careless driving, it is not to be supposed that the fear of having to pay money will do so.”⁹⁷

The Plan was never enacted anywhere, in part because the advent of the Depression brought other economic problems to the forefront of public policy, and in part because there was no consensus that auto accidents were sufficiently similar to workplace injuries to warrant treating them in the same way. The debates that followed the debut of the Plan reveal that the relationships between drivers and passengers, between drivers and pedestrians, and especially between drivers and other drivers, often were not seen as sufficiently analogous to the relationship between employers and employees to garner a consensus in favor of adopting a strict liability approach modeled on workers’ compensation.⁹⁸ Whereas employers were automatically in a position to pass on the costs of accidents to the consuming public, most drivers were individuals who were not driving for business purposes and could not raise prices in order to cover the increased costs of liability.⁹⁹ The question of which driver was a “cause” of injury in two-vehicle accidents could not be satisfactorily resolved with the same kind of bright-line rule that enabled workers’ compensation to hold the employer liable as the “cause” of all injuries except those resulting from the employee’s wilful misconduct.¹⁰⁰ And perhaps most importantly, the worker-protection rationale that had been so compelling in the employment context fell flat in the context of motor vehicle accidents. Whereas workers’ compensation had a somewhat paternalistic quality that critics of the Plan seemed to accept, they could see no basis for a similar paternalism in the auto accident context.

The most significant innovation proposed by the Columbia Plan was its use of mandatory liability insurance as the mechanism for as-

96. *Id.* at 53-96.

97. *Id.* at 159, 160.

98. Simon, *supra* note 94, at 579-80 (citing Austin J. Lilly, *Compensation for Automobile Accidents: A Symposium—Criticism of the Proposed Solution*, 32 COLUM. L. REV. 803, 805 (1932)).

99. *Id.*

100. See Lilly, *supra* note 98, at 805 (contrasting the employer-employee relationship, characterized by contractual arrangements between members of two distinct and separate classes, with the relationships between persons affected by the proposed compulsory automobile compensation law, who have no contractual relationships with each other, and who may belong to the same or different classes).

sureing victim compensation.¹⁰¹ At this point only a handful of states required drivers to be insured. What the *Phoenix* Court had seen as a virtue, the Plan made a necessity. Unlike employers, most drivers were not capable of paying compensation on their own; insurance was a necessary feature of the Plan if it were to fill the compensation gap. The insurance requirement was thus simultaneously a method of assuring victim compensation and of imposing the kind of responsibility for injury that *Phoenix* had conceived of more than a generation earlier. By mandating the purchase of liability insurance, the Plan did not diminish individual responsibility, but (in the language of the *Phoenix* doctrine) increased each driver's "means of meeting that responsibility."¹⁰²

But there was a notable conflict between the reasoning behind the Plan and the reasoning of its critics. Although the Plan itself was devoid of any reference to the loss spreading that would result from the compulsory liability insurance it proposed, supporters of the Plan made it clear that this was one of its advantages.¹⁰³ The mandatory insurance requirement was a method of rendering individual drivers analogous to employers. By purchasing insurance, each driver passed along the cost of the injuries he or she caused to a pool composed of all other drivers. The cost of injuries was thereby collectivized. Young B. Smith, Dean of the Columbia Law School, argued that

The fact that employers and employees constitute separate and distinct classes, whereas frequently the victims of motor car accidents are also motorists, does not differentiate the cases for purposes of risk distribution. Workmen's compensation laws would be no less effective in spreading losses resulting from injuries to workers even though there were large numbers of men who, simultaneously, occupied the position of employer in one enterprise and the position of employee in another. Likewise, the fact that a motorist, who is required to insure against injuries caused others by his car, may himself be injured by another's car, does not affect the distribution of risks resulting from the operation of automobiles so long as all motorists are required to insure.¹⁰⁴

Praising the Plan, Smith wondered whether it, "as did [the report] of the Wainwright Commission, foreshadow[ed] an impending develop-

101. COLUMBIA PLAN, *supra* note 93, at 138.

102. See *Phoenix Ins. Co. v. Erie & W. Transp. Co.*, 117 U.S. 312, 324 (1886).

103. Young B. Smith, *Compensation for Automobile Accidents: A Symposium—The Problem and Its Solution*, 32 COLUM. L. REV. 785, 791 (1932).

104. *Id.* at 792.

ment in the law looking towards a more scientific distribution of inevitable risks which are incident to an important and necessary activity in modern society."¹⁰⁵

The Director of Study for the Plan made a similar point:

The problem is how to distribute the losses caused by automobile accidents in a way best suited to the public welfare. Conceivably, the losses may be allowed to rest where they first fall, that is on the victim of the accident and often on his family . . . or they may be partly shifted to the shoulders of the motorist or of his insurance carrier under a scheme of liability for negligence; or they may be shifted, under a compensation scheme, to the motorists as a class or to all the taxpayers.¹⁰⁶

He concluded, "If a compensation plan can be administered so as to spread losses as I have suggested, I believe that we should adopt it."¹⁰⁷

To critics of the Plan, however, drivers simply were not in a position that was analogous to the position of employers, and liability insurance could not make them so.¹⁰⁸ However serious the auto injury problem might be, the almost paternalistic, worker-protection aspect of workers' compensation could not be transposed to the auto context. For example, the General Counsel of the Maryland Casualty Company argued that employers and employees constituted "equally separate and distinct" classes so that

one distinct and separate class is responsible (theoretically) for the conditions which produce accidents, and the other distinct and separate class is the victim of the accident. Employers do not claim compensation against workmen. . . . Nor is consideration given to the fact that employers who do the paying under workmen's compensation, in theory at least, have the money with which to pay,—money produced by the operations which caused the accident and the result-

105. *Id.* at 786. For this reason, Smith thought that the Plan should have gone even further:

If the purpose of changing the present bases of risk distribution in the case of motor car accidents is to spread the losses thereby incurred over a larger group in the community, by placing upon motorists a more equitable share of the burden than is the case under existing law, one hesitates in approving a scale of compensation which falls so far short of accomplishing this result.

Id. at 801.

106. Shippen Lewis, *The Merits of the Automobile Accident Compensation Plan*, 3 LAW & CONTEMP. PROBS. 583, 588 (1936).

107. *Id.* at 589.

108. See Lilly, *supra* note 98, at 804 (arguing that the analogy between workers' compensation and auto accident insurance "affords neither precedent or justification").

ing loss to the victim; and thus the cost of payment can be readily absorbed by industry and distributed amongst all those who have to do with industry and its products or service, including the recipients of the payments.¹⁰⁹

Disputing the workers' compensation analogy, another critic pointed out that "[u]nder the workmen's compensation laws the employer is liable 'regardless of fault' only to his own employees and while they are acting within the scope of their employments, subject to his orders, whereas, under this plan a motorist would be liable to strangers whatever they might be doing."¹¹⁰ The Plan would therefore "amount to a wholesale shifting of the major responsibility for the economic consequences of wrongdoing on the highways from the wrongdoers to the unoffending. The insurance would merely disguise and mitigate the consequences of this underlying vice."¹¹¹

What was being contested here was not just the practical difficulty entailed in determining *ex ante* who would be an injurer and who a victim, which the Plan handled in a somewhat wooden though nonetheless workable fashion.¹¹² More importantly, there was opposition in principle to the very idea of using insurance to conflate, and render irrelevant, the categories of injurer and victim. For supporters of the Plan, auto liability insurance was a way of financing the proposed strict liability obligation to pay compensation that could otherwise not have been financed. It was a way of assuring that there would be compensation for auto injuries. Compulsory insurance rendered feasible a form of liability that might not otherwise have been sensible to adopt. But for the critics, liability insurance could be an appropriate method of financing liability only if the form of liability that it financed was otherwise justified. Adding a compulsory liability insurance component to the Plan could not justify imposing strict liability; this form of liability had to be independently justified, and in the critics' view this justification could not be given. The dispute was thus over the extent to which an auto liability regime should function as a method of ensuring compensation for the injuries that would inevitably result from use of the automobile. It is no surprise, therefore, that the role that liability insurance might actually play in influencing the level of those inju-

109. *Id.* at 805.

110. P. Tecumseh Sherman, *Grounds for Opposing the Automobile Accident Compensation Plan*, 3 *LAW & CONTEMP. PROBS.* 598, 600 (1936).

111. *Id.* at 601.

112. The Columbia Plan's solution was to hold each driver liable for the other's injuries, and to hold the other drivers in multi-vehicle accidents jointly and severally liable. *COLUMBIA PLAN*, *supra* note 93, at 139.

ries had to take a back seat, so to speak, as a result of the more salient dispute over the compensation goals of the Plan.

IV. THE ERA OF ENTERPRISE LIABILITY THEORY

The period between the publication of the Columbia Plan and the mid-1960s was dominated by thinking about enterprise-based strict liability. Two different sources of thinking about liability insurance during this period are worth examining. In the first group are the enterprise liability theorists themselves—tort law scholars and judges who thought and wrote about this issue. In the second group are insurance law scholars and insurance specialists who, while they tended not to write about enterprise liability, can provide a glimpse into contemporaneous thinking on the insurance side of the tort law-insurance divide.

A. *The Tort Law Perspective*

Both workers' compensation and the Columbia Plan influenced the next generation of reform advocates, the most prominent among them being the enterprise liability theorists Fleming James and Roger Traynor.¹¹³

James conducted a scholarly campaign in the 1940s and 1950s that attacked the fault standard and recommended a variety of changes that would promote broader distribution of the costs of accidental injury.¹¹⁴ He regarded tort liability "as a means for *distributing* losses over society as a whole or some fairly large segment of it."¹¹⁵ He argued that "some good accrues from the fact of distribution itself," because "consistent distribution of losses over a large group tends to substitute (through the operation of the law of large numbers), a certain and calculable cost for the uncertain risk of ruinous losses to individuals."¹¹⁶ For James, the ultimate goal was the adoption of social insurance: "The full blessings of distribution can best be attained by comprehensive social insurance, but some measure of advantage may be had within the present framework of our law of torts, for many of

113. For discussion of the enterprise liability movement, see VIRGINIA E. NOLAN & EDMUND URSIN, *UNDERSTANDING ENTERPRISE LIABILITY: RETHINKING TORT REFORM FOR THE TWENTY-FIRST CENTURY* (1995).

114. See George L. Priest, *The Invention of Enterprise Liability: A Critical History of the Intellectual Foundations of Modern Tort Law*, 14 J. LEGAL STUD. 461, 470-83 (1985) (summarizing James' views of the tort system).

115. See Fleming James, Jr., *Contribution Among Joint Tortfeasors: A Pragmatic Criticism*, 54 HARV. L. REV. 1156, 1156 (1941).

116. *Id.*

its rules tend in practice to shift losses to agencies which can and do distribute them."¹¹⁷

James thus picked up the compensatory impulse that lay at the heart of the Columbia Plan and gave it a rationale that had been at most inchoate in the Plan itself: net social gain would result from loss spreading. In one of his only two articles on insurance itself, James argued at the outset that the best way to assure accident victims compensation is "to distribute the losses involved over society as a whole or some very large segment of it. Such a basis for administering losses may be called social insurance."¹¹⁸ James used this term in different ways. Sometimes he seems to have meant insurance that was financed out of general revenues,¹¹⁹ and sometimes he considered activity-based liability insurance that happened to spread costs broadly to be "social insurance."¹²⁰ Consequently, it is difficult to know how clearly James recognized the difference between the cost-internalization/accident prevention potential of enterprise-based strict liability, perhaps linked with liability insurance, and broadly loss-distributive social insurance that was likely to be without much cost-internalization potential. Since he was extremely skeptical of the accident prevention potential of tort liability anyway, the advantages of broad risk distribution took priority.¹²¹ In his article about the impact of liability insurance on accident law he devoted only two paragraphs to the adjustment of premium rates to create safety incentives, part of which concentrated on the limitations of this device.¹²² His focus was the expansion of liability in order to promote loss spreading, whether or not this resulted in additional accident prevention.

Traynor, in contrast, focused much more clearly on activity-related liability insurance in developing the argument for enterprise-based strict liability, and was more sanguine than James about the prospect that enterprise liability would promote accident preven-

117. *Id.* at 1157.

118. Fleming James, Jr., *Accident Liability Reconsidered: The Impact of Liability Insurance*, 57 *YALE L.J.* 549, 550 (1948). The other article, Fleming James, Jr. & John V. Thornton, *The Impact of Insurance on the Law of Torts*, 15 *LAW & CONTEMP. PROBS.* 431 (1950), is mainly concerned with the way in which expansion in various forms of insurance coverage had promoted expansion in the scope of tort liability.

119. *See* James, *supra* note 118, at 550 (characterizing social insurance as a basis for administering losses over society as a whole).

120. *See id.* at 562-63 (discussing social insurance in the context of liability insurance).

121. *See id.* at 569 ("As for the branch of the law which is concerned with civil damages or their equivalent, it is doubtful whether it contributes very much to accident prevention.").

122. *Id.* at 560-61.

tion.¹²³ His concurrence in *Escola*, which eventually served as the intellectual foundation for the adoption of *Restatement (Second) of Torts* section 402A, argued for product manufacturers' strict liability on the grounds that manufacturers were both in the best position to minimize the risk of injury to product consumers and to insure against that risk.¹²⁴ But these two strands of argument were at this point incompletely distinct—the passages in which Traynor discusses them move back and forth between the injury-reduction and insurance arguments without seeming to recognize that they are logically independent. Product manufacturers might be superior injury reducers, superior insurers, or both, but because Traynor seems to have thought that in fact they were both, he did not need to distinguish carefully between these two capacities. Two decades later, writing for a majority that was adopting enterprise liability rather than arguing for it in a concurrence, he gave the insuring function no express reference at all and was content to cite himself and James, along with Prosser, as sources for the arguments in favor of strict products liability.¹²⁵

James, Traynor, and a number of other scholars moved more explicitly during this era than ever before beyond the *Phoenix* conception of liability insurance—as a means of meeting the responsibility to provide compensation—and toward the fully modern view of liability insurance as a means of spreading loss.¹²⁶ Their arguments for enterprise liability were based on a combination of the desirability of ensuring compensation, the benefits of greater loss spreading, and (for some of the theorists) the possibility of more effective accident reduction. But it took time for the full complement of goals to be teased out of their arguments, in part because they were one-directional. Neither James nor Traynor, for example, spent much effort identifying the situations in which enterprise liability would not make sense.

A last, though less well-known, piece of scholarship that emerged at the end of this period illustrates this tendency. Robert Morris's *Enterprise Liability and the Actuarial Process—The Insignificance of Fore-*

123. Traynor's role as a tort theorist more generally is discussed in G. EDWARD WHITE, *TORT LAW IN AMERICA: AN INTELLECTUAL HISTORY 180-210* (expanded ed. 2003).

124. *Escola v. Coca Cola Botling Co.*, 150 P.2d 436, 440-41 (Cal. 1944) (Traynor, J., concurring).

125. *Greenman v. Yuba Power Prods., Inc.*, 377 P.2d 897, 901 (Cal. 1963) (citing *Escola*, 150 P.2d at 440 (Traynor, J., concurring)); 2 FOWLER V. HARPER & FLEMING JAMES, JR., *THE LAW OF TORTS* §§ 28.15-28.16, at 1569-74 (1956); William L. Prosser, *The Assault Upon the Citadel (Strict Liability to the Consumer)*, 69 *YALE L.J.* 1099 (1960)).

126. See, e.g., L.W. Feezer, *Capacity to Bear Loss as a Factor in the Decision of Certain Types of Tort Cases*, 78 *U. PA. L. REV.* 805 (1930); Leon Green, *The Individual's Protection Under Negligence Law: Risk Sharing*, 47 *Nw. U. L. REV.* 751 (1953).

sight,¹²⁷ was published in the very issue of the *Yale Law Journal* in which Guido Calabresi's first piece of torts scholarship appeared in 1961.¹²⁸ Morris argued that, contrary to what some earlier scholars had argued, there was no need to limit enterprise liability to events that are in some sense foreseeable to the responsible enterprise, because the actuarial process that leads to insurance against tort liability makes that unnecessary.¹²⁹ Because of the way in which policyholders posing similar risks are grouped together for purposes of premium rating, and because the occurrence of low-probability events contributes in only a minor way to the fixing of these rates, enterprises will not have much incentive to react to the prospect of liability for such events, whether they are "foreseeable" or not. Further, unless a certain form of accident becomes part of a pattern that repeats itself with actuarial significance, liability insurance rates are unlikely to take this type of accident into account in any important way and are therefore unlikely to influence policyholder behavior.¹³⁰ The article by Morris thus seemed to confirm what earlier and more prominent scholars such as James especially had been saying: that liability insurance should be regarded primarily as a method of loss spreading, and not as a device that figures in any significant way in loss prevention.

B. The Perspective of Insurance Professionals and Insurance Law Scholars

The story among insurance specialists and insurance law scholars during the enterprise liability period differs somewhat from the way that tort theorists were addressing the relation between liability insurance and accident prevention. But the ultimate message that we can derive from their thinking is not far from what we saw prevailed among torts scholars and reformers. Insurance lawyers and insurance law scholars made virtually no reference to the relation between liability insurance and accident prevention in their work over a period of many decades. Whatever they may have known or assumed about the impact of liability insurance rating on accident prevention, this function did not figure in what they chose to address in their scholarly work. In contrast, insurance professionals and business scholars understood that insurance premium rating had the potential to influ-

127. C. Robert Morris, Jr., *Enterprise Liability and the Actuarial Process—The Insignificance of Foresight*, 70 *YALE L.J.* 554 (1961).

128. Guido Calabresi, *Some Thoughts on Risk Distribution and the Law of Torts*, 70 *YALE L.J.* 499 (1961) [hereinafter *Risk Distribution*].

129. See Morris, *supra* note 127, at 574-77.

130. *Id.* at 595.

ence accident prevention, but they tended to discount the importance of this function.

From the beginning and virtually across the board, insurance law scholars were apparently unconcerned with the impact of liability insurance on accident prevention. For example, William Reynolds Vance, an important insurance law scholar of the early twentieth century who taught at George Washington and Yale, published a "hornbook"¹³¹ and more focused law review articles¹³² that offered only a cursory consideration of liability insurance. The first edition of Vance's hornbook, published just after the turn of the century, contained 609 pages of text, of which only the last five pages were devoted to liability insurance.¹³³ Unsurprisingly, there was no mention of accident prevention. Moreover, even an expanded second edition, published more than twenty-five years later during the beginning of the enterprise liability era, still treated liability insurance only in passing and, again, contained no mention of accident prevention.¹³⁴

Nor did the passage of time affect matters. A 1957 treatise on insurance law by Edwin Patterson, Cardozo Professor of Jurisprudence at Columbia Law School and former Deputy Superintendent of Insurance for the State of New York, contained no reference at all to the relation between liability insurance premium rates and accident prevention.¹³⁵ Fourteen years later, the first edition of Keeton's widely used insurance law hornbook contained a bare two paragraphs that made only glancing reference to the subject.¹³⁶

I do not mean to suggest that none of these scholars was aware that liability insurance premiums could be and often were varied with the levels of risk posed by policyholders, or that changes in risk levels within the control of policyholders might affect premiums. On the contrary, undoubtedly they were well aware of these practices. Indeed, by the time Keeton wrote his insurance law treatise he had already co-authored an important book on no-fault auto insurance that analyzed this very potential in the context of the auto accident problem.¹³⁷ Rather, for the most part, these scholars appear to have re-

131. WILLIAM REYNOLDS VANCE, *HANDBOOK OF THE LAW OF INSURANCE* (1904).

132. *E.g.*, William R. Vance, *The History of the Development of the Warranty in Insurance Law*, 20 *YALE L.J.* 523 (1911).

133. VANCE, *supra* note 131, at 604-09.

134. WILLIAM R. VANCE, *HANDBOOK OF THE LAW OF INSURANCE* 912-18 (2d ed. 1930).

135. *See generally* EDWIN W. PATTERSON, *ESSENTIALS OF INSURANCE LAW: AN OUTLINE OF LEGAL DOCTRINES IN THEIR RELATIONS TO INSURANCE PRACTICES* (2d ed. 1957).

136. *See* ROBERT E. KEETON, *BASIC TEXT ON INSURANCE LAW* 566-67 (1971).

137. *See* ROBERT E. KEETON & JEFFREY O'CONNELL, *BASIC PROTECTION FOR THE TRAFFIC VICTIM: A BLUEPRINT FOR REFORMING AUTOMOBILE INSURANCE* 371-73 (1965).

garded the issue as being beyond the purview of insurance law as a distinct subject. They were writing about insurance law doctrines and (later in the period) the policy implications of these doctrines, not about the functions of insurance within the tort system or within the broader system of social welfare in which tort liability and workers' compensation might be regarded as playing a part. The result was that they had no reason to explore or analyze the impact on or potential influence of liability insurance on accident prevention.

On the other hand, turning to the insurance professionals and scholars, the picture is a bit different. They were aware of the capacity of liability insurance to affect accident prevention, but skeptical about it. Writing fifteen years after workers' compensation was adopted in New York, the authors of the leading treatise on the subject seemed to appreciate the accident prevention potential of the interaction between workers' compensation and insurance.¹³⁸ They first noted that "[i]ndustry should bear the cost [of work-related injury] initially so that it may be stimulated and encouraged to reduce it by removing the causes of injury [T]he industry having the lowest injury ratio will have a lowered cost of production and will, therefore, be at a decided advantage over its competitors."¹³⁹ While this seemed to be a reference to differences across industries rather than among companies within a particular industry, there followed a later chapter on "merit rating" that extolled the virtues of varying premiums with the degree of risk posed by the policyholder: "By placing a penalty upon the risk which is worse than the average of its class, and by rewarding policyholders for their efforts in prevention in direct ratio to the results produced as measured by the improvement in the conditions of individual risks, merit rating commercializes safety."¹⁴⁰

Also in the period between the wars, Albert Mowbray, an actuary and Professor of Insurance at the University of California, published a general text on insurance as part of the McGraw-Hill Insurance series that included works by such well-known legal figures as John Alan Appleman and Edwin Patterson.¹⁴¹ Mowbray's book contained a short chapter devoted entirely to the topic "prevention of loss."¹⁴² Most of the chapter, however, addressed generic safety measures such as the

138. G.F. MICHELbacher & THOMAS N. NIAL, *WORKMEN'S COMPENSATION INSURANCE* (1925).

139. *Id.* at 82.

140. *Id.* at 301.

141. ALBERT H. MOWBRAY, *INSURANCE: ITS THEORY AND PRACTICE IN THE UNITED STATES* (2d ed. 1937).

142. *Id.* at 32-44.

founding of Underwriters Laboratories, the development of fire prevention devices, and the value of safety inspections.¹⁴³ Only when he came to discuss workers' compensation did Mowbray include a few sentences about the provision of rate reductions for reducing the risk of loss.¹⁴⁴

Among insurance specialists, awareness of this potential for liability insurance rating to promote accident prevention persisted in the coming decades, but it continued to take a back seat to other concerns. Thus, writing for a largely legal audience shortly after World War II, C.A. Kulp of the Wharton School—author of a leading business school textbook on insurance¹⁴⁵—put the relation between premium rates and accident prevention in the following way:

Finally, a rate may be expected to encourage the reduction of loss. Sound insurance principle requires, however, that this objective be kept clearly secondary to those of equity and adequacy. Insurance after all is a device to pool risk and share losses. To the extent that the insurer can soundly and fairly combine provision of safety incentives with this fundamental purpose of insurance, very good. But the condition definitely limits the role of the rate as a safety incentive.¹⁴⁶

Admittedly, these are just a few examples of formally published works, not the views of insurance executives or agents working out in the field in actual insurance practice. In future work I hope to examine some of the more informal sources reflecting the views of such individuals. But in a sense the views of the scholars and professionals who engaged in formal publication were likely to be more influential on the making of policy and the evolution of attitudes toward policymaking than those who worked in the trenches of the insurance business. After all, I am concerned here not with the enactment of any particular piece of legislation that might have been more influenced by practical considerations than by academic thinking, but rather with the evolution of ideas about the relation between liability

143. *Id.* at 35-41.

144. *See id.* at 41-42 ("Rate reductions can be brought about only by reduction in hazard, and definite schedules, allowing rate reductions for better than average conditions and requiring penalties for poorer conditions, are in use in some states. Insurance rates are modified in accordance with the losses experienced on individual risks.")

145. C.A. KULP, CASUALTY INSURANCE (1928); C.A. KULP, CASUALTY INSURANCE: AN ANALYSIS OF HAZARDS, POLICIES, COMPANIES AND RATES (rev. ed. 1942); C.A. KULP, CASUALTY INSURANCE: AN ANALYSIS OF HAZARDS, POLICIES, INSURERS AND RATES (3d ed. 1956).

146. C.A. Kulp, *The Rate-Making Process in Property and Casualty Insurance—Goals, Technics, and Limits*, 15 LAW & CONTEMP. PROBS. 493, 494 (1950).

insurance and accident prevention. Whether or not these ideas originated with legal and insurance scholars, it was in their work that the intellectual foundations of change would have been located. In any event, I am reasonably confident that the flavor of my brief survey is substantially accurate. Those who worked in insurance for a living or studied and wrote about the insurance business were aware that liability insurance premiums varied with risk levels, but considered the effect of such variation on safety to be a secondary concern.

In short, by about 1960, in both academic circles and in the courts, liability insurance was regarded mainly as a method of spreading the risk of loss. No longer was it merely a method by which a potentially liable party obtained the capacity to "meet its responsibility" to compensate those it injured. And the potential in theory for liability insurance to promote safety was also recognized by insurance specialists. But perhaps because there was considerable skepticism about the prospects for making use of this capacity, there was no refined analysis of the way in which liability insurance premium rating could promote safety, or of the way in which the tension between loss spreading and accident prevention played out in practice. Even after enterprise liability theory and insurance law scholarship were fully developed, the role played by ideas about liability insurance in tort and tort-reform theory was limited and simplistic, in part because enterprise liability was seen so heavily as a method of ensuring the compensation of victims by spreading loss in broad channels of distribution.

C. The Transition of the 1960s

It was in the decade of the 1960s that legal scholars began to make the transition to a more sophisticated way of thinking about the relation between liability insurance and accident prevention. The principal, though not exclusive, catalyst for this transition was a renewed debate about the proper method of handling auto accidents. Critics of the tort system once again noted the series of flaws in the manner that tort handled auto accidents that the Columbia Plan had identified a generation earlier, and argued that substituting other methods of compensating the victims of auto accidents would be a superior approach.¹⁴⁷ The publication of Guido Calabresi's first article after he began teaching occurred at the very beginning of this pe-

147. Although there was a growing literature on the problem prior to the mid-1960s, two of the major treatments of the problem appeared at mid-decade. See ALFRED F. CONARD ET AL., *AUTOMOBILE ACCIDENT COSTS AND PAYMENTS* (1964); KEETON & O'CONNELL, *supra* note 137.

riod.¹⁴⁸ Although the article was not addressed directly to the auto accident problem, it provided support for these critics, among other things by laying out a more refined way of analyzing arguments for and against enterprise liability than had previously been available.

The first major response to the proponents of auto liability reform came in 1965 in a book by Blum and Kalven.¹⁴⁹ Their argument consisted heavily of analysis and criticism of the various alternatives to the fault system. Those proposing alternatives had argued, among other things, that the fault system failed to deter negligent driving, at least in part because of widespread insurance against liability. In practice, auto liability insurance largely disregarded individual fault, setting premiums by reference to broad actuarial categories and settling cases for reasons of expedience. To make their argument work, therefore, Blum and Kalven had to show that the fault system's interaction with auto liability insurance did not necessarily doom that system.

Their strategy was to imagine an ideal, alternative way of pricing insurance against liability based on fault, and to argue that if that ideal were adopted, the fault system would be preferable to the alternatives being proposed to replace it. They readily recognized that, at the time, "liability insurers in allocating costs among the insured appear[ed] to think in strict liability terms."¹⁵⁰ However, instead of following this recognition where it seemed to lead—toward some form of nonfault liability—they argued that it would be better to improve the way in which liability insurance was priced so that it did differentiate based on driver fault.¹⁵¹ In view of the secondary importance that we have seen earlier scholars and writers attach to premium rating as a method of accident prevention, this was a significant proposal, peculiar though it may have been as a way of defending the fault system.

It was at this point that Calabresi entered the debate, in three articles that presaged a number of points that he would develop much further in *The Costs of Accidents*. For our purposes here, it is sufficient to say that he began in these articles to analyze how the refinement and degree of subcategorization of insurance affects the interaction between loss spreading and accident reduction.¹⁵² In these pieces he argued that both the existing tort system and tort reform inevitably

148. Calabresi, *Risk Distribution*, *supra* note 128.

149. WALTER J. BLUM & HARRY KALVEN, JR., *PUBLIC LAW PERSPECTIVES ON A PRIVATE LAW PROBLEM: AUTO COMPENSATION PLANS* (1965).

150. *Id.* at 66.

151. *Id.* at 66-67.

152. Guido Calabresi, *Does the Fault System Optimally Control Primary Accident Costs?*, 33 *LAW & CONTEMP. PROBS.* 429, 443-45 (1968); Guido Calabresi, *Fault, Accidents and the Wonderful World of Blum and Kalven*, 75 *YALE L.J.* 216, 225-32 (1965) [hereinafter *World of Blum*]

pursue a mix of goals. There could be neither maximum accident prevention nor maximum loss spreading in systems that pursued both.¹⁵³ These and other justice-related goals would have to be optimized in mixed systems that compromise each goal in service of the proper combination of them all. Criticizing reform proposals, as Blum and Kalven had, on the ground that they did not maximize a particular one of these different goals, simply ignored the fact that loss spreading, accident prevention, and other values are inevitably in tension.¹⁵⁴ The proper task of the tort theorist was to understand how these values interacted and to analyze the consequences of the different possible interactions. The stage was thus set for a full-blown analysis of the relation among these values.

V. THE COSTS OF ACCIDENTS AND THE MODERN ERA OF TORT LAW

That analysis emerged in 1970, with the publication of *The Costs of Accidents*. At its most general level, the book is about the relation between deterrence and loss spreading—between what Calabresi calls primary and secondary accident cost avoidance.¹⁵⁵ He was highly critical of the way the fault system pursued these goals and his analysis strongly implied that in certain contexts enterprise-based strict liability would be superior.¹⁵⁶ But he moved beyond the limits of the earlier enterprise liability theorists' thinking by recognizing that liability insurance figured not only in the loss-spreading function of tort liability but also in the accident prevention function,¹⁵⁷ and by identifying contexts in which enterprise liability might and might not be the most effective means of achieving these goals.¹⁵⁸ His economic approach to analyzing the problem almost inevitably brought consideration of the relationship between liability insurance and accident prevention into play.

Early in the book, Calabresi discussed the different approaches to loss spreading, one of which is of course insurance, including liability insurance.¹⁵⁹ In these slightly more than a dozen pages, Calabresi developed a framework for thinking about the role that insurance can play in mediating between the two somewhat inconsistent goals of tort

and Kalven]; Guido Calabresi, *The Decision for Accidents: An Approach to Nonfault Allocation of Costs*, 78 HARV. L. REV. 713, 720-34 (1965) [hereinafter *The Decision for Accidents*].

153. E.g., Calabresi, *The Decision for Accidents*, *supra* note 152, at 744-45.

154. Calabresi, *World of Blum and Kalven*, *supra* note 152, at 221-22.

155. THE COSTS OF ACCIDENTS, *supra* note 2, at 26-27.

156. E.g., *id.* at 50-54.

157. *Id.* at 54.

158. *Id.* at 52-54.

159. *Id.* at 46-54.

liability, reducing accidents, and spreading the costs of those accidents that occur. Of course the book was about far more than liability insurance, which figures directly in the analysis at only a few points. But as I noted earlier, some of the enterprise liability theorists had tended to think of insurance as being wholly unrelated to accident prevention; the insurance law scholars had been indifferent to and therefore disregarded the relation between liability insurance and tort liability; and, although insurance professionals understood how insurance premium rating occurred, tort law theory was beyond the scope of their interest as well.

In his discussion, Calabresi brought together a combination of insights that were significant advances over earlier thinking about liability insurance. He explained how it is that the extent to which insurance spreads risk is a function of the degree of differentiation among different categories of insureds in the setting of premium rates.¹⁶⁰ The less differentiation, the more spreading. The more differentiation there is, the less loss spreading occurs but the greater the potential for accident reduction even though liability for losses is insured.¹⁶¹ He further explained why private insurance may generate what is regarded as insufficient loss spreading because of the cost of constructing insurance categories, people's inability to value risk properly, their lack of incentive to purchase insurance if they have limited assets, and different parties' differential ability to insure.¹⁶²

When this insurance analysis was combined with Calabresi's more general analytical framework, it provided a systematic basis for thinking about the role that liability insurance can play in tort law. In a sense, what Calabresi did was substantially refine and advance the conception of liability insurance as a device that was potentially consistent with accident prevention that had been absent from tort law thinking since just before the time of workers' compensation. Because so much of the ongoing debate about tort reform during the ensuing years had been concerned with the role that tort might play in filling the injury compensation gaps in existing forms of social welfare protection, this conception of liability insurance had long been dormant. But Calabresi reinvigorated it.

This moment in intellectual history coincided with developments in the world of insurance that highlighted the practical importance of Calabresi's thought. Calabresi showed that both injurers and victims

160. *Id.* at 47.

161. *Id.* at 46.

162. *Id.* at 56-59.

are potentially in a position to take actions that will contribute to accident prevention, and that both injurers and victims are potentially in a position to take actions that will spread the losses associated with the accidents that do occur. But this was not a merely theoretical possibility. By 1970, potential victims were actually acquiring the means of becoming effective spreaders of at least some of the costs of accidents. For example, Medicare had been introduced in 1965, and employment-based group health insurance was becoming available to significant portions of the American population. Given the rise of these and other forms of victim-based loss spreading, it is no surprise that accident prevention would come to play a larger role in thinking about tort liability, and that the relation between liability insurance and accident prevention would seem more significant than it had during the period when injurer-based loss spreading had seemed to be the principal means by which this goal might be achieved.

This change of emphasis was certainly reflected in the mass tort cases that began to be filed in the decade after publication of *The Costs of Accidents*. Mass tort defendants have tended to be large corporate enterprises with a high volume of loss and a statistically reliable base of loss experience.¹⁶³ In a mass tort setting the potential defendant's liability insurance premiums are therefore likely to be much more nearly proportional to the degree of risk posed by its activities than in the sporadic accident context.¹⁶⁴ Consequently, the argument that the mass tort defendant's access to insurance would mitigate its accident prevention incentives would tend to be weaker than in most other tort settings. Conversely, potential victims' access to their own insurance would tend to de-emphasize the loss-spreading effect of imposing mass tort liability, since both victims and injurers would be at least somewhat adequate loss spreaders. But health insurance and other victims-insurance premiums are not at all differentiated with respect to the risk of suffering the kinds of injury or disease associated with mass tort. Consequently, in this respect the accident prevention incentives created by allocating costs to victims would likely be minimal. And potential victims are not nearly as effective spreaders of the risk of suffering wage loss as a result of mass torts, because insurance against such loss is much less widespread than health insurance. In short, it is no surprise that as the years went on, because of their accident prevention capacities, the injurers in mass tort settings were so often considered superior bearers of the risk of loss—"cheapest cost

163. David Rosenberg, *The Causal Connection in Mass Exposure Cases: A "Public Law" Vision of the Tort System*, 97 HARV. L. REV. 849, 855 (1984).

164. *Id.* at 854-55.

avoiders," in Calabresi's terms. And even when they were not, the argument against imposing liability also often was based on the analytical framework that Calabresi had developed.¹⁶⁵

The rise of mass tort liability thus occurred only after the earlier thinkers' preoccupation with ensuring the compensation of victims was finally displaced by a more sophisticated approach that weighed deterrence more heavily and took the availability and functioning of insurance into account in that calculus. The availability of victim insurance prompted some commentators, and undoubtedly some courts as well, to focus even more heavily on the deterrent effect of the threat of liability, leaving the compensation and loss-spreading goals to be addressed through victim insurance.¹⁶⁶

At the same time, the growth of health (and to a lesser extent, disability) insurance may well have provided victims with sufficient compensation for the immediate costs of injury to enable them to maintain lawsuits that would have been settled in the past. In this sense health and disability insurance may have enhanced the "staying power" of plaintiffs in a manner analogous to providing them with access to the capital market to finance their lawsuits.¹⁶⁷ Paradoxically, instead of reducing the importance of tort, the growth of these forms of insurance may be helping to fuel its expansion.

Even apart from mass tort issues, subsequent scholarship has built on Calabresi's insights in many ways, and his insights about insurance have been no exception. For example, in a 1985 article, Richard Epstein argued that products liability was a flawed insurance system and that many of the losses that products liability imposed on manufacturers would be more effectively insured against by victims.¹⁶⁸ Analyzing the tort liability and insurance "crisis" of the mid-1980s, George Priest contended that liability insurance premiums had skyrocketed (and insurance had become completely unavailable for some enterprises) because modern tort liability made it impossible for liability insurance accurately to differentiate the premiums charged different insureds.¹⁶⁹ In a series of articles, Steven Shavell analyzed the conditions under which liability insurance and the deterrence of accidents

165. See George L. Priest, *The Current Insurance Crisis and Modern Tort Law*, 96 YALE L.J. 1521 (1987).

166. See, e.g., Rosenberg, *supra* note 163.

167. See Jeffrey O'Connell, *Blending Reform of Tort Liability and Health Insurance: A Necessary Mix*, 79 CORNELL L. REV. 1303, 1306-07 (1994).

168. Richard A. Epstein, *Products Liability as an Insurance Market*, 14 J. LEGAL STUD. 645 (1985).

169. See Priest, *supra* note 165.

will be consistent.¹⁷⁰ And I offered my own contribution by extending Calabresi's insight that insurance categories do not always differentiate among insureds in a way that is considered collectively desirable. I showed how insurance categories are fashioned and how insurers' use of these categories can be regulated to help achieve the degree and kind of accident prevention and loss spreading that we collectively desire, even when insurers have not done so themselves.¹⁷¹ Moreover, Calabresi's influence on more recent work in the area continues to be felt. For example, in a number of articles, Jon Hanson has argued the case for enterprise liability on the ground that liability insurance has greater potential to create accident prevention incentives than first-party insurance.¹⁷²

CONCLUSION

We have come a long way since the first forms of liability insurance were introduced in this country over a century ago. The early ideas about the relation between liability insurance and accident prevention contained the kernels of modern thought about this relation, but they reflected older views regarding the purpose of liability insurance mainly as a method of ensuring the capacity of tort defendants to compensate victims. During the first half of the twentieth century the focus on whether and to what extent tort law and its reform should be employed to contribute to broad policies of social welfare resulted in increasing emphasis being placed on the loss-spreading effects of liability insurance. As different sorts of tort reform were proposed and debated, however, the relation between liability insurance and accident prevention was given noticeably little attention. It was not until Guido Calabresi began to write that a full-blown framework for analyzing this relationship emerged. That framework has influenced the courts and legal scholars for over three decades now, and it continues to organize and affect the way we think about the issue.

170. See Steven Shavell, *On Liability and Insurance*, 13 BELL J. OF ECON. 120 (2001); Steven Shavell, *On the Social Function and Regulation of Insurance*, 25 GENEVA PAPERS ON RISK AND INS. 166, 168 (2000).

171. KENNETH S. ABRAHAM, *DISTRIBUTING RISK: INSURANCE, LEGAL THEORY, AND PUBLIC POLICY* 64-100 (1986).

172. See, e.g., Jon D. Hanson & Kyle D. Logue, *The First-Party Insurance Externality: An Economic Justification for Enterprise Liability*, 76 CORNELL L. REV. 129 (1990); see also Steven P. Croley & Jon D. Hanson, *Rescuing the Revolution: The Revived Case for Enterprise Liability*, 91 MICH. L. REV. 683 (1993).